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Dickson Car Wheel Company (U.S.A.) v. United Mexican States

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With regard to the complaint of the claimant Agency of the failure of the Mexican authorities to continue the investigation after having decreed the liberty of Andrés López, it is noted that the law imposes no obligation upon the judicial authorities to prosecute those investigations within any fixed period and consequently their action depends upon whether as the result of some unforeseen cause fresh clews are discovered which may lead to the clearing up of the facts.

By reason of the foregoing the Commission is of the opinion that this claim must be disallowed.

Nielsen, Commissioner:

I concur in the disallowance of the claim.

Decision

The claim of the United States of America on behalf of Sophie B. Sturtevant against the United Mexican States is disallowed.

DICKSON CAR WHEEL COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(July —, 1931, dissenting opinion by American Commissioner, undated. Pages 175-206.)

CONTRACT CLAIMS.—CREDITORS CLAIMS.—SEQUESTRATION.—RESPONSIBILITY FOR DEBTS OF SEQUESTERED CORPORATION.—CLAIMS AGAINST GOVERNMENT-OWNED CORPORATION.—UNJUST ENRICHMENT AS A BASIS FOR INTERNATIONAL CLAIM. Claim was made for car wheels sold and delivered to National Railways of Mexico prior to date possession thereof was taken by Mexican Government. Said corporation retained its corporate existence from date of sequestration of its property in December, 1914, to date of return of such property in 1925. During such period the railways were operated by the Mexican Government and no part of the revenues therefrom was paid over to such corporation. Following such period the net revenues therefrom were distributed in accordance with a certain agreement between the Mexican Government and the International Committee of Bankers. Claim disallowed, since (i) injury, if any, was against a Mexican corporation, (ii) creditor of such corporation has no standing to present an international claim, (iii) suit in Mexican courts was at all times available to claimant for such debt, and (iv) no basis of claim for unjust enrichment lies, inasmuch as any obligation to compensate for use of car wheels would have been owed to Mexican corporation, whose property they became on sale and delivery.

PROCEDURE.—FORMALITIES IN RENDERING AWARD. Fact noted, in dissenting opinion of American Commissioner, that "Decision" signed by other two Commissioners was not rendered at "a public sitting" as required by rules of procedure.

Cross-reference : Annual Digest, 1931-1932, p. 228.

Commissioner Fernández MacGregor, for the Commission:

The facts which gave rise to this claim are the following:

By virtue of a contract entered into in April of 1912 between the National Railways of Mexico and the North American Corporation, the Dickson Car Wheel Company, the latter made several deliveries of car wheels to the former. The said deliveries were made on various dates between December 13, 1913 and January 6, 1914.

In accordance with a decree issued in December 1914, the Constitutionalist Government took possession of the railways of the National Railways, this possession being prolonged until December of 1925 when they were returned to private management.

During that period the Dickson Car Wheel Company addressed itself on various occasions to the National Railways Company requesting payment for the merchandise the price of which amounted to $4,126.64, but the latter company never paid, alleging that owing to the seizure of the railways it received no revenue whatever for the operation of its lines for which reason it was unable at that time to meet its obligations.

The Government of the United States on behalf of the American company has filed this claim alleging that the Government of Mexico is internationally responsible for the amount of the obligation contracted by the Railways Company.

The Mexican Agency has not questioned the accuracy of the facts related by the American Agency, but it denies that they can create international responsibility on the part of Mexico.

The claimant Agency has adduced various reasons in order to establish the responsibility of Mexico, reasons which will be analysed in the order of their presentation.

In the American Brief it was attempted at first to maintain that Mexico contracted an obligation towards the claimant company from the moment the contract was entered into in 1912, by reason of the ownership by the Government of a majority of the capital stock of the Railways Company. (American Brief, p. 31.) However, this argument, which has very slight juridical value, was withdrawn by American Counsel in oral argument (Stenographic record of the American Agency, p. 1603) for which reason it is unnecessary to insist upon the fact that as the Mexican Government was not a party to that contract, notwithstanding that it held a majority of the capital stock of the Railways Company, it neither acquired of itself any right nor contracted responsibility of any kind as a result thereof. The problem consists then in determining whether the taking over of the lines of the Railways Company operated in any other way to transfer to the Government of Mexico the obligation contracted by the former.

The American Brief contends, in the first place, that the Government of Mexico became responsible for the obligation contracted by the Railways Company when it effected the seizure, since from that moment the said company ceased to have an independent existence, the Government having substituted it in its rights and obligations. In support of this argument the American Brief makes reference to a decision rendered by the Circuit Court of Appeals for the Second Circuit in the *Oliver Trading Company* case as well as to the decisions of this Commission in the claims of the *Home Insurance Co.*, Docket No. 73 (*Opinions of Commissioners, 1927*, p. 51), and of the *Illinois Central Railroad Co.*, Docket No. 432 (*ibid*, p. 15). Reference is also made

to Annual Reports of the Railways Company, and finally to the agreement between the Government of Mexico and the International Committee of Bankers in 1925. (American Brief, p. 30). As this agreement, in the part relative thereto, refers to the relations created between the Government and the Railways Company subsequent to the return of the lines, and in no wise appertains to the relations which existed during the period of possession by the Government, it appears to be expedient to postpone until later the study of this agreement.

With respect to the case of the *Oliver Trading Company*, it is sufficient to note that Counsel of the claimant Government admitted during the hearings that that decision could not really be considered as pertinent to the issues of the instant claim, since in the *Oliver* case only the relations between the company and the Government of Mexico which arose during the period of possession by the Government were discussed. (Stenographic record of the American Agency, p. 1582.) The Judge of the Circuit Court of Appeals in saying that the National Railways of Mexico are "merely a name" referred to the denomination "National Railways of Mexico, Government Administration" which designated the system of railroads in the possession of the Government during the period of its control thereof, and not to the entity whose lines had been seized.

But as the Agency of the United States alleged that the respondent Government had assumed in the *Oliver Trading Company* case (5 Fed. Repl. 2nd Series 659) a position contrary to that assumed in the instant claim, it is necessary to examine that case more attentively. An analysis of the arguments presented by the Government of Mexico in each case demonstrates not only that there is no contradiction whatever between the averments maintained but that, on the contrary, the points of view adduced before the Circuit Court are in harmony with those set forth in this case.

The complaint which was filed before a New York court was based upon a contract *entered into in 1921* between the Oliver Trading Company and the National Railways of Mexico, Government Administration. The plaintiff company alleged that the provisions of the said contract had not been properly fulfilled for which reason it instituted proceedings against the Government of Mexico and the National Railways Company jointly, obtaining a writ of attachment against certain funds which the said Government had in United States territory.

Counsel for the Government of Mexico demonstrated that beginning in 1914 the lines of the National Railways Company which had been seized at that time were under the administration of the Government, for which reason the said company had not had any participation in the contract of 1921. The argument adduced in this regard is reproduced in the Brief of the United States filed in this claim, and is as follows:

"We agree entirely with the Plaintiff's contention that the private corporation, National Railways of Mexico, which is one of the Defendants in this suit, has no connection with the operation, management or control of the Railways; and that it has no relationship whatsoever to any of the matters which are the basis of the alleged cause of action of the Plaintiff." (Brief of the United States, p. 36).

