

# **REPORTS OF INTERNATIONAL ARBITRAL AWARDS**

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## **RECUEIL DES SENTENCES ARBITRALES**

**General Claims Commission (Agreement of Sept. 8, 1923)(United Mexican  
States, United States of America)**

VOLUME IV pp. 7-320



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## **SECTION I**

**SPECIAL AGREEMENT : September 8, 1923.**

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**PARTIES : United Mexican States, United States of America.**

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**ARBITRATORS : C. van Vollenhoven (Netherlands), Presiding Commissioner, G. Fernández Macgregor, Mexican Commissioner, Joseph R. Baker, American Commissioner until May 31, 1925, Nathan I. Miller, American Commissioner until January 5, 1926, Edwin B. Parker, American Commissioner until July 17, 1926, Fred K. Nielsen, American Commissioner from July 31, 1926.**

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**REPORT : Opinions of Commissioners under the Convention concluded September 8, 1923 between the United States and Mexico. February 4, 1926, to July 23, 1927. (Government Printing Office, Washington, 1927.)**

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## Convention

### GENERAL CLAIMS CONVENTION<sup>1</sup> OF SEPTEMBER 8, 1923

*Signed at Washington, September 8, 1923; ratification advised by the Senate of the United States, January 23, 1924; ratified by the President of the United States, February 4, 1924; ratified by Mexico, February 16, 1924; ratifications exchanged at Washington, March 1, 1924; proclaimed by the President of the United States, March 3, 1924*

The United States of America and the United Mexican States, desiring to settle and adjust amicably claims by the citizens of each country against the other since the signing on July 4, 1868, of the Claims Convention entered into between the two countries (without including the claims for losses or damages growing out of the revolutionary disturbances in Mexico which form the basis of another and separate Convention), have decided to enter into a Convention with this object, and to this end have nominated as their Plenipotentiaries;

The President of the United States of America:

The Honorables Charles Evans Hughes, Secretary of State of the United States of America, Charles Beecher Warren and John Barton Payne, and

The President of the United Mexican States:

Señor Don Manuel C. Téllez, Chargé d'Affaires ad interim of the United Mexican States at Washington;

Who, after having communicated to each other their respective full powers found to be in due and proper form, have agreed upon the following Articles:

ARTICLE I. All claims (except those arising from acts incident to the recent revolutions) against Mexico of citizens of the United States, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties, and all claims against the United States of America by citizens of Mexico, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties; 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 by the claimant to the Commission hereinafter referred to; and all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice, and which claims may have been presented to either Government for its interposition with the other since the signing of the Claims Convention concluded between the two countries July 4, 1868, and which have remained unsettled, as well as any other such claims which may

<sup>1</sup> Source : Treaties, etc., 1923-1937, Vol. 4, p. 4441.



be filed by either Government within the time hereinafter specified, shall be submitted to a Commission consisting of three members for decision in accordance with the principles of international law, justice, and equity.

Such Commission shall be constituted as follows: one member shall be appointed by the President of the United States; one by the President of the United Mexican States; and the third, who shall preside over the Commission, shall be selected by mutual agreement between the two Governments. If the two Governments shall not agree within two months from the exchange of ratifications of this Convention in naming such third member, then he shall be designated by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague described in Article XLIX of the Convention for the pacific settlement of international disputes concluded at The Hague on October 18, 1907. In case of the death, absence or incapacity of any member of the Commission, or in the event of a member omitting or ceasing to act as such, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE II. The Commissioners so named shall meet at Washington for organization within six months after the exchange of the ratifications of this Convention, and each member of the Commission, before entering upon his duties, shall make and subscribe a solemn declaration stating that he will carefully and impartially examine and decide, according to the best of his judgment and in accordance with the principles of international law, justice and equity, all claims presented for decision, and such declaration shall be entered upon the record of the proceedings of the Commission.

The Commission may fix the time and place of its subsequent meetings, either in the United States or in Mexico, as may be convenient, subject always to the special instructions of the two Governments.

ARTICLE III. In general, the Commission shall adopt as the standard for its proceedings the rules of procedure established by the Mixed Claims Commission created under the Claims Convention between the two Governments signed July 4, 1868, in so far as such rules are not in conflict with any provision of this Convention. The Commission, however, shall have authority by the decision of the majority of its members to establish such other rules for its proceedings as may be deemed expedient and necessary, not in conflict with any of the provisions of this Convention.

Each Government may nominate and appoint agents and counsel who will be authorized to present to the Commission, orally or in writing, all the arguments deemed expedient in favor of or against any claim. The agents or counsel of either Government may offer to the Commission any documents, affidavits, interrogatories or other evidence desired in favor of or against any claim and shall have the right to examine witnesses under oath or affirmation before the Commission, in accordance with such rules of procedure as the Commission shall adopt.

The decision of the majority of the members of the Commission shall be the decision of the Commission.

The language in which the proceedings shall be conducted and recorded shall be English or Spanish.

ARTICLE IV. The Commission shall keep an accurate record of the claims and cases submitted, and minutes of its proceedings with the dates

thereof. To this end, each Government may appoint a Secretary; these Secretaries shall act as joint Secretaries of the Commission and shall be subject to its instructions. Each Government may also appoint and employ any necessary assistant secretaries and such other assistance as deemed necessary. The Commission may also appoint and employ any persons necessary to assist in the performance of its duties.

ARTICLE V. The High Contracting Parties, being desirous of effecting an equitable settlement of the claims of their respective citizens thereby affording them just and adequate compensation for their losses or damages, agree that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim.

ARTICLE VI. Every such claim for loss or damage accruing prior to the signing of this Convention, shall be filed with the Commission within one year from the date of its first meeting, unless in any case reasons for the delay, satisfactory to the majority of the Commissioners, shall be established, and in any such case the period for filing the claim may be extended not to exceed six additional months.

The Commission shall be bound to hear, examine and decide, within three years from the date of its first meeting, all the claims filed, except as hereinafter provided in Article VII.

Four months after the date of the first meeting of the Commissioners, and every four months thereafter, the Commission shall submit to each Government a report setting forth in detail its work to date, including a statement of the claims filed, claims heard and claims decided. The Commission shall be bound to decide any claim heard and examined within six months after the conclusion of the hearing of such claim and to record its decision.

ARTICLE VII. The High Contracting Parties agree that any claim for loss or damage accruing after the signing of this Convention, may be filed by either Government with the Commission at any time during the period fixed in Article VI for the duration of the Commission; and it is agreed between the two Governments that should any such claim or claims be filed with the Commission prior to the termination of said Commission, and not be decided as specified in Article VI, the two Governments will by agreement extend the time within which the Commission may hear, examine and decide such claim or claims so filed for such a period as may be required for the Commission to hear, examine and decide such claim or claims.

ARTICLE VIII. The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions. They further agree to consider the result of the proceedings of the Commission as a full, perfect and final settlement of every such claim upon either Government, for loss or damage sustained prior to the exchange of the ratifications of the present Convention (except as to claims arising from revolutionary disturbances and referred to in the preamble hereof). And they further agree that every such claim, whether or not filed and presented to the notice of, made, preferred or submitted to such Commission shall from and after the conclusion of the proceedings of the Commission be considered

and treated as fully settled, barred and thenceforth inadmissible, provided the claim filed has been heard and decided.

ARTICLE IX. The total amount awarded in all the cases decided in favor of the citizens of one country shall be deducted from the total amount awarded to the citizens of the other country and the balance shall be paid at Washington or at the City of Mexico, in gold coin or its equivalent to the Government of the country in favor of whose citizens the greater amount may have been awarded.

In any case the Commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution. In any case where the Commission so decides the restitution of the property or right shall be made by the Government affected after such decision has been made, as hereinbelow provided. The Commission, however, shall at the same time determine the value of the property or right decreed to be restored and the Government affected may elect to pay the amount so fixed after the decision is made rather than to restore the property or right to the claimant.

In the event the Government affected should elect to pay the amount fixed as the value of the property or right decreed to be restored, it is agreed that notice thereof will be filed with the Commission within thirty days after the decision and that the amount fixed as the value of the property or right shall be paid immediately. Upon failure so to pay the amount the property or right shall be restored immediately.

ARTICLE X. Each Government shall pay its own Commissioner and bear its own expenses. The expenses of the Commission including the salary of the third Commissioner shall be defrayed in equal proportions by the two Governments.

ARTICLE XI. The present Convention shall be ratified by the High Contracting Parties in accordance with their respective Constitutions. Ratifications of this Convention shall be exchanged in Washington as soon as practicable and the Convention shall take effect on the date of the exchange of ratifications.

In witness whereof, the respective Plenipotentiaries have signed and affixed their seals to this Convention.

Done in duplicate at Washington this eighth day of September, 1923.

(Signed) CHARLES EVANS HUGHES.  
JOHN BARTON PAYNE.

CHARLES BEECHER WARREN.  
MANUEL C. TÉLLEZ.

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## Decisions

### THE GLOBE COTTON OIL MILLS (U.S.A.) v. UNITED MEXICAN STATES.

(*February 4, 1926. Pages 1-2*)<sup>1</sup>.

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PROCEDURE, MOTION TO REJECT MEMORIAL.—VARIANCE BETWEEN MEMORANDUM AND MEMORIAL OF CLAIM.—AMENDMENT OF MEMORIAL. Motion to reject memorial on ground of variance in amount from that set forth in memorandum *denied*.

(*Text of decision omitted.*)

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### THE GLOBE COTTON OIL MILLS (U.S.A.) v. UNITED MEXICAN STATES.

(*February 11, 1926. Page 2.*)

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PROCEDURE, TIME FOR FILING OF ANSWER. Time for filing of answer *held* suspended to date of instant opinion.

(*Text of decision omitted.*)

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### FLORA LEE (U.S.A.) v. UNITED MEXICAN STATES.

(*February 15, 1926. Page 3.*)

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PROCEDURE, MOTION FOR LEAVE TO FILE MEMORIAL.—AMENDMENT OF MEMORIAL. Motion for leave to file separate memorial for part of claim previously filed denied without prejudice to recourse to procedure of filing memorial on basis of memorandum followed by filing of motion to amend such memorial.

(*Text of decision omitted.*)

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<sup>1</sup> References to page numbers herein are to the original report referred to on the title page of this section.

PINE KING LAND AND LUMBER CO. (U.S.A.) *v.* UNITED  
MEXICAN STATES.

*(March 2, 1926. Page 4.)*

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PROCEDURE, MOTION TO DISMISS.—JURISDICTION OVER CLAIM BASED ON TITLE TO REAL PROPERTY.—LITISPENDENCE. Motion to dismiss, on grounds that claims based on title to real property were outside jurisdiction of tribunal and that a similar claim was pending before a Mexican court, overruled.

*(Text of decision omitted.)*

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CLARA W. RONEY AND GEORGE E. BOLES (U.S.A.) *v.* UNITED  
MEXICAN STATES.

*(March 2, 1926. Pages 5-6.)*

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CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION. Motion to dismiss claims clearly within competence of Special Claims Commission established under Convention of September 10, 1932, granted. Any such claim held outside jurisdiction of tribunal.

These cases are before this Commission on the Mexican Agent's motion to dismiss.

1. The claimants are the widow and father of Frederick John Roney and Early Boles, respectively, who it is alleged were unlawfully killed by armed Mexicans on or about the 5th day of January, 1920.

2. The ground of the motion to dismiss is that it appears on the face of the record that these cases fall within the jurisdiction of the Special Claims Commission, constituted under the Special Claims Convention, and are not within the jurisdiction of this Commission.

3. This Commission is constituted under the terms of the General Claims Convention signed September 8, 1923. The preamble recites that the high contracting parties, "desiring to settle and amicably adjust claims by the citizens of each country against the other \* \* \* (without including the claims for losses or damage growing out of the revolutionary disturbances in Mexico which form the basis of another and separate convention) have decided to enter into a convention with this object". Article I of the Convention, defining in broad and general terms the jurisdiction of this Commission, carves out of its general jurisdiction claims "arising from acts incident to the recent revolutions". The other and separate convention, referred to in the preamble of the General Claims Convention, is that designated "Special Claims Convention" signed September 10, 1923, Article III of which specifies five categories of claims which fall within the jurisdiction of the Special Claims Commission constituted thereunder.

4. The Memorandum, the Memorial and the documents and proofs in support thereof, filed by the American Agent, read together, bring these cases clearly within the jurisdiction of the Special Claims Commission. This being true, this Commission is without jurisdiction to hear and decide them and the motion of the Mexican Agent to dismiss must be sustained.

5. These claims are two out of several hundred, which have been filed by the American Agent with both this Commission and the Special Claims Commission. As the jurisdiction of this Commission is general and as many cases may arise in which, from the facts alleged, it is not clear within which jurisdiction they fall, it will prove helpful to this Commission to have before it, in considering such claims, the opinions of the Special Claims Commission in the series of test cases, already submitted to it, in which it is believed opinions will be rendered at an early date. Such opinions on legal points are entitled to and will have great consideration and will be given great weight by this Commission in construing the exceptions contained in Articles I and VIII and in the preamble of the General Claims Convention.

6. In the cases here presented, however, the allegations contained in the memorandum and supporting exhibits numbered 4, 9, 15, 22, 23, 25, and 29 filed by the American Agent, leave no room to doubt that they fall within the jurisdiction of the Special Claims Commission, and hence that this Commission is without jurisdiction to decide them.

7. It is hereby ordered that docket Nos. 195 and 284, the United States of America on behalf of Clara W. Roney and George E. Boles, respectively, *v.* United Mexican States, be, and they are, hereby dismissed without prejudice to the right of the United States of America to espouse and prosecute them elsewhere.

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EL EMPORIO DEL CAFÉ, S.A. (UNITED MEXICAN STATES) *v.*  
UNITED STATES OF AMERICA.

(*March 2, 1926. Pages 7-9.*)

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PROCEDURE, MOTION TO DISMISS. Upon a motion to dismiss, allegations of memorial to which it is addressed must be taken as confessed.

UNLAWFUL COLLECTION OF CUSTOMS DUTIES BY OCCUPYING MILITARY AUTHORITIES. Claimant paid to occupying American military authorities at Vera Cruz export duties on shipment to Mexican destination *via* port of Vera Cruz. Under Mexican law claimant was entitled to refund of such shipment when it reached its final Mexican destination but respondent Government failed to make such refund after demand. Motion to dismiss for lack of jurisdiction *denied*.

*Cross-reference:* Annual Digest, 1925-1926, p. 234.

*Comments:* Edwin M. Borchard, "Decisions of the Claims Commissions, United States and Mexico," Am. J. Int. Law, Vol. 20, 1926, p. 536 at 542.

This case is before the Commission on the American Agent's motion to dismiss. For the purposes of this motion only, the truth of all the allegations in the Memorial filed by the Mexican Agent must be taken as confessed.

1. From the Memorial it appears that the Government of Mexico has espoused and filed this claim on behalf of *El Emporio Del Café, S. A.*, a Mexican corporation, to recover moneys held by the American Government which were paid to it as export duties on shipments of coffee at the customhouse at Veracruz, Mexico, in August, 1914, while it was in military occupation of that city. It is alleged that during such military occupation the Government of Mexico established a temporary customhouse at Orizaba for the collection of customs passing through the port of Veracruz and that the claimant was required to pay, and did pay, to the Mexican customs authorities at Orizaba the same amount paid by claimant to the American authorities at Veracruz; that the shipments of coffee on which these customs duties were paid had for their final destination Ciudad Juárez, Chihuahua, Mexico, and after passing through the ports of Veracruz and New Orleans were delivered to this final destination through this Northern Mexican gateway; that under the laws of Mexico then in effect the claimant became entitled to have refunded it all export duties paid on shipments passing out of Mexico in transit to final destination in Mexico; that the Mexican Government did refund claimant the said customs duties paid to it by claimant at Orizaba, but that a like sum paid by claimant to the American authorities at Veracruz is still withheld by the American Government.