It having been established that the National Railways Company did not participate in the aforementioned contract and, consequently, that it did not assume any obligation with respect to the plaintiff company, counsel for Mexico proceeded to demonstrate that the designation *National Railways of Mexico, Government Administration* referred to no company or juridical

person other than to the Mexican Government itself, and in this connection set forth the following:

"As the Affidavit of Mr. de Hoyos, verified the 6th day of February, 1923, states, the Government of Mexico operates the Railways under the name 'National Railways of Mexico, Government Administration', as a matter of convenience and as a means of identification; and it does so *directly* without the interposition, means, aid or assistance of any factitious organization, corporate or otherwise." .... "there is no other organization, group, corporation or entity concerned in any way, manner or fashion with the operation of the National Railways of Mexico, other than the United States of Mexico itself, and can further state that the words 'National Railways of Mexico, Government Administration', is a mere description for the purpose of convenience and apt expression to cover the operation by the Mexican Government of the Railway properties, which it took over under governmental decrees, and which it operates directly. That they were not handed over or transferred to any group of individuals or to any single person as agent for the Government, but they are directly, immediately and personally run, operated and maintained by the United States of Mexico for public purposes." (Brief of the United States pp. 36-37).

The Government of Mexico, therefore, being alone responsible for the fulfilment of the contract with the Oliver Trading Company, the Circuit Court of Appeals dismissed the complaint on the ground that a sovereign State cannot be sued in the courts of another country.

In that case, then, it was established that the National Railways Company, not having been a party to the contract of 1921, did not contract any obligation with respect to the Oliver Trading Company, the Government of Mexico being alone responsible. The Agency of Mexico, in the instant claim, has therefore alleged, *in accordance with that viewpoint*, that the Government, not having been a party to the contract entered into between the National Railways Company and the Dickson Car Wheel Company, cannot be taxed with any obligation thereunder. It is obvious that there is no contradiction between the two contentions which were maintained to cover two completely different situations.

The argument presented in this case by the Government of Mexico is applicable to the similar situation created in the United States as a result of the seizure of the railways in its territory in 1917. In the case of the *Missouri Pacific Railroad Company v. Ault* (256 U.S. 554) the Supreme Court of the United States stated clearly:

".... if the cause of action arose prior to Government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the Government ...."

The foregoing observations are likewise applicable to the cases of the *Illinois Central Company* and to the *Home Insurance Company*. The relations between the said companies and the National Railways Company wherein the latter had been substituted by the Government, were not in issue in either of these cases. In both cases the relations had been formed directly between the Government of Mexico in its character of administrator of the lines taken over and the claimant companies.

Nor can the Annual Reports of the Railways serve as a basis for the contentions of the American Agency, since these documents show to the contrary that notwithstanding the fact that the Railways Company did not control its lines, it did not for that reason cease to have its own juridical existence, as an entity independent of the Government. From those reports it appears clearly that during the period of control by the Government meetings

were held and reports rendered as prescribed by the statutes. The company continued to receive income from sources other than those relating to the operation of its lines and specifically continued to recognize as its own, obligations contracted prior to 1914.

From the foregoing the contention advanced by the American Agency in the sense that the National Railways Company had disappeared, as a juridical entity, and that the Government had superseded it in the rights and obligations contracted by it prior to the seizure appears to be inadmissible.

Another of the contentions set forth in the Brief of the United States is that the Government in taking over the National Railways Company exercised an act of expropriation which conformably to Article 27 of the Constitution then in force, can be done only after payment of indemnification, and that in not doing so the Government had committed an unlawful act. (American Brief, p. 9.)

The refutation made by the Mexican Agency in this respect, in the sense that the application of the decree of December 1914 is not invested with the character of an expropriation, appears to be correct. The taking over was merely temporary in nature and the property rights of the National Railways Company were never disregarded. The said decree was issued in strict accord with Article 145 of the Law on Railways then in force which does not require the previous payment of indemnification. The Article referred to reads as follows:

"X. The Federal authorities are entitled, in the event that in their opinion the defense of the country requires it, to make requisitions on the railroads, their personnel and all their operating material and to make disposition thereof as they may consider advisable.

In this event the Nation shall indemnify the railroad companies. If no agreement is reached as to the amount of the indemnification, the latter shall be based upon the average gross earnings in the last five years, plus ten per cent, all expenses to be paid by the company."

It will be seen that although it is true that Mexican law requires the indemnification of the company it is likewise true that the indemnification may be made by agreement or upon the basis of the average gross earnings plus a fixed amount, the company paying all of the expenses of administering the lines during the period of possession. In the particular case of the National Railways Company the return of the lines was effected conformably to an agreement entered into between the Government of Mexico and the International Committee of Bankers in which the form of indemnification to the Company was stipulated. This agreement having been accepted by the Company it is impossible to conclude, as maintained by the American Agency, that the said Company has been the victim of an expropriation, violative of the laws of Mexico.

The Agency of the United States also maintained in its Brief that the car wheels having been sold to the Railways Company under a guarantee of four to five years, the Government could have invoked that guarantee, bringing suit thereunder in a proper case, against the vendor company, and that as a consequence since the Government enjoyed that right it was likewise obliged to make payment for the material.

This argument appears to merit little attention since the Government of Mexico, in the event of the car wheels being unsatisfactory could not have, either under the laws of Mexico or in accordance with North American law, secured judgment against the Dickson Car Wheel Company; it has

already been said that the Government was not a party to the contract of 1912 and that legally it had not superseded the purchasing company in its rights. The right of guaranty belonged solely and exclusively to the National Railways Company.

The arguments just examined are invested with a subsidiary character in the Brief of the claimant Government. The two fundamental arguments, which were the only ones sustained by Counsel of the United States during the hearings, are the following:

1. The taking over of the lines, together with its resultant consequences, has prevented the National Railways Company from fulfilling its obligation towards the Dickson Car Wheel Company, and that prevention constitutes an act destructive of its rights.

2. As a result of the taking over of the lines the Government of Mexico obtained an unjust enrichment, at the expense of the claimant company, which, in turn suffered an injury in its patrimony, as a direct result of the enrichment of the Government.

With respect to the first argument the Agency of Mexico sustained that the claimant Company could always bring suit against the Railways Company in the Mexican courts, during the period of possession and subsequent to the return of the lines in 1925. The Agency of the United States, on the other hand, denied that the creditor company could have sued the debtor company during the years included between 1914 and 1925, and maintained that even if it could have done so theoretically, subsequent to the return of the lines, in reality, it would not have obtained any practical result thereby, inasmuch as by reason of the Agreement of 1925 the Government has continued until the present day in control of the net revenues of the Company, as a result of which the Company continues as formerly without the funds necessary to pay the debt.

With relation to the first part of the argument, the objection adduced by the Mexican Agency is found to be correct, since the Railways Company never lost its own juridical identity during the period of possession. In a letter of March 14, 1919, from the Mexican Company to its American creditor (Annex No. 28 of the Memorial) the former recognizes the debt, but indicates that not being in receipt of any revenue from the operation of the seized lines, it was impossible for it *at that time* to make payment, for which reason it requested the American company to wait until conditions changed. It is to be noted that the Company in that letter put forward no reason of a legal nature as preventing it from making payment; and, with respect to the material impossibility, it limited itself to indicating that it was receiving no revenue *from the operation of its lines.*

There was no legal reason whatsoever to prevent the Dickson Car Wheel Company from bringing suit against the Railways Company if it had desired to do so, inasmuch as it continued to preserve its identity and recognized the debt as its own. In support of the contrary contention the American Agency made reference to the *amparo* interposed by José Barrios and decided by the Supreme Court of Mexico (*Semanario Judicial V Epoca*, Tomo XX, p. 1049). As that *amparo* was interposed on appeal, the decision of the Court contains no details of the facts upon which the decision was based; the decision itself does not determine whether the Railways Company could have been sued by the plaintiff, but simply holds that the action ought to be filed in the Federal Courts and not in the ordinary courts. The question decided, then, was one of jurisdiction only, and not one going to the merits of the case.

It having already been indicated that the Railways Company was in receipt of revenue other than that corresponding to the operation of its lines, and it not having been demonstrated that the Dickson Car Wheel Company could not have brought suit in the courts of Mexico against the Railways Company, during the period of possession, it clearly follows that this aspect of the argument of the Agency of the United States is not justified by the facts.

The claimant Agency also contends that subsequent to the return of the lines, the Dickson Car Wheel Company was deprived of all means of collecting its debt, inasmuch as the net revenue of the Railways Company was controlled absolutely by the Government, by virtue of the Agreement of 1925, which did not provide for the payment of obligations of this nature contracted by the Company prior to the seizure.

The argument and the evidence submitted by the Agency of Mexico refute that contention. During the hearings Counsel for Mexico read the Annual Reports of the National Railways Company, numbers XIX and XX, demonstrating that the Agreement mentioned did not create such impossibility, since, on the contrary, the Company has been liquidating its debts by degrees. American counsel bases his point of view on paragraph III of the Agreement. It reads as follows:

"3.—Beginning January 1, 1926, the total net revenue of the Railways as available shall be remitted each month by the Executive President of the Railways directly to the committee at its office in New York, for the purpose of paying cash warrants issued in respect of the Railways' debt subject to the Agreement, and any surplus over the amount thus required shall be utilized, as provided in sub-paragraph 5 of paragraph (c) of Section 4, as herein amended, in the discretion of the Committee, in paying overdue Cash Warrants or in retiring Current Interest Scrip issued under the Agreement."

The interesting part of this aspect of the problem does not consist in the analysis of the use which is to be made of the net revenue, but in knowing what is to be understood thereby; that is, to know what are the previous deductions made from the gross revenue. The Annual Reports aforementioned show that in addition to the deductions set aside for the rehabilitation of the Railways and for the expenses inherent to the operation of the lines, *there is an item destined by the Railways Company for the liquidation of its general obligations.*

As a practical demonstration that this item really is for the liquidation of obligations of the same nature as that contracted with respect to the Dickson Car Wheel Company, the Agency of Mexico filed as additional proof evidence of settlement of a debt of the Railways Company to the Charles Nelson Company, which debt was identically the same as the one in favor of the claimant company and which gave rise to a claim before this Commission.

There is no doubt that the Railways Company ceased to receive revenue *from the operation of the lines* which were in the possession of the Government, but this does not signify that the Company was deprived of all revenue. The funds necessary to attend to matters in the offices of Mexico, New York and London continued to be expended annually during all the period of possession. The Tenth Annual Report of the Company shows that during the year 1917-1918, those expenses amounted to the sum of 179,646.67 pesos (page 12), which compels the thought that there was revenue. This is corroborated by noting on the general balance sheet of June 1918, (page 28 of the said report) that the company had the sum of 538,637.51 pesos

in cash on hand and in the banks; these funds, according to page 35 of the Report, were derived from interest and dividends on securities susceptible of immediate negotiation and rents from lands situated in Tampico. In short, the income or the properties of the company during the period of possession would have sufficed fully to satisfy the amount owed to the Dickson Car Wheel Company which was only $4,126.64.

The particular reasons of the National Railways Company for not liquidating the credit of the Dickson Car Wheel Company are immaterial to this Commission. With regard to the arguments adduced by the American Agency with respect to this claim, the only thing of interest is to determine whether there was available to the company a prompt legal remedy and whether the Railways are and have been in a position to meet their obligation. As these points must be answered in the affirmative, the contention of the United States to the effect that the claimant company was prevented from suing and obtaining payment of the amount of its credit during the period of possession or the reafter, must be dismissed.

The final argument developed by the claimant Agency has for its foundation the theory of unjust enrichment. It is maintained that the Government obtained an unjust enrichment at the expense of the Company. The enrichment consists of the use made by the Government of the material delivered by the claimant company to the Railways Company, and the detriment, in the destruction of the rights which the Dickson Car Wheel Company had against the Railways Company.

The interpretation of the theory of unjust enrichment has encountered serious difficulties in its practical application in municipal law. There is no doubt that at the present time that theory is accepted and applied generally by the countries of the world, even in the absence of a specific law, but the difficulty rests in fixing the limits within which it can and must be applied.

In order that an action *in rem verso* may lie in municipal law it is necessary that the following elements coexist:

1. That there be an enrichment of the defendant.
2. That this enrichment be the direct consequence of a patrimonial injury suffered by the plaintiff. That is, that the same causative act create simultaneously the enrichment and the detriment.
3. That the enrichment of the defendant be unjust.
4. That the injured person have in his favor no contractual right which he could exercise to compensate him for the damage. (See Bonnecase. Sup. de Baudry. T. III, pages 216 to 372.)

It is obvious that the theory of unjust enrichment as such has not yet been transplanted to the field of international law as this is of a juridical order distinct from local or private law. As will be shown further on it is necessary to establish the international illegality of the causative act, and that the injury suffered by the national of the claimant country be the result of that act. However, even omitting that circumstance, the theory of unjust enrichment is inapplicable to this case.

The claimant Agency has maintained, in effect, that the injury suffered by the Dickson Car Wheel Company consisted in the destruction of its rights acquired by virtue of the contract of 1912. Having already expressed the opinion that those rights, constituted by the possibility of bringing suit against the National Railways Company, were preserved intact in spite of the taking over of the lines, it is unnecessary to make further comments on this point.

The enrichment of the Government consisted, according to the claimant Agency, in having enjoyed the use and benefit of the car wheels during the period of possession. Now in accordance with Mexican law, which governs the contract of 1912, since its consummation took place in Mexico, the delivery of goods to the Railways operated to transfer to them property rights, the Dickson Car Wheel Company preserving a personal right, a credit against the said Railways. Therefore, upon taking over the lines of this company and in utilizing in their operation the car wheels delivered by the Dickson Car Wheel Company, the Government was making use of property belonging to the National Railways Company to which the American company no longer had any positive right. Consequently, the obligation of the Government to make compensation for that use arose solely and exclusively with respect to the Railways, the property of which was being utilized.

Conformably to the Agreement of 1925 the Government agreed to return the lines to the Railways Company in the same condition as when seized, and to this end, by virtue of paragraph 9 of the said Agreement appointed a commission of experts to determine the amount of physical damage sustained by the Railways during the period of Government possession. The paragraph is as follows:

"An appraisal commission to be composed of three experts, shall determine the physical damage sustained by the Railways during the period of government control and operation."

The Appraisal Commission, on May 29, 1929, rendered its decision conformably to which the Government agreed to the sum of $15,000,000.00 for the physical damage.