2. The American military forces in occupying Veracruz and in establishing all proper rules and regulations for the government of the occupied territory saw fit to adopt and enforce the laws then prevailing in Mexico for levying and collecting customs duties. Had Mexico on behalf of the claimant merely alleged that the American authorities were not entitled to perform any act of administration at Veracruz, and stopped there, then the Commission would have dismissed this claim; not, to be sure, because of the political background of said occupation, for the Commission shall have to decide very likely several controversies with political backgrounds. Neither does the mere fact that the occupation had been directed by the President of the United States, whose action was approved by the Congress, affect the question presented, for in determining the jurisdiction of this Commission the rank, be it high or low, of the national authorities whose acts are made a basis for complaint is immaterial. While the individual claimant was twice compelled to pay customs duties on the basis of the Mexican tariff laws which, according to these very laws, were due only once; and while one of these payments must therefore have been unlawfully enforced, the Commission is not clothed, by the terms of the Convention under which it is constituted, with jurisdiction to inquire and decide which payment was legal and which illegal. A controversy of this character, constituting a controversy between the two Governments themselves, does not change its nature when presented by either Government in the shape of the claim of an individual, and such a controversy has not been submitted to this Commission by the provisions of the Convention under which it is acting.

3. But the administrative acts of the American representatives during such occupation can and must be examined to determine to what, if any, extent they invaded the rights of Mexican nationals to their damage. The Memorial alleges that while the Mexican tariff laws which the American authorities undertook to administer authorized the collection of export duties which were actually collected, they also required that the duties so paid should be refunded to the shipper when and if the shipments on which duties were paid were reshipped into Mexico. Assuming the truth of said

allegations, it follows that the claimant was entitled to such refund from the American authorities, which has not been made.

4. For the reasons stated, the motion to dismiss is denied, and the respective Agents are directed to prepare this case for final submission in accordance with this interlocutory decision. The running of time for filing the Answer has been suspended from September 18, 1925, to March 2, 1926.

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DAVID GONZALEZ (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(*March 2, 1926. Pages 9-10.*)

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UNLAWFUL COLLECTION OF CUSTOMS DUTIES BY OCCUPYING MILITARY AUTHORITIES. Double payment of export duties to Mexican authorities and occupying American military authorities in and of itself does not give rise to a claim within the jurisdiction of the tribunal. Motion to dismiss *denied* without prejudice to amendment of memorial to set forth any other facts bringing claim within jurisdiction of tribunal.

(*Text of decision omitted.*)

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THOMAS O. MUDD (U.S.A.) *v.* UNITED MEXICAN STATES.

(*March 2, 1926. Pages 10-11.*)

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PROCEDURE, MOTION TO DISMISS.—JURISDICTION.—CONTRACT CLAIMS.—CALVO CLAUSE.—ACTS OF MUNICIPALITIES. Motion to dismiss, on ground that claims based on nonperformance of contractual obligations, claims involving Calvo clause, or claims arising from the acts of municipalities in their civil capacity, are outside jurisdiction of tribunal, *dismissed* without prejudice when it appeared on the face of the record that at least some phases of claim were of a character to be within jurisdiction of tribunal. No ruling was thereby made that claims of the character objected to were without the jurisdiction of the tribunal.

(*Text of decision omitted.*)

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ARMANDO COBOS LOPEZ (UNITED MEXICAN STATES) *v.*  
UNITED STATES OF AMERICA.

(March 2, 1926. Pages 12-13.)

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RESPONSIBILITY FOR ACTS OF MILITARY OCCUPATION.—PROXIMATE CAUSE.

Claimant was a student in the Mexican Naval School in Veracruz closed by order of the President of Mexico upon the occupation of the city by American military forces. Claim for inability to resume education for lack of funds when school reopened *disallowed*.

This case is before this Commission on the American Agent's motion to dismiss.

1. The pertinent paragraphs of the Memorial, as amended by the motion of the Mexican Agent filed February 27, 1926, through which it is sought on behalf of the claimant to fix liability on the United States, read as follows:

"That in the year 1914, he was a student of the Naval School established in the city and port of Veracruz; that as a direct and proximate result of the armed invasion of the said city by forces of the American Government, Venustiano Carranza, President of the United Mexican States at that time, ordered the closing of the Naval School until further orders, i.e., until such time as the port of Veracruz should again come under the control of the National forces; that when the school was reopened, he was absolutely wanting in the means to acquire the necessary equipment, which brought about the impossibility of continuing his career. \* \* \* That the injury suffered by him being the proximate consequence of the occupation of the Naval Academy as a part of the port of Veracruz by the American forces, and inasmuch as it was this act that brought about the closing of the Academy and the impossibility for the claimant to continue his career because of the difficult personal circumstances in which he was left, \* \* \*."

2. The only act of the Government of the United States complained of is the military occupation of Veracruz. According to the allegation of the Memorial, the naval school, which claimant was attending, was closed by order of the President of Mexico. When it reopened, the claimant was unable to re-enter the school for lack of funds. There is no allegation of any wrong cognizable by this Commission committed by the American Government, or for which it is responsible, and resulting either directly or indirectly or remotely in injury to claimant; and it is apparent from the Memorial that no such allegation can be made. It would not be profitable to discuss the remoteness, both in time and in the natural and normal sequence, of the damage alleged, to the act complained of; although it is apparent that such act was not in legal contemplation the proximate cause of such damage. It therefore follows that the motion of the American Agent to dismiss this claim must be sustained.

3. The Commission decrees that the Government of the United States of America is not obligated to pay to the Government of the United Mexican States, any amount on account of the claim asserted herein on behalf of Armando Cobos Lopez.

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JOSEPH E. DAVIES (U.S.A.) *v.* UNITED MEXICAN STATES.*(March 2, 1926. Pages 13-14.)*

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JURISDICTION.—CONTRACT CLAIMS. Claim for non-performance of a contractual obligation. Motion to dismiss, for lack of jurisdiction, *overruled*.

This case is before this Commission on the Mexican Agent's motion to dismiss.

1. The motion rests on the assertion that claims based on an alleged nonperformance of contractual obligations are outside the jurisdiction of this Commission.

2. Although the allegation of nonperformance of contractual obligations is apparent on the face of the record, it does not necessarily follow as a legal conclusion that the claim does not fall within the General Claims Convention.

3. The Commission therefore overrules the motion without prejudice. The running of time for filing the Answer has been suspended from January 27, 1926, to March 2, 1926.

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WILLIAM A. PARKER (U.S.A.) *v.* UNITED MEXICAN STATES.*(March 2, 1926. Page 14.)*

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PROCEDURE, MOTION TO DISMISS.—NATIONALITY, PROOF OF. When on the face of the record it appeared that claimant was an American national, motion to dismiss *overruled*.

*(Text of decision omitted.)*

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ILLINOIS CENTRAL RAILROAD COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.*(March 31, 1926. Pages 15-21.)*

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JURISDICTION, *compromis* BASIS FOR. The *compromis* is the tribunal's charter and its terms determine the scope of the tribunal's jurisdiction.

CONTRACT CLAIMS. Contract claims *held* within the tribunal's jurisdiction by virtue of terms of *compromis*.

DENIAL OF JUSTICE.—EXHAUSTION OF LOCAL REMEDIES. Article V of *compromis* construed to require some resort to local remedies, though not necessarily an exhaustion of such remedies, in order that tribunal may have jurisdiction.