With respect to damages, that is to the *lucrum cessans* the Railways Company was compensated therefor in the manner indicated by the Chief of Public Credit in an address given by him in the Treasury Department, and which is entitled the "Public Debt of Mexico":

"Now then, the Agreement provides for the payment of damages, although indirectly. This indirect method is the assistance which is given to them, the power granted to them to fix the necessary rates and to reduce expenses, so that the net income may be sufficient to satisfy the obligations accumulated during the period of possession."

It will be seen from the foregoing that the Government obtained no unjust enrichment at the expense of the Dickson Car Wheel Company.

Finally, as has been said, this company had at all times a speedy remedy in an action on its contract against the Railways Company, for which reason the action *in rem verso* is not applicable.

The reasons set forth above justify in themselves a decision adverse to the claimant company, but there are besides reasons of a more basic character which compel the dismissal of the claim.

In the preceding paragraphs an endeavor was made solely and exclusively to ascertain whether the Dickson Car Wheel Company really sustained an injury imputable to the Government of Mexico as a consequence of the taking over of the Railways, and the conclusion was in the negative. However, even in the supposition that the injury really existed, that fact, in itself, would not be sufficient to create responsibility on the part of Mexico. In effect, conformably to Article I of the Convention of 1923, all claims against Mexico of citizens of the United States for losses or damages

suffered by persons or by their properties shall be submitted to a Commission for decision *in accordance with the principles of international law.* This article on the one hand limits the acceptable claims to those based on losses or damages; and on the other hand it stipulates that the said claims shall be decided *in accordance with the principles of international law.*

Under international law, apart from any convention, in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard. The above cited Convention requires further the existence of damage suffered by a national of the claimant Government. It is indispensable therefore, in order that a claim may prosper before this Commission, that two elements coexist: an unlawful international act and a loss or injury suffered by a national of the claimant Government. The lack of either of these two elements must necessarily be fatal to any claim filed with this Commission.

Can it be said that these two indispensable elements exist in the claim of the Dickson Car Wheel Company?

The Agency of the United States has limited itself to alleging the existence of damage suffered by the American company. Conceding for a moment that this really exists as the result of damage suffered by the National Railways Company caused by the taking over of the lines, it would be necessary to establish further the international illegality of the original act. The problem in this case would consist in deciding whether damage caused directly to a company of Mexican nationality and which would recoil upon a company of North American nationality, remotely causing it an injury, constitutes an act violative of the Law of Nations.

The relation of rights and obligations created between two States upon the commission by one of them of an act in violation of international law, arises only among those States subject to the international juridical system. There does not exist, in that system, any relation of responsibility between the transgressing State and the injured individual for the reason that the latter is not subject to international law. The injury inflicted upon an individual, a national of the claimant State, which implies a violation of the obligations imposed by international law upon each member of the Community of Nations, constitutes an act internationally unlawful, because it signifies an offense against the State to which the individual is united by the bond of nationality. The only juridical relation, therefore, which authorizes a State to exact from another the performance of conduct prescribed by international law with respect to individuals is the bond of nationality. This is the link existing between that law and individuals and through it alone are individuals enabled to invoke the protection of a State and the latter empowered to intervene on their behalf.

A State, for example, does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury. As Oppenheim well says referring to the *heimatlose*:

> "But since they do not own a nationality, the link by which they could derive benefits from International Law is missing, and thus they lack protection as far as this law is concerned.... In practice, Stateless individuals are in most States treated more or less as though they were subjects of foreign States, but however much they are maltreated, international law cannot aid them." (Oppenheim, *International Law*, Par. 312.)

An act of a State against a *heimatlos* or against one of its own nationals may affect the domestic relations or the contractual relations which the latter may have with respect to the nationals of other countries. Would the loss or damage which these might suffer cause responsibility on the part of the actor State with respect to the States to which the injured individuals belonged?

The injury suffered by an individual linked by family relations to an individual of another nationality who has been the victim of an act of another State has been discussed only before the German-American Commission in the case of the Lusitania Death Claims. In that case the umpire, Judge Parker sentenced Germany to pay indemnification for damages suffered by American citizens as a consequence of the death of individuals of another nationality. The principles of international law, however, were not applied in this decision, as Judge Parker limited himself to making an interpretation of the Treaty of Berlin. The United States Commissioner in his opinion expressed himself in the following manner:

"Inasmuch, therefore, as these claims come within the terms of the Treaty of Berlin, it is unnecessary to consider whether or not Germany would be liable for them under any principles of international law independently of that Treaty, because Germany's liability under that Treaty is not limited to claims which can be supported by international law independently of that Treaty". (*Administrative Decisions and Opinions*, p. 198.)

Judge Parker concurring in this viewpoint expressed himself in the following words:

"In the group of cases here presented, Germany's obligation, as fixed by the Treaty of Berlin, is to make compensation and reparation, measured by pecuniary standards, for damages suffered by American survivors of civilians whose deaths were caused by Germany's acts in the prosecution of the war." (*Ibid*, page 209.)

In order to impose responsibility upon Germany, in accordance with that Treaty, it is not necessary to establish the existence of an unlawful act with respect to the United States, but only to prove that there is an injury suffered by American citizens as the result of the death of civilians irrespective of their nationality.

That view cannot be accepted by international law in the absence of a specific Treaty. I am of the opinion that the following observations of Mr. Borchard in this regard are correct:

"While it is true that surviving dependents have a right of action, especially preserved to them in the Treaty of Versailles, it is a question whether international law does not imply the condition that the decedent must have had the nationality of the claimant country. Both precedent and theory sustain the belief that citizenship of the decedent in the claimant country is always required as a condition of an international claim. Where heirs have been admitted to the jurisdiction of international claims commissions, doubts have arisen whether the heirs as well as the decedent must have the nationality of the claimant country some commissions dispensing with this necessity in the case of the heir but not in the case of the decedent. To be sure, practically none of these cases were actions for wrongful death of the decedent, but involved inherited claims. Yet it is not believed that this modifies the principle. In these Lusitania cases, the Department of State appears to have entertained considerable doubt whether it could press claims of American dependents arising out of the wrongful deaths of aliens. Theory justifies the doubt. When a state espouses the claim of its citizen, it is not merely prosecuting for its 'economic loss', but for the loss of

prestige and moral injury it has sustained and would sustain if it permitted its citizens to be injured without redress. Diplomatic protection is the sanction which insures a standard of treatment commensurate with international law. If states permitted their citizens to be killed abroad promiscuously or without redress by other states or their officials, the 'injured' state would soon lose prestige and its citizens that security which diplomatic protection is designed to afford. Rules of municipal law as to the survivorship of causes of action are likely here to confuse rather than aid. It has not heretofore been deemed a cause of international complaint, if national dependents sustain injury through the killing of an alien. Other nationals may also sustain 'economic loss' through such wrongful act, and if dependents, why not *creditors*, partners, and even insurers? Indeed, a state might thus have to pay damage to foreign countries for injuries inflicted, upon its *own citizens*. Surely this could not be good law. The reason for the rule that the killed or injured person must be a citizen of the claimant state is that the prestige of only one state has been deemed impaired by a wrongful assault, and that is the national state of the killed or injured person. As that state alone could have interposed to prevent the injury, how can another state, whose citizen merely suffers a resultant pecuniary loss, claim damages for an 'original' wrong?" (*American Journal of International Law*. January, 1926, page 70.)

This Commission without having specifically discussed the applicable theory, has already indicated in the Costello case that when an individual directly injured lacks North American nationality even though members of his family possess it, there is no claim. (*Opinions of Commissioners, 1929*, p. 265.)