*Cross-references:* Am. J. Int. Law, Vol. 20, 1926, p. 794; Annual Digest, 1925-1926, pp. 4, 215, 235, 407.

*Comments:* Edwin M. Borchard, "Decisions of the Claims Commissions, United States and Mexico," Am. J. Int. Law, Vol. 20, 1926, p. 536.

This case is before this Commission on the Mexican Agent's motion to dismiss.

1. The claim is put forward by the United States of America on behalf of the Illinois Central Railroad Company (an American corporation) to recover the sum of \$1,807,531.36, with interest thereon from April 1, 1925, alleged to be the balance due on 91 locomotive engines sold and delivered by the claimant to the Government Railway Administration of the National Railways of Mexico. The grounds of the motion to dismiss are (first) that the claim is based on an alleged nonperformance of contractual obligations and therefore not within the jurisdiction of this Commission and (second) that, the obligation itself not being denied by Mexico, no controversy exists for the decision of this Commission.

*Jurisdiction over contract claims*

2. The challenge of this Commission's jurisdiction to hear and decide any case grounded on a breach of contract obligations requires an examination and construction of the terms of the Treaty to ascertain the scope of this Commission's jurisdiction, which must be determined by it.

3. This Commission is constituted in pursuance of the provisions of a Convention entered into between the United States of America and the United Mexican States, signed at Washington September 8, 1923, which became effective on March 1, 1924. Its terms clothe this Commission with the jurisdiction and power and made it its duty to hear, examine, and decide:

(a) All claims against one Government by nationals of the other for losses or damages suffered by such nationals or by their properties; and

(b) All claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice; but

(c) There is excepted from the foregoing categories claims "arising from acts incident to the recent revolutions".

The examination and application of clause (a) will suffice for the disposition of this case.

4. Before entering upon this examination the Commission feels bound to state that any representation of international jurisprudence, and especially of the jurisprudence of the Mexican Claims Commission of 1868, intended to proclaim in a general way that such jurisprudence was either in favor of jurisdiction over contract claims or disclaimed jurisdiction over contract claims, is contrary to the wording of the awards themselves. Whatever statements from authors in this respect it may be possible to quote, a perusal of the very awards clearly shows that not only either allowance or disallowance of contract claims is not their general and uniform feature but that it is even impracticable to deduce from them one consistent system. A rule that contract claims are cognizable only in case denial of justice or any other form of governmental responsibility is involved is not in them; nor can a general rule be discovered according to which mere nonperformance of contractual obligations by a government in its civil capacity withholds jurisdiction, whereas it grants jurisdiction when the nonperformance is accompanied by some feature of the public capacity of the Government as an authority. It seems especially hazardous to construe awards like the umpire's in the Pond case, the Treadwell case, the De Witt case, the Kearney case, etc. (Moore, 3466-3469), as if they decided in favor of jurisdiction over

contract claims but dismissed the claims on their merits. As, moreover, no claims convention or arbitration treaty known to the Commission used exactly the wording of the present Convention of September 8, 1923 (though the treaty of August 7, 1892, between the United States and Chile comes near to it; (Moore, 4691), the Commission has to seek its own way.

5. The Treaty is this Commission's charter. It must look primarily to the language of that Treaty, and particularly to Articles I and VIII and the preamble, to discover the scope and limits of its jurisdiction. The words "all claims for losses or damages suffered by persons or by their properties" (except one group of claims only which has been turned over to a Special Claims Commission) indicate in themselves a broad and liberal spirit underlying and permeating this Treaty; and it is well known to have been the purpose of the negotiators to have by this Convention removed a source of irritation between the two Nations and a constant menace to their friendly intercourse. The phrase "for losses or damages suffered by persons or by their properties" is broader than any provision in similar previous treaties with Mexico—apart from Article VI of the treaty of January 30, 1843, which says "all claims", and from the unratified treaty of November 20, 1843, which said the same (Moore, 1245, 1246; Malloy, 1120). This phrase in no wise limits the preceding phrase "all claims" save that it in effect restricts the Commission's jurisdiction to claims susceptible of measurement by pecuniary standards and excludes those of either a speculative or a punitive character. For all practical purposes the initial words "All claims" of Article I are as broad as the like phrase embodied in the unratified treaty of 1843. This is emphasized by the fact that the other clause in Article I contained in the foregoing paragraph 3 (*b*), providing for a special contingency repeats this same phrase, "all claims", and merely adds thereto "for losses, or damages \* \* \* resulting in injustice".

6. Must these opening words of Article I be construed in the light of the closing words of paragraph (1) of the same article, reading that the claims should be decided "in accordance with the principles of international law", etc., to the effect that "all claims" must mean all claims for which either government is responsible according to international law? The conclusion suggested exceeds what is required by logic and in the Commission's view goes too far. If it be true that all the claims of Article I should be decided "in accordance with the principles of international law", etc., the only permissible inference is that they must be claims of an international character, not that they must be claims entailing international responsibility of governments. International claims, needing decisions in "accordance with the principles of international law", may belong to any of four types:

(*a*) Claims as between a national of one country and a national of another country. These claims are international, even in cases where international law declares one of the municipal laws involved to be exclusively applicable: but they do not fall within Article I.

(*b*) Claims as between two national governments in their own right. These claims also are international and also are outside the scope of Article I.

(*c*) Claims as between a citizen of one country and the government of another country acting in its public capacity. These claims are beyond doubt included in Article I.

(*d*) Claims as between a citizen of one country and the government of another country acting in its civil capacity. These claims too are international in their character, and they too must be decided "in accordance with the

principles of international law", even in cases where international law should merely declare the municipal law of one of the countries involved to be applicable.

It seems impossible to maintain that legal pretensions belonging to this fourth category are not "claims". It seems equally impossible to maintain that they are not "international claims". If it were advanced that a state turning over claims of this category to an international tribunal waives part of its sovereignty, this would be true; but so does every treaty containing provisions which depart from pure municipal law, as the majority of treaties do. It is entirely clear that on several occasions both the United States and Mexico expressly gave claims commissions jurisdiction over contract claims, showing thereby that in principle conferring on an international tribunal jurisdiction over contract claims is not contrary to their legal conceptions. The so-called Porter Convention of the Second Hague Peace Conference of 1907, to which both the United States and Mexico are parties, though having for its object the prevention of the use of force in collecting debts growing out of contract obligations until other methods, including arbitration, had been exhausted, nevertheless is a striking illustration of the recognition of contract claims as proper subjects for submission to an international tribunal. The Commission concludes that the final words of Article I, which provide that it shall decide cases submitted to it "in accordance with the principles of international law, justice and equity", prescribe the rules and principles which shall govern in the decision of claims falling within its jurisdiction but in no wise limit the preceding clauses, which do fix this Commission's jurisdiction.

7. The argument is advanced that as Article V waives the requirement that as a prerequisite to diplomatic intervention remedies before local courts must be exhausted and as under its laws the United States can be sued only on claims arising out of contract, therefore Article V must refer to contract claims, as these are the only claims which could be enforced by local American tribunals. This argument lacks force inasmuch as Article V applies as well to Mexico as to the United States and under Mexican law not only claims against the Mexican Government based on contract but on other property rights or on torts may be enforced through the courts.

8. This much for the text of the Treaty of 1923. There remains the question whether there has been a misunderstanding on the part of the Mexican negotiators of this Treaty with respect to the inclusion of contract claims within its terms. In the absence of all evidence in this respect, an assumption to this effect appears to the Commission unlikely. If the Mexican negotiators of May-August, 1923, had been in doubt as to the views of the American Government relative to contract claims and had been desirous to ascertain it, nothing would have been more obvious than to consult Charles Cheney Hyde's book of 1922, "International Law Chiefly as Interpreted and Applied by the United States"; the more so as since February, 1923, the author was solicitor in the State Department at Washington. Volume I, page 559, of this work sums up the attitude of the United States in the following words:

"That it is disposed both to seek and permit the adjustment by arbitration of contractual claims of American citizens against foreign governments, as well as those of citizens of foreign States against itself. Arbitrators have, moreover, not hesitated to interpret broadly the scope of jurisdiction conferred upon them."

It is irrelevant and immaterial to consider the correctness of this interpretation of Mr. Hyde; the quotation is conclusive to show that if the Mexican

negotiators had felt in want of acquainting themselves with current American views as to international jurisdiction over contract claims, they can not possibly have been victims of the impression that the United States was averse to including contract claims.

9. From the foregoing considerations no other deduction is possible than that claims arising from breach of contract obligations are included within the terms of Article I of the Treaty of 1923. This is in conformity with what is known about the broad and liberal intention of the negotiators of the Treaty as recalled in paragraph 5 above. The attention of the Commission has been directed to some of the secret records of the negotiations between the representatives of the two Nations preliminary to the conclusion of this Treaty. These records tend to confirm the soundness of the conclusion reached by the Commission independent of them.

10. That there may be no possible confusion of thought, the Commission expressly states that in what is above written it has not considered the problem whether in the absence of a claims convention a foreign office would be entitled to resort to diplomatic intervention on account of the nonperformance of contractual obligations owing to one of its nationals by the government of another country. Some high executive authorities have denied this right; others have held that it could not be doubted. It is not for this Commission to pronounce upon this problem; the Commission bases its opinion with respect to its jurisdiction on the terms of an express claims convention.

#### *Exhaustion of legal remedies in local courts*

11. The construction and application of Article V of the Treaty of 1923 has been called in question in connection with the problem of the Commission's jurisdiction over contract claims. The Commission has no hesitation in rejecting the contention that while under Article V the legal remedies need not be "exhausted" some resort must nevertheless be had to the local tribunals before the claim can be so impressed with an international character as to confer jurisdiction on this Commission.

#### *Influence of nondenial of obligation on jurisdiction*

12. Nonperformance of a contractual obligation may consist either in denial of the obligation itself and nonperformance as a consequence of such denial, or in acknowledgement of the obligation itself and nonperformance notwithstanding such acknowledgment. In both cases such nonperformance may be the basis of a claim cognizable by this Commission. The fact that the debtor is a sovereign nation does not change the rule. Neither is the rule changed by the fact that the default may arise not from choice but from necessity.

#### *Decision*

13. From the foregoing it follows that the motion to dismiss must be and is hereby denied. The running of time for filing the Answer has been suspended from November 19, 1925, to March 31, 1926.

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NORTH AMERICAN DREDGING COMPANY OF TEXAS (U.S.A.)  
v. UNITED MEXICAN STATES.

(March 31, 1926, concurring opinion by American Commissioner, undated.  
Pages 21-34).

JURISDICTION.—CALVO CLAUSE. A Calvo clause *held* to bar claimant from presenting to his Government any claim connected with the contract in which it appeared and hence to place any such claim beyond the jurisdiction of the tribunal. The clause will not preclude his Government from espousing, or the tribunal from considering, other claims based on the violation of international law. Article V of the *compromis* *held* not to prevent the foregoing result.

CONTRACT CLAIMS. Motion to dismiss, for lack of jurisdiction, claim based on non-performance of a contract with Mexican Government *rejected*.

*Cross-references:* Am. J. Int. Law, Vol. 20, 1926, p. 800; Annual Digest, 1925-1926, pp. 4, 179, 191, 218, 244, 261, 292; British Yearbook, Vol. 8, 1927, p. 181.

*Comments:* Edwin M. Borchard, "Decisions of the Claims Commissions, United States and Mexico," Am. J. Int. Law, Vol. 20, 1926, p. 536 at 538; Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions," Jour. Compar. Legis. and Int. Law, 3d ser., Vol. 19, 1937, p. 98 at 102; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 234; Lionel Summers, "*La clause Calvo: tendances nouvelles*," Rev. de Droit Int., Vol. 12, 1933, p. 229 at 232.

This case is before this Commission on a motion of the Mexican Agent to dismiss. It is put forward by the United States of America on behalf of North American Dredging Company of Texas, an American corporation, for the recovery of the sum of \$233,523.30 with interest thereon, the amount of losses and damages alleged to have been suffered by claimant for breaches of a contract for dredging at the port of Salina Cruz, which contract was entered into between the claimant and the Government of Mexico, November 23, 1912. The contract was signed at Mexico City. The Government of Mexico was a party to it. It had for its subject matter services to be rendered by the claimant in Mexico. Payment therefor was to be made in Mexico. Article 18, incorporated by Mexico as an indispensable provision, not separable from the other provisions of the contract, was subscribed to by the claimant for the purpose of securing the award of the contract. Its translation by the Mexican Agent reads as follows:

"The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans,

nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."

1. The jurisdiction of the Commission is challenged in this case on the grounds (first) that claims based on an alleged nonperformance of contract obligations are outside the jurisdiction of this Commission and (second) that a contract containing the so-called Calvo clause deprives the party subscribing said clause of the right to submit any claims connected with his contract to an international commission.

2. The Commission, in its decision this day rendered on the Mexican motion to dismiss the Illinois Central Railroad Company case, Docket No. 432, has stated the reasons why it deems contractual claims to fall within its jurisdiction. It is superfluous to repeat them. The first ground of the motion is therefore rejected.

### *The Calvo clause*

3. The Commission is fully sensible of the importance of any judicial decision either sustaining in whole or in part, or rejecting in whole or in part, or construing the so-called "Calvo clause" in contracts between nations and aliens. It appreciates the legitimate desire on the part of nations to deal with persons and property within their respective jurisdictions according to their own laws and to apply remedies provided by their own authorities and tribunals, which laws and remedies in no wise restrict or limit their international obligations, or restrict or limit or in any wise impinge upon the correlative rights of other nations protected under rules of international law. The problem presented in this case is whether such legitimate desire may be accomplished through appropriate and carefully phrased contracts; what form such a contract may take; what is its scope and its limitations; and does clause 18 of the contract involved in this case fall within the field where the parties are free to contract without violating any rule of international law?

4. The Commission does not feel impressed by arguments either in favor of or in opposition to the Calvo clause, in so far as these arguments go to extremes. The Calvo clause is neither upheld by all outstanding international authorities and by the soundest among international awards nor is it universally rejected. The Calvo clause in a specific contract is neither a clause which must be sustained to its full length because of its contractual nature nor can it be discretionarily separated from the rest of the contract as if it were just an accidental postscript. The problem is not solved by saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no alternative except that of exclusion of foreigners from business. The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and adequate balance between the sovereign right of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other. No international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible within the general rules and principles of international law. By merely ignoring world-wide abuses either of the right of national protection or of the right of national jurisdiction no solution compatible with the requirements of modern international law can be reached.



5. At the very outset the Commission rejects as unsound a presentation of the problem according to which if article 18 of the present contract were upheld Mexico or any other nation might lawfully bind all foreigners by contract to relinquish all rights of protection by their governments. It is quite possible to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so.

6. The Commission also denies that the rules of international public law apply only to nations and that individuals can not under any circumstances have a personal standing under it. As illustrating the antiquated character of this thesis it may suffice to point out that in article 4 of the unratified International Prize Court Convention adopted at The Hague in 1907 and signed by both the United States and Mexico and by 29 other nations this conception, so far as ever held, was repudiated.

7. It is well known how largely the increase of civilization, intercourse, and interdependence as between nations has influenced and moderated the exaggerated conception of national sovereignty. As civilization has progressed individualism has increased; and so has the right of the individual citizen to decide upon the ties between himself and his native country. There was a time when governments and not individuals decided if a man was allowed to change his nationality or his residence, and when even if he had changed either of them his government sought to lay burdens on him for having done so. To acknowledge that under the existing laws of progressive, enlightened civilization a person may voluntarily expatriate himself but that short of expatriation he may not by contract, in what he conceives to be his own interest, to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of international law and does not tend to promote good will among nations.