The foregoing being noted, it will now be seen whether the principle varies when those relations are of a contractual nature.

This is not the first time that this problem has been studied by arbitral tribunals. In the Spanish American Commission of 1871 there were filed several claims on behalf of American citizens, creditors of Spanish subjects as the result of injuries to the properties of the latter caused by the Spanish Government. These claims were disallowed it being stated that internationally the creditor could not have greater rights than the debtor. (Moore's *Arbitrations*, pp. 2335 and 2336.)

Similarly, the Commission between the United States and Venezuela in the Bance case disallowed the claim of the creditors of a Venezuelan national. (*Arbitrations of 1903*, p. 172.)

In the so called "Life Insurance Claims" filed by American companies in the German American Commission, Judge Parker, referring to injuries suffered as a consequence of the contractual claims existing between the claimant companies and the persons originally injured, notwithstanding that the latter were North American nationals, resolved the problem in the following manner:

"The great diligence and research of American counsel have pointed this Commission to no case decided by any municipal or international tribunal awarding damages to one party to a contract claiming a loss as a result of the killing of the second party to such contract by a third party without any intent of disturbing or destroying such contractual relations. The ever increasing complexity of human relations resulting from the tangled network of intercontractual rights and obligations are such that no one could possibly foresee all the far-reaching consequences, springing solely from contractual relations, of the negligent or wilful taking of a life. There are few deaths caused by human agency that do not pecuniarily affect those with whom the deceased had entered into contractual relations; yet through all the ages no system of jurisprudence has essayed the task, no international tribunal or municipal court has essayed

the task, and law, which is always practical, will hesitate to essay the task, of tracing the consequences of the death of a human being through all of the ramifications and the tangled web of contractual relations of modern business". (Consolidated edition of *Decisions and Opinions of the Mixed Claims Commission, United States and Germany*, Washington, p. 137.)

Judge Parker in the preceding paragraph limited himself to applying under international law the same standard as governs in municipal law. This rule has been concisely stated by Sutherland in his work on damages as follows:

"Where the plaintiff is injured by the defendant's conduct to a third person it is too remote if he sustains no other than a contract relation to such third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such third person to perform his part, ... unless the wrongful act is wilful for that purpose." (Vol. 1, Sec. 33.)

From the reasons set forth the following conclusions are reached:

I. A State does not incur international responsibility from the fact that a subject of the claimant State suffers damage as a corollary or result of an injury which the defendant State has inflicted upon one of its own nationals or upon an individual of a nationality other than that of the claimant country, with whom the claimant is united by ties of relationship.

II. A State does not incur international responsibility from the fact that an individual or company of the nationality of another State suffers a pecuniary injury as the corollary or result of an injury which the defendant State has inflicted upon an individual or company irrespective of nationality when the relations between the former and the latter are of a contractual nature.

This second conclusion recognizes one exception only within the Convention of September 8, 1923. Article I permits the filing of "All claims for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership of his proportion of the loss or damage suffered is presented to the Commission ...." That is, it is necessary that the individual or company claimant have a substantial and bona fide interest in the company *originally* injured, regardless of its nationality, which shall make an allotment of the proportional part of the loss or damage suffered by the individual or company claimant. It is obvious that the instant case does not come within the exception.

The damage that might have been suffered by the claimant company is not definite, but is of a provisional character. Even if it had not been able to collect its credit with the National Railways Company because for several years this company had been in a special condition, such condition was created by the fact that the Government of Mexico had to take over the management of the lines in order to face an emergency which put in serious danger the social order and even the independence of that Nation. Considering the matter even from this viewpoint, there would be no international responsibility on the part of the Government of Mexico for this act. States have always resorted to extraordinary measures to save themselves from imminent dangers and the injuries to foreigners resulting from these measures do not generally afford a basis for claims. Moratoriums imposed upon National Banks are measures of this character, and there

is no precedent showing that international indemnities have been awarded on this ground. The foreigner, residing in a country which, by reason of natural, social or international calamities is obliged to adopt those measures, must suffer the natural detriment to his affairs, without any remedy, since Governments, as expressed by a distinguished jurist, are not insurers against every event.

For the reasons set forth I am of the opinion that the claim of the Dickson Car Wheel Company must be disallowed.

Decision

The claim of the United States of America on behalf of the Dickson Car Wheel Company is disallowed.

Commissioner Nielsen, dissenting:

Claim in the amount of $4,126.64, with interest, is made in this case by the United States of America against the United Mexican States on behalf of the Dickson Car Wheel Company. The principal sum claimed is for the price of car wheels furnished to the National Railways of Mexico (hereinafter called the Railways) between December 13, 1913, and January 6, 1914. The Company undertook to obtain compensation from the Railways and was informed that payment could not be made, since the Government was operating the Railways and the Company received no revenues whatever from their operation.

The principal contention of the United States was that the Government of Mexico stood, as stated in the American Brief, "in the place of the corporation", and that the corporation, during the period of Government control, "was in fact merely a name". It was argued that the Government was responsible for the payment of accounts, since it was in complete control of the Railways; did not even pay the Railways as Mexican law required for use of the properties; and finally, by certain arrangements entered into with bankers when the Railways were restored, provided for the disposition of future earnings of the roads, so that debts such as the one in question could not be paid. It was also contended that, since the Mexican Government had the use of the material supplied by the claimant, an unjust enrichment to the former resulted from such use and non-payment.

In behalf of Mexico, it was contended that there was no legal claim against the Mexican Government, and that the claimant Company's remedy was against the Railways.

No detailed discussion is necessary to show the correctness of the contention of the United States with respect to the complete control exercised by the Government over the Railways. A few brief citations to official records will suffice. On behalf of Mexico, the argument was stressed that the Government merely took over the lines. The fact that the Company's charter was not destroyed has no bearing on the contention made with respect to complete control of property and operations.

In a communication of March 14, 1919, addressed to the claimant Company, the acting auditor of the Railways excused non-payment by saying: "our properties have been operated by the Government and we are having no revenue whatever from the operation of same". In the Sixth Annual Report of the Railways, dated February 20, 1915, reference was made to difficulties encountered in the past year. It was stated that "the situation was such that the officers and employees were prevented access

to its offices and archives" (p. 3). In the Seventh Annual Report, dated October 6, 1915, reference was made to information which it was necessary to give to interested persons with respect to enormous amounts due from the Railroad company. They were informed, it was pointed out, that the company "was not receiving any revenue whatsoever, its properties being interfered with" (p. 4). This report contains a communication in which an official of the company states: "we lost control over our archives, and we were even prevented from entering the offices".

In the *Boletín de la Secretaría de Gobernación* of October, 1922, it appears that the Railways had attempted to obtain some compensation from the Government. Reference is made to enormous debts and to damages said to have been suffered, and this official document refers to "the truly terrible situation in which the railroads found themselves in June of this year" (Vol. 1, p. 353).

In a case instituted by José A. Barrios against the Railways, the Supreme Court of Mexico, in an *amparo* proceeding, stated that, while the National Railways of Mexico constituted a corporation in ordinary times and as such was represented by a Board of Directors, when in accordance with the Railway Law the Federal Government took them over, the Government itself assumed "*the representation and obligations* of the Company". (Italics inserted.)

In view of the contentions made in the instant case by the Government of Mexico, another litigation involving that Government is, in my opinion, still more interesting and more important with respect to the propriety of those contentions.