#### *Lawfulness of the Calvo clause*

8. The contested provision, in this case, is part of a contract and must be upheld unless it be repugnant to a recognized rule of international law. What must be established is not that the Calvo clause is universally accepted or universally recognized, but that there exists a generally accepted rule of international law condemning the Calvo clause and denying to an individual the right to relinquish to any extent, large or small, and under any circumstances or conditions, the protection of the government to which he owes allegiance. Only in case a provision of this or any similar tendency were established could a parallel be drawn between the illegality of the Calvo clause in the present contract and the illegality of a similar clause in the Arkansas contract declared void in 1922 by the Supreme Court of the United States (257 U.S. 529) because of its repugnance to American statute provisions. It is as little doubtful nowadays as it was in the day of the Geneva Arbitration that international law is paramount to decrees of nations and to municipal law; but the task before this Commission precisely is to ascertain whether international law really contains a rule prohibiting contract provisions attempting to accomplish the purpose of the Calvo clause.

9. The commission does not hesitate to declare that there exists no international rule prohibiting the sovereign right of a nation to protect its citizens

abroad from being subject to any limitation whatsoever under any circumstances. The right of protection has been limited by treaties between nations in provisions related to the Calvo clause. While it is true that Latin-American countries—which are important members of the family of nations and which have played for many years an important and honorable part in the development of international law—are parties to most of these treaties, still such countries as France, Germany, Great Britain, Sweden, Norway, and Belgium, and in one case at least even the United States of America (Treaty between the United States and Peru dated September 6, 1870, Volume 2, Malloy's United States Treaties, at page 1426; article 37) have been parties to treaties containing such provisions.

10. What Mexico has asked of the North American Dredging Company of Texas as a condition for awarding it the contract which it sought is, "If all of the means of enforcing your rights under this contract afforded by Mexican law, even against the Mexican Government itself, are wide open to you, as they are wide open to our own citizens, will you promise not to ignore them and not to call directly upon your own Government to intervene in your behalf in connexion with any controversy, small or large, but seek redress under the laws of Mexico through the authorities and tribunals furnished by Mexico for your protection?" and the claimant, by subscribing to this contract and seeking the benefits which were to accrue to him thereunder, has answered, "I promise".

11. Under the rules of international law may an alien lawfully make such a promise? The Commission holds that he may, but at the same time holds of that he can not deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen can not by contract tie in this respect the hands of his Government. But while any attempt to so bind his Government is void, the Commission has not found any generally recognized rule of positive international law which would give to his Government the right to intervene to strike down a lawful contract, in the terms set forth in the preceding paragraph 10, entered into by its citizen. The obvious purpose of such a contract is to prevent abuses of the right to protection, not to destroy the right itself—abuses which are intolerable to any self-respecting nation and are prolific breeders of international friction. The purpose of such a contract is to draw a reasonable and practical line between Mexico's sovereign right of jurisdiction within its own territory, on the one hand, and the sovereign right of protection of the Government of an alien whose person or property is within such territory, on the other hand. Unless such line is drawn and if these two coexisting rights are permitted constantly to overlap, continual friction is inevitable.

12. It being impossible to prove the illegality of the said provision, under the limitations indicated, by adducing generally recognized rules of positive international law, it apparently can only be contested by invoking its incongruity to the law of nature (natural rights) and its inconsistency with inalienable, indestructible, unprescriptible, uncurtailable rights of nations. The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the

ocean; but they have failed as a durable foundation of either municipal or international law and can not be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand. Inalienable rights have been the cornerstones of policies like those of the Holy Alliance and of Lord Palmerston; instead of bringing to the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace.

*Interpretation of the Calvo clause in the present contract*

13. What is the true meaning of article 18 of the present contract? It is essential to state that the closing words of the article should be combined so as to read: "being deprived, in consequence, of any rights as aliens *in any matter connected with this contract*, and without the intervention of foreign diplomatic agents being in any case permissible *in any matter connected with this contract*". Both the commas and the phrasing show that the words "in any matter connected with this contract" are a limitation on either of the two statements contained in the closing words of the article.

14. Reading this article as a whole, it is evident that its purpose was to bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws. The closing words "in any matter connected with this contract" must be read in connection with the preceding phrase "in everything connected with the execution of such work and the fulfillment of this contract" and also in connection with the phrase "regarding the interests or business connected with this contract". In other words, in executing the contract, in fulfilling the contract, or in putting forth any claim "regarding the interests or business connected with this contract", the claimant should be governed by those laws and remedies which Mexico had provided for the protection of its own citizens. But this provision did not, and could not, deprive the claimant of his American citizenship and all that that implies. It did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act.

15. What, therefore, are the rights which claimant waived and those which he did not waive in subscribing to article 18 of the contract? (a) He waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfilling a contract in an inferior country subject to a system of capitulations; and as if the only real remedies available to him in the fulfillment, construction, and enforcement of this contract were international remedies. All these he waived and had a right to waive. (b) He did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfillment, execution, or enforcement of this contract as such. (c) He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this

contract or out of other situations. (d) He did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law. But he did frankly and unreservedly agree that in consideration of the Government of Mexico awarding him this contract, he did not need and would not invoke or accept the assistance of his Government with respect to the fulfilment and interpretation of his contract and the execution of his work thereunder. The conception that a citizen in doing so impinges upon a sovereign, inalienable, unlimited right of his government belongs to those ages and countries which prohibited the giving up of his citizenship by a citizen or allowed him to relinquish it only with the special permission of his government.

16. It is quite true that this construction of article 18 of the contract does not effect complete equality between the foreigner subscribing the contract on the one hand and Mexicans on the other hand. Apart from the fact that equality of legal status between citizens and foreigners is by no means a requisite of international law—in some respects the citizen has greater rights and larger duties, in other respects the foreigner has—article 18 only purposes equality between the foreigner and Mexicans with respect to the execution, fulfilment, and interpretation of this contract and such limited equality is properly obtained.

17. The Commission ventures to suggest that it would strengthen and stimulate friendly relations between nations if in the future such important clauses in contracts as article 18 in the contract in question were couched in such clear, simple, and straightforward language, frankly expressing its purpose with all necessary limitations and restraints as would preclude the possibility of misinterpretation and render it insusceptible of such extreme construction as sought to be put upon article 18 in this instance, which if adopted would result in striking it down as illegal.

#### *The Calvo clause and the claimant*

18. If it were necessary to demonstrate how legitimate are the fears of certain nations with respect to abuses of the right of protection and how seriously the sovereignty of those nations within their own boundaries would be impaired if some extreme conceptions of this right were recognized and enforced, the present case would furnish an illuminating example. The claimant, after having solemnly promised in writing that it would not ignore the local laws, remedies, and authorities, behaved from the very beginning as if article 18 of its contract had no existence in fact. It used the article to procure the contract, but this was the extent of its use. It has never sought any redress by application to the local authorities and remedies which article 18 liberally granted it and which, according to Mexican law, are available to it, even against the Government, without restrictions, both in matter of civil and of public law. It has gone so far as to declare itself freed from its contract obligations by its *ipse dixit* instead of having resort to the local tribunals to construe its contract and its rights thereunder. And it has gone so far as to declare that it was not bound by article 7 of the contract and to forcibly remove a dredge to which, under that article, the Government of Mexico considered itself entitled as security for the proper fulfilment of its contract with claimant. While its behavior during the spring and summer of 1914, the latter part of the Huerta administration, may be in part explained by the unhappy conditions of friction then existing between the

two countries in connection with the military occupation of Veracruz by the United States, this explanation can not be extended from the year 1917 to the date of the filing of its claim before this Commission, during all of which time it has ignored the open doors of Mexican tribunals. The record before this Commission strongly suggests that the claimant used article 18 to procure the contract with no intention of ever observing its provisions.

*The Calvo clause and the Claims Convention*

19. Claims accruing prior to the signing of the Treaty must, in order to fall within the jurisdiction of this Commission under Article I of the Treaty, either have been "presented" before September 8, 1923, by a citizen of one of the Nations parties to the agreement "to [his] Government for its interposition *with the other*", or, after September 8, 1923, "such claims"—*i.e.*, claims presented for interposition—may be filed by either Government *with this Commission*. Two things are therefore essential, (1) the presentation by the citizen of a claim to his Government and (2) the espousal of such claim by that Government. But it is urged that when a Government espouses and presents a claim here, the private interest in the claim is merged in the Nation in the sense that the private interest is entirely eliminated and the claim is a national claim, and that therefore this Commission can not look behind the act of the Government espousing it to discover the private interest therein or to ascertain whether or not the private claimant has presented or may rightfully present the claim to his Government for interposition. This view is rejected by the Commission for the reasons set forth in the second paragraph of the opinion in the Parker claim (Docket No. 127), this day decided by this Commission, and need not be repeated here.

20. Under article 18 of the contract declared upon the present claimant is precluded from presenting to its Government any claim relative to the interpretation or fulfillment of this contract. If it had a claim for denial of justice, for delay of justice or gross injustice, or for any other violation of international law committed by Mexico to its damage, it might have presented such a claim to its Government, which in turn could have espoused it and presented it here. Although the claim as presented falls within the first clause of Article I of the Treaty, describing claims coming within this Commission's jurisdiction, it is not a claim that may be rightfully presented by the claimant to its Government for espousal and hence is not cognizable here, pursuant to the latter part of paragraph 1 of the same Article I.

21. It is urged that the claim may be presented by claimant to its Government for espousal in view of the provision of Article V of the Treaty, to the effect "that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim". This provision is limited to the application of a general principle of international law to claims that may be presented to the Commission falling within the terms of Article I of the Treaty, and if under the terms of Article I the private claimant can not rightfully present its claim to its Government and the claim therefore can not become cognizable here, Article V does not apply to it, nor can it render the claim cognizable, nor does it entitle either Government to set aside an express valid contract between one of its citizens and the other Government.

*Extent of the present interpretation of the Calvo clause*

22. Manifestly it is impossible for this Commission to announce an all-embracing formula to determine the validity or invalidity of all clauses partaking of the nature of the Calvo clause, which may be found in contracts, decrees, statutes, or constitutions, and under widely varying conditions. Whenever such a provision is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizen whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void. Nor does this decision in any way apply to claims not based on express contract provisions in writing and signed by the claimant or by one through whom the claimant has deraigned title to the particular claim. Nor will any provision in any constitution, statute, law, or decree, whatever its form, to which the claimant has not in some form expressly subscribed in writing, howsoever it may operate or affect his claim, preclude him from presenting his claim to his Government or the Government from espousing it and presenting it to this Commission for decision under the terms of the Treaty.

23. Even so, each case involving application of a valid clause partaking of the nature of the Calvo clause will be considered and decided on its merits. Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant. But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfilment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities and then wilfully ignores them by applying in such matters to his Government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim.

*Summary of the considerations on the Calvo clause*

24. (a) The Treaty between the two Governments under which this Commission is constituted requires that a claim accruing before September 8, 1923, to fall within its jurisdiction must be that of a citizen of one Government against the other Government and must not only be espoused by the first Government and put forward by it before this Commission but, as a condition precedent to such espousal, must have been presented to it for its interposition by the private claimant.

(b) The question then arises, Has the private claimant in this case put itself in a position where it has the right to present its claim to the Government of the United States for its interposition? The answer to this question depends upon the construction to be given to article 18 of the contract on which the claim rests.

(c) In article 18 of the contract the claimant expressly agreed that in all matters connected with the execution of the work covered by the contract and the fulfilment of its contract obligations and the enforcement of its contract rights it would be bound and governed by the laws of Mexico administered by the authorities and courts of Mexico and would not invoke or accept the assistance of his Government. Further than this it did not bind itself. Under the rules of international law the claimant (as well as the

Government of Mexico) was without power to agree, and did not in fact agree, that the claimant would not request the Government of the United States, of which it was a citizen, to intervene in its behalf in the event of internationally illegal acts done to the claimant by the Mexican authorities.

(d) The contract declared upon, which was sought by claimant, would not have been awarded it without incorporating the substance of article 18 therein. The claimant does not pretend that it has made any attempt to comply with the terms of that article, which as here construed is binding on it. Therefore the claimant has not put itself in a position where it may rightfully present this claim to the Government of the United States for its interposition.

(e) While it is true that under Article V of the Treaty the two Governments have agreed "that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim", this provision is limited to claims falling under Article I and therefore rightfully presented by the claimant.

(f) If it were necessary to so construe article 18 of the contract as to bind the claimant not to apply to its Government to intervene diplomatically or otherwise in the event of a denial of justice to the claimant growing out of the contract declared upon or out of any other situation, then this Commission would have no hesitation in holding such a clause void *ab initio* and not binding on the claimant.

(g) The foregoing pertains to the power of the claimant to bind itself by contract. It is clear that the claimant could not under any circumstances bind its Government with respect to remedies for violations of international law.

(h) As the claimant voluntarily entered into a legal contract binding itself not to call as to this contract upon its Government to intervene in its behalf, and as all of its claim relates to this contract, and as therefore it can not present its claim to its Government for interposition or espousal before this Commission, the second ground of the notion to dismiss is sustained.

#### *Decision*

25. The Commission decides that the case as presented is not within its jurisdiction and the motion of the Mexican Agent to dismiss it is sustained and the case is hereby dismissed without prejudice to the claimant to pursue his remedies elsewhere or to seek remedies before this Commission for claims arising after the signing of the Treaty of September 8, 1923.

#### *Concurring opinion*

My fellow Commissioners construe article 18 of the contract before the Commission in this case to mean that with respect to all matters involving the execution, fulfillment, and interpretation of that contract the claimant bound itself to exhaust all remedies afforded under Mexican law by resorting to Mexican tribunals or other duly constituted Mexican authorities before applying to its own Government for diplomatic or other protection, and that this article imposes no other limitation upon any right of claimant.

They further hold that said article 18 was not intended to and does not prevent claimant from requesting its Government to intervene in its behalf

diplomatically or otherwise to secure redress for any wrong which it may heretofore have suffered or may hereafter suffer at the hands of the Government of Mexico resulting from a denial of justice, or delay of justice, or any other violation by Mexico of any right which claimant is entitled to enjoy under the rules and principles of international law, whether such violation grows out of this contract or otherwise. I have no hesitation in concurring in their decision that any provision attempting to bind the claimant in the manner mentioned in this paragraph would have been void *ab initio* as repugnant to the rules and principles of international law.

Article 18, as thus construed, in effect does nothing more than bind the claimant by contract to observe the general principle of international law which the parties to this Treaty have expressly recognized in Article V thereof. Mexico's motive for expressly incorporating this rule as an indispensable provision of the contract, which could be ignored by the claimant only by subjecting itself to the penalties flowing from its breach of the contract seems both obvious and reasonable and in harmony with the spirit and not repugnant to the letter of the rules and principles of international law. The provision as thus construed should be treated both by claimant and its Government with the scrupulous and unfaltering respect due any legal contract.

Accepting as correct my fellow Commissioners' construction of article 18 of the contract, I concur in the disposition made of this case.

Edwin B. PARKER,  
*Commissioner.*

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

(*March 31, 1926. Pages 35-42.*)

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NATIONALITY, PRESUMPTION OF—NATIONALITY, EFFECT OF ESPOUSAL OF CLAIM BY GOVERNMENT. Fact that a Government espouses a claim does not create a presumption that claimant is of nationality of espousing Government.