In *The Oliver American Trading Company, Inc.*, v. *The Government of the United States of Mexico, et al.*, 5 Fed. (2nd) 659, an action was originally instituted against the Government of Mexico and the National Railways of Mexico, Government Administration, as defendants to recover the sum of $1,164,348.90. Service was made by attaching tangible personal property and credits within the State of New York alleged to belong to the defendants.

The Court, speaking through three eminent Circuit Judges in the final decision in the case, held that the National Railways of Mexico was, quoting contentions made by the Government of Mexico, "merely a name" for the system of railroads in possession of the Mexican Government. There was in that situation only one defendant before the Court, namely the Government of Mexico. And the Court, further sustaining the Mexican Government, held that the Government was immune from suit in the courts of the United States.

It is very interesting to note the assertion in the Mexican Brief in the instant case before the Commission that the "statement made in the course of the decision to the effect that the 'National Railroads of Mexico is merely a name' is mere dicta, and with all due respect to Justice Rogers of the Circuit [Court] of Appeals the Mexican Agency submits that such statement is lacking of legal foundation". The statement which the Mexican Brief asserts to be *dictum* and without foundation is the Mexican Government's language approved by the Court in dealing with Mexico's contention in the *Oliver* case.

Mexico in a Brief filed in that case asserted that "the private corporation—National Railways of Mexico", named as defendant, had "no connection with the operation, management or control of the Railways". And it was further alleged that there was no reason for implying that there

existed "some other organization, roaming at large, which might be brought in as a Defendant".

Mexico in its Brief made numerous similar statements, one of which is particularly interesting. It was said: "the United States of Mexico itself has continued and still continues to operate and maintain the Railways, just as it operates and maintains the Customs and the Departments of Immigration, Treasury, Interior, and Education; as a purely governmental function carried on directly by government officers without the interposition of any agency" (p. 4).

The Circuit Court of Appeals, quoting the Mexican Brief and sustaining the Mexican Government's contentions, said:

"While the action is nominally against both the government of Mexico and the National Railways of Mexico, it is in reality a suit only against the Mexican government. For it appears that the National Railways of Mexico is 'merely a name' for a system of railroads in the possession of the Mexican government, and has been controlled and operated by Mexico since 1914 for national purposes, just as it operates the Post Office, the Customs Service, or any other branch of the national government."

If the allegations made in the Mexican Brief in the instant case were correct, then obviously Mexico submitted improper contentions before the Circuit Court of Appeals and the Judges made an incorrect statement of fact and an improper application of the law. This I do not consider to have been the situation.

It is interesting and important therefore to observe that Mexico came before the Circuit Court of Appeals and contended that, because of complete control of the Government over the Railways, there was no remedy against the Railway company. In my opinion, it is therefore clear that Mexico in the instant case repudiates its own contentions made before the Federal District Court and before the Circuit Court of Appeals and contends that, in spite of that complete control which the Mexican Government explained and which is shown by a mass of documents, some of which have been referred to, there is no remedy against Mexico in the instant case, but that the remedy was and is against the Railways.

It is stated in the opinion written by Mr. Fernández MacGregor that the Judge of the District Court in New York in stating that the National Railways of Mexico was "merely a name" referred to the designation, National Railways of Mexico, Government Administration, by which the railroad system which was under government administration was designated, and not to the moral entity whose lines were under control. A casual examination of the records in the case would I think reveal the incorrectness of this statement.

Indeed, it was the three Circuit Judges of the Circuit Court of Appeals of the Second Circuit, who, sustaining Mexico's contentions in the case, said "that the National Railways of Mexico is 'merely a name' for a system of railroads in the possession of the Mexican government".

The *Oliver* case was begun in a State court in New York. Summons was served on a man alleged to be the managing agent of the Mexican Government and also upon another man as the managing agent of the National Railways of Mexico, Government Administration. Action was promptly taken by the Government of Mexico to remove the case to a Federal District Court. It appears that the first step Mexico took was to eliminate the "National Railways of Mexico, Government Administration" as a defendant. In connection with the action taken to that end, it was alleged in behalf

of Mexico, as stated in the opinion rendered by Judge Knox of the United States District Court of the Southern District of New York on October 11, 1923, "that the suit was between plaintiff, a Delaware corporation, and aliens, to wit: The Government of the United States of Mexico, a sovereign State and National Railways of Mexico, a corporation organized under the laws of that country". In other words, Mexico succeeded at once in eliminating the designated Government Administration. The "National Railways of Mexico" are designated in this opinion as one of the parties defendant. In the Brief filed by Mexico before the Court, the Mexican Government's representatives, ignoring the Government Administration, designated also the National Railways of Mexico as a defendant. In the attempt utterly to eliminate the "National Railways of Mexico, Government Administration", to which reference is made in the opinion of my associates, the Mexican Government's Brief before the District Court began with the following paragraph:

> "Plaintiff in its brief seeks to create the impression that the Defendant named in this action as the National Railways of Mexico is not the former corporation operating the Railways, but is some corporate or quasi-corporate body used by the United States of Mexico in the operation and administration of the Railways."

The plaintiff evidently thought that suit could be maintained against the "National Railways of Mexico, Government Administration". Mexico, speaking through its representatives, in ample language successfully combated that idea. It goes so far in its efforts as to state that it is strongly felt "that the Plaintiff is attempting to confuse the Court's mind on his question". And although the suit was instituted against the designated Government Administration, Mexico proceeded to treat the National Railways of Mexico as the defendant. After it was stated that the Railways were operated by the Government, it was asserted that there was "no other entity which the Plaintiff could implead". It was further stated that the National Railways of Mexico, Government Administration, was a designation for the purpose of "convenience and as a means of identification" and was "a mere description for the purpose of convenience and apt expression to cover the operation by the Mexican Government of the Railway properties". It was said that there was no entity or group in Mexico "such as was the Director General of Railways during the United States Government Administration 'conducting or maintaining the railroads of Mexico' ".

Mexico, having successfully eliminated the designated Government Administration as a defendant, proceeded to eliminate the National Railways of Mexico. They were eliminated, because Mexico convinced the Court that the Mexican Government was in complete control of the Railways and managed them as any department of the Government was managed. Mexico having then successfully merged the Railways with the Government pleaded that the Government was immune. It was sustained by the Court.

In the *Oliver* case, Mexico successfully advanced the contention that no action would lie against the National Railways of Mexico because of complete government control. In the instant case before the Commission, Mexico states that the remedy is and was against the Railways.

In the instant case before the Commission, Mexico in its Brief refers to the opinion of the Circuit Court of Appeals, sustaining and quoting Mexico's own language in the *Oliver* case, and states that what the Court

said, although it was what Mexico contended, was "lacking of legal foundation".

Apart from the contentions effectively advanced by counsel for the United States in oral argument with respect to unjust enrichment, the fundamental contention made by the United States, found in its Brief, was that Mexico is liable in the instant case because the Mexican Government was, as was so fully and no doubt accurately described by Mexico in the *Oliver* case, in such complete control of the Railways that they could not settle the claim of the claimant Company against the Railways. That contention I consider to be clearly sound and to be sufficient to establish the claimant Government's case.

It is unnecessary to cite legal authority to support the statement that contractual rights are property. *Long Island Water Supply Company* v. *Brooklyn*, 166 U.S. 685. This Commission has been repeatedly concerned with rights of that nature, as have other international tribunals. The decision in the case of *Company General of the Orinoco* in the French-Venezuelan Arbitration of 1902, *Ralston's Report*, p. 244, is interesting in connection with the instant case. Umpire Plumley held that Venezuelan authorities made impossible a contract of a French concessionnaire to sell its rights to a British company, and that the Government of Venezuela became liable for the value of the concession, since the action on the part of the respondent Government resulted in practically a total loss. In the instant case obviously the Government of Mexico made it impossible for the Railway Company to fulfill its contractual obligations with the Dickson Car Wheel Company. There is no evidence to the contrary. Certainly the loss is not speculative.

I consider that, in view of the conclusion reached in the opinion of my associates, it is not unnatural that the opinion should contain certain statements which fall considerably short of accuracy and some wanting in relevancy. I shall briefly comment on some of these things.

It is stated at the outset that, as shown on page 31 of the American Brief, it was contended on behalf of the United States that Mexico incurred a contractual obligation toward the claimant Company because the Mexican Government was the principal stockholder in the Railway Company. From a reading of the Brief at the point mentioned, it will be seen that the contention there made was that after the taking over of the railroads they lacked "opportunity and capacity" for independent action and that "the Government of Mexico itself stood in the place of the corporation, and the corporation during that period was in fact merely a name". That contention I consider to be absolutely sound.

It is further stated by my associates that the Railway Company continued to receive income from sources distinct from the operation of the lines, and that therefore the argument of the American Agency that the Railway Company had disappeared as a juridical entity is not sound. No reference is made to any source of income which could have been applied to the claimant's debt. I am not aware of any contention made in the record or in oral argument to the effect that the Railway Company disappeared as a juridical entity. The Railway Company explained it could not pay the claimant Company. The reason was that the Government was in complete control; that the Company received no revenue; and that it received no compensation for the use of its property. A judgment against the Company, provided that could have been obtained, would of course have been no more valuable than the contractual obligation, unless such judgment could have been satisfied out of properties of the Railway Company. It is not to

be supposed that property under control of the Government during a so-called emergency could have been attached and sold to satisfy a judgment of a private creditor. As has been pointed out, Mexico contended before the Circuit Court of Appeals in New York that such property could not be attached, and that suit *in personam* could not be maintained against the Railway Company, the Company being the same as the Government in view of government control.

It is said in the opinion of my associates that the Railroads were not taken over by virtue of the right of eminent domain or expropriation, the control of the Government being merely temporary and the Railroads not being deprived of property rights. I am unable to perceive that a company deprived of the use of vast properties for more than a decade is not deprived of property rights. Of course, the appropriation of user, just as the taking of complete title, can properly be accomplished as an act of sovereignty in all civilized countries, including Mexico. I assume that throughout the world, whether user or title is taken, compensation is required, and the sovereign right exercised is the right of expropriation or eminent domain, the two terms being used synonymously. If Mexico takes property in some other way or by some other domestic right, the point is of course immaterial.

The only point of importance is that Mexico did take and control the properties and did prevent the Railways from discharging their obligations to the claimant Company. It further failed to pay compensation for user. It failed to pay estimated damages. It left the Railroads, as a Department of the Mexican Government said, "in a truly terrible condition". It entered into certain agreements with bankers for the disposition of the Railroad Company's revenues in the future. It is scarcely necessary to observe that the remedies of the claimant Company against the Railway Company may properly be described in the language employed by an eminent judge in speaking of obligations that cannot be enforced—"ghosts that are seen in the law but that are illusive to the grasp".

With respect to the *Barrios* case referred to in the opinion written by Mr. Fernández MacGregor, it is interesting to note that the Supreme Court of Mexico declared that the Mexican Government in taking control of the Railways "assumed the representation and obligations of the Company". It is further interesting to observe that the Court said that, if a decision should be rendered for the plaintiff against the Railway Company "the obligations would have to be paid from funds of the National Treasury, where all of the proceeds of the said railroads have been deposited during the period of seizure".

A speculation as to what would have happened had suit been brought in a Mexican Federal Court is of course useless. We do not know whether, in view of the Government's control, the action could have been maintained. But what seems to me to be reasonably certain is that a satisfaction of the judgment out of property employed by the Government in what has been described as an emergency would not have been permitted. Hence in that situation a judgment was no better than the original promise to pay the Dickson Car Wheel Company which the Government prevented the Railways from fulfilling and did not itself fulfil.

Reference is made in the opinion of my associates to the interesting production by Mexico of additional evidence in the form of a letter shortly before the beginning of the oral argument, showing that a claim of some other concern against the Railways had suddenly been settled by partial payment taken in a compromise. This interesting settlement of course had no value

to the claimant Company in the instant case. This case involves the question whether, when the claimant's original cause of action arose, the Government of Mexico prevented the settlement of the claim. I presume the cause of action arose either when the goods were delivered, or more likely, when payment was requested. That the Government prevented payment at that time is to my mind clear. This being the case, it seems to be equally clear that the government is responsible for the destruction of the claimant's property rights.

It appears to me that certain altogether too narrow views of responsibility under international law expressed by my associates in the opinion written by Mr. Fernández MacGregor may be responsible for the failure to find liability in the instant case.

It is said in the opinion that, in order that a government may incur responsibility, it is necessary that there should exist a violation of a duty imposed by some international law standard. It is true that, when conduct on the part of persons concerned with the discharge of governmental functions results in a failure to meet obligations imposed by rules of international law, a nation must bear the responsibility. But, on the other hand, of course there is what has been called a direct responsibility on the part of the nation for acts of representatives or agencies of governments. This evidently is overlooked by my associates. The wrong in this case arose out of the destruction of contractual rights which I have discussed. The loss is the price of the property the claimant sold, or, it might be said, loss of the property or the destruction of the rights growing out of the contract of sale.

A further seemingly strange conclusion expressed in the opinion with respect to responsibility presumably accounts for the somewhat lengthy discussion of questions pertaining to nationality. I do not perceive the slightest degree of relevancy of these matters.

It is said that the problem in the instant case is to determine if a damage caused to a Mexican national and which affects an American national, causing remote damage, constitutes an act violative of the law of nations.

This brief sentence to my mind is a total fallacy. In the first place, the United States has not complained of an injury to a Mexican national. It does not predicate its claim on any such ground. It might indeed be considered that the Mexican national was benefited in that it was not obliged to pay its debts, since the Mexican Government prevented the payment. The damage caused to the American national was not remote. It was a very specific loss directly consequent upon the action of the Mexican Government. The issue is whether acts of Mexican authorities in causing directly an injury, namely, the destruction of property rights, impose responsibility on Mexico. It will readily be seen, therefore, that the elaborate discussion of questions in relation to nationality can have no application to the instant case.

Reference to the *Costello* case, decided by this Commission, seems particularly inapt. In that case the Commission considered questions pertaining to the citizenship of several persons said by the United States to be American citizens, including Timothy J. Costello. The Commission found him to be an American citizen, in spite of the fact that during a certain period the Government of the United States did not consider him to be entitled to protection while resident abroad. The Presiding Commissioner made an observation supplementary to the opinion written for the Commission. He raised a question as to the application of certain cases cited in the opinion. These cases were undoubtedly properly cited to show

the views of certain courts. The Mexican Commissioner concurred in the views of the Presiding Commissioner. I believe that the most casual examination of the decisions cited will reveal the pertinency of the citations. The Mexican Commissioner added an observation with respect to international obligations of Mexico in view of the temporary status of Costello. I am utterly unable to see how the case can have any bearing on the instant case.

I likewise do not perceive the relevancy of the *Cisneros* case which dealt incidentally with the seizure of property of a Spanish subject in Cuba. The question decided was whether a daughter born in New York two years after the seizure could recover indemnity from Spain.

Also I do not perceive the relevancy of the *Bance* case in the Venezuelan-American Arbitration of 1903. The case dealt with certain funds which were involved in bankruptcy proceedings in Venezuela. The Commission declared that a Venezuelan receiver, who appeared as claimant to recover a credit in behalf of an American concern, acted only as administrator of the property of the bankrupt party, and that it was not possible to consider any individual credits from the total estate as the property of any one creditor. *Ralston's Report*, p. 172.

Possibly Mr. Fernández MacGregor had in mind, in making general reference to cases found in *Moore's Arbitrations*, the case of *Mora and Arango*. The decision mentioned there appears to lend some support to the conclusions of my colleagues. The case is very meagrely reported, and it seems to me that the soundness of the decision may be questioned. In any event, it involved the seizure of property and not a complete management of property such as we are concerned with in the instant case, involving of course questions as to proper treatment of business obligations. With reference to this point, I may observe that it seems to me unreasonable to suppose that the Mexican Government, after taking over the railroads, would have failed to pay salaries of employees earned in part, but coming due after, the assumption of control.

A brief generality such as that quoted in the opinion of my associates from Mr. Sutherland's work on damages may easily be misleading. The meagre language quoted may appear to lend support to the conclusion of my associates in the absence of further specific statements of the author illustrating what he had in mind. The remote character of the damages with which Mr. Sutherland deals may be illustrated by quoting the first case he cites following the quotation in the opinion written by Mr. Fernández MacGregor. Mr. Sutherland says:

> "A., who had agreed with a town to support for a specific time and for a fixed sum all the town paupers, in sickness and in health, was held to have no cause of action against S. for assaulting and beating one of the paupers, whereby A. was put to increased expense."

It may further be observed, as has already been pointed out, that, entirely irrespective of the question whether the Government treated the Mexican National Railways kindly or ruthlessly, it did destroy the claimant's contractual property rights by preventing payment for the material which was sold to the Railways.

In the opinion of Umpire Parker in the so-called *Insurance* cases, decided under the Agreement to settle claims growing out of the World War, concluded between the United States and Germany on August 10, 1922, a statement may be found which may also appear to give some support to the conclusion of my associates. In addition to the quotations appearing

in their opinion it may, however, also be worth while to take note of the Umpire's observations to the effect that an insurance company, in issuing a policy without expressly excluding any risk, must have been impelled "to take into account every possible risk", including such as developed in these cases.

I cannot agree with the very general statements in the opinion of my associates with respect to the seizure or destruction of property in emergencies without compensation to owners. Nor do I see any relevancy to a reference to a moratorium, since none existed.

It would seem to be reasonable to suppose that long before the period of complete control of the Railroads ceased, the statute of limitation ran against the debt of the claimant company. Of course if control impeded action against the railroad company, as Mexico contended in the case of the *Oliver Trading Company* that it did, it may be that the statute could not be pleaded in defense, even if the railroad company desired to plead it. But in the instant case Mexico alleges that control did not interfere with remedies against the company.

Reference is made in the opinion of my associates to the form in which suit might be instituted in a case in which a cause of action arose prior to government control of the railroads in the United States during the World War. The action taken by the Government of the United States to meet obligations incurred by the railroads prior to government control, and obligations arising subsequent to control, is of some interest in considering the issues involved in the instant case. This is so because legislation, and proclamations issued pursuant to such legislation, were presumably framed with a view to the requirements of constitutional guarantees with respect to the protection of property rights, guarantees such as are found not only in the Constitution of the United States, but in the Constitution of Mexico, and in domestic law throughout the world, and, in my opinion, are secured by international law.

Provision was made for the payment by the Railway Administration of accounts accruing prior to control and of accounts subsequent to control. Provision was made for suits in which causes of action arose prior to control and for suits in which causes of action arose during control. The physical property under the management of the Government was, however, immune from levy. *Missouri Pacific Railroad Company, et al.*, v. *Ault*, 256 U.S. 554; *United States Railroad Administration, Director General of Railroads, Bulletin No. 4 (revised)*, p. 64 *et seq.* Accounts were kept so that obligations arising prior to control were chargeable to the railroads, and those arising during the period of control were chargeable to the government. Under this system it was of course proper, and doubtless necessary, that a suit on a cause of action arising prior to control should be filed against the railroad company against which the cause of action arose in a given case. The properties of many hundreds of companies were under control. Payment was made by the government for the use of the railroads.

Action carefully taken to adjust claims in tort or claims in contract prior to control or after control is, of course, something very different from action preventing the payment of claims. It is the latter kind of action upon which the United States bases its claim in the instant case. The system of bookkeeping employed for purposes of a final accounting with the railroads with respect to railroad obligations and government obligations has no bearing on this point.

I consider that a clear injustice has been done to the claimant in the instant case.

I consider it to be important to mention an interesting point that has arisen since the instant case was argued. Rule XI, 1, provides:

"The award or any other judicial decision of the Commission in respect of each claim shall be rendered at a public sitting of the Commission."

The other two Commissioners have signed the "Decision" in this case. However, no meeting of the Commission was ever called by the Presiding Commissioner to render a decision in the case, and there has never been any compliance with the proper rule above quoted.

INTERNATIONAL FISHERIES COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(July —, 1931, concurring opinion by Presiding Commissioner, July —, 1931, dissenting opinion by American Commissioner, undated. Pages 206-286.)

JURISDICTION.—CONTRACT CLAIMS.—CALVO CLAUSE. Claimant, an American corporation, as stockholder of a Mexican corporation, presented a claim for nine hundred and eighty-five thousandths of $4,500,000.00, plus interest, said sum being alleged to be the value of a contract or concession held by the latter corporation with the Mexican Government. The concession was cancelled by the appropriate department of the Mexican Government on the ground of non-performance of the terms of the contract within the time stipulated. Said contract or concession contained a Calvo clause. Claim *disallowed* for lack of jurisdiction pursuant to decision in *North American Dredging Company of Texas* claim *supra.*

Cross-reference: Annual Digest, 1931-1932, p. 273.

Fernández MacGregor Commissioner:

This claim has been presented by the United States of America on behalf of a North American corporation known as the International Fisheries Company, which asserts that it has suffered damages as a result of the cancellation by the Government of Mexico of a contract or concession which it had granted to a Mexican Company called "La Pescadora, S.A." wherein the claimant possessed a considerable number of shares, for which reason it asks for an indemnity equal to nine hundred and eighty-five thousandths of the sum of $4,500,000.00, which according to it, was the value of the cancelled contract or concession, plus interest.

There have been presented in the instant claim many very important points of law the study of which requires extreme care. But many of them can be set aside if it is true as contended by the Mexican Agency, that this Commission is without jurisdiction to hear the claim in question by reason of the contract-concession, which is said to have been annulled by the Government of Mexico, having a clause wherein the persons obtaining the concession agreed to submit themselves absolutely to the Mexican Courts in everything pertaining to the interpretation and fulfilment of the contract,