NATIONALITY, PROOF OF. Nationality is a fact, to be proven as any other fact, to the satisfaction of the tribunal. Evidence *held* sufficient to establish nationality.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—RULES OF EVIDENCE.—ADMISSIBILITY OF EVIDENCE. The tribunal is not bound by municipal rules of evidence and the greatest liberality will obtain in the admission of evidence.

EVIDENCE, DUTY OF BOTH PARTIES TO SUBMIT. It is the duty of the two Agents to co-operate in submitting to the tribunal all relevant facts. Each Agent should present all the facts that can be reasonably ascertained by him without regard to what their effect may be.



**PRIMA FACIE CASE.** After claimant has established a *prima facie* case and respondent Government has offered no evidence in rebuttal, latter may not insist that evidence be produced to establish allegations beyond a reasonable doubt.

**BURDEN OF PROOF.—EFFECT OF FAILURE TO PRODUCE MATERIAL EVIDENCE.** No international rules exist relative to a division of the burden of proof between the parties. Nevertheless, an unexplained failure to produce material evidence peculiarly within the knowledge of one of the parties may be taken into account by the tribunal in reaching a decision.

**AFFIDAVITS AS EVIDENCE.** In a claim for goods sold to the Mexican Government, affidavit of claimant *held* to establish fact of sale and delivery.

**QUASI-CONTRACT OR UNJUST ENRICHMENT AS A BASIS OF CLAIM.—LACK OF AUTHORITY OF OFFICIAL AS A DEFENCE.** Where respondent Government has received and retained for its benefit goods sold to various officials by claimant, it is responsible therefor without regard to question of authority of such officials.

**OWNERSHIP OF CLAIM.** Where record raises a doubt as to ownership of claim by claimant, final decision postponed in order that effort may be made to obtain further evidence on this issue.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 174; Annual Digest, 1925-1926, pp. 240, 243, 414; British Yearbook, Vol. 8, 1927, p. 183.

*Comments:* Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions," Jour. Compar. Legis. and Int. Law, 3d. ser., Vol. 19, 1937, p. 98 at 101; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 238.

1. It is alleged in the memorial that William A. Parker, who was born and has ever remained an American national, was, on and prior to December 8, 1911, until March 27, 1918, engaged in the City of Mexico as a dealer in typewriters, typewriting and general office supplies and repair of typewriters; that on the last named date, he caused a corporation to be formed under the Mexican law, designating it *Compañía Parker S. A.*; that at sundry times between December 8, 1911, and March 27, 1918, claimant sold and delivered, or rendered services in the nature of repairs to typewriters to various departments of the Government of Mexico, at prices which were agreed upon at the time of delivery or at the time the services were rendered; and that, after giving to the Government of Mexico all proper credits, there is due claimant \$39,090.05 which remains unpaid. The claim of William A. Parker against the United Mexican States has, on his behalf, been espoused by the United States of America and submitted to this Commission for decision. A Mexican motion to dismiss the claim was overruled by this Commission on March 2, 1926.

#### *Nationality of the claim*

2. The nationality of the claim presented has been challenged on several grounds. In response to this challenge it is contended that when a Govern-

ment espouses a claim of one of its nationals against another Government the private nature of the claim and the private interest of the claimant therein ceases to exist and the claim becomes a public claim of the espousing Government. From this premise the proposition is deduced and pressed that the espousal of a claim by either Government before this Commission and the allegation in the memorial of facts as distinguished from conclusions from which it would follow that the claim possessed the nationality of said Government is *prima facie* evidence that it is impressed with such nationality, subject to rebuttal by affirmative evidence to the contrary which may be offered by the opposing Agent. This contention is rejected by the Commission. It is clear that the Treaty of 1923 does not deal with any government-owned claims but does deal throughout with private claims of citizens which have been espoused by their respective Governments. Provision is even made in certain cases for a restitution of a "property or right \* \* \* to the claimant" (Article IX of the Treaty). However, the Commission does hold that the control of the Government, which has espoused and is asserting the claim before this Commission, is complete. In the exercise of its discretion it may espouse a claim or decline to do so. It may press a claim before this Commission or not as it sees fit. Ordinarily a nation will not espouse a claim on behalf of its national against another nation unless requested so to do by such national. When, on such request, a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In exercising such control, it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation, and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. But the private nature of the claim inheres in it and is not lost or destroyed so as to make it the property of the nation, although it becomes a national claim in the sense that it is subject to the absolute control of the nation espousing it.

3. The nationality of the claim is challenged on account of insufficiency of the proof offered in support of the American nationality of the claimant (a) because it is only supported by the affidavits of three witnesses, one of whom is the claimant, the second a brother of claimant and the third a friend of long standing who could not have positive information with respect to the fact of his birth; (b) because no birth certificate is presented, nor is its absence explained; and (c) because two of the affidavits were taken before an American vice consul in Mexico who is not authorized to administer oaths under the laws of Mexico where the affidavits were taken. Article III of the Treaty of 1923 provides that "either Government may offer to the Commission any documents, affidavits, interrogatories or other evidence desired in favor of or against any claim \* \* \* in accordance with such rules of procedure as the Commission shall adopt". Section 1 of Rule VIII adopted by the Commission in 1924 provides that "The Commission will receive and consider all written statements, documents, affidavits, interrogatories, or other evidence which may be presented to it by the respective agents \* \* \* in support of or against any claim, and will give such weight thereto as in its judgment such evidence is entitled in the circumstances of the particular case". Under these provisions of the Treaty and the rules of this Commission, the affidavits of the claimant himself, his brother, and his friend, are clearly admissible in evidence in this case. Their evidential value—the weight to be given them—is for this Commission to determine and in so determining their pecuniary interest and family ties will be taken

into account. But, the contention made that the Government is the sole claimant before this Commission, hence the personal, business, or other relations between the private owner of the claim and third persons whose testimony is here offered can be taken into account only by the claimant Government in determining whether it will or will not espouse the claim, but not by this Commission, illustrates the extreme lengths to which the theory of the national character of the claim may be carried and is rejected. An unsworn statement may be accepted in evidence, but the weight to be given it will be determined by the circumstances of the particular case. Under the statutes of the United States, an American vice consul in a foreign land to which he is accredited is authorized to take the affidavit of an American citizen, and the mere fact that no such authority is conferred upon him by the laws of Mexico does not affect either the admissibility or the weight of the affidavits filed herein. In those jurisdictions where the local laws require registration of births a duly certified copy of such registration is evidence of birth in establishing either American or Mexican nationality by birth; but such evidence is not exclusive, and while ordinarily it is desirable that certificates of registrations of birth, which are usually contemporaneous with the fact of birth, should be produced when practicable in support of a claim of nationality by birth, or the absence of such certificate explained, it by no means follows that proof of birth can not be made in any other way. While the nationality of an individual must be determined by rules prescribed by municipal law, still the facts to which such rules of municipal law must be applied in order to determine the fact of nationality must be proven as any other facts are proven. On the record as presented, the claimant himself, his brother, and a third witness all testified to facts from which no other conclusion can be drawn than that claimant was born, and has always remained, an American national. The Mexican Government offers no evidence in rebuttal, but relies on the insufficiency of this proof. On the record as presented, the Commission decides that the claimant was by birth, and has since remained, an American national.

4. The nationality of the claim was further challenged on behalf of Mexico on the ground that claimant on March 27, 1918, had conveyed all of his property, rights, and interests, including the claim here put forward, to the Compañía Parker S. A., a Mexican corporation and impressed with Mexican nationality; and therefore, in the absence of allegations and proof that this claimant had a substantial and *bona fide* interest in the said corporation and in the absence of presenting to this Commission an allotment to the claimant by said corporation of his proportion of the loss or damage suffered by him through the corporation, the claim on his behalf does not fall within the provisions of the Treaty. On the hearing of this case the Commission requested both Agencies to present further evidence fully disclosing the facts with respect to this contention, in response to which request each Agent has presented a telegram. That filed by the Mexican Agent states in effect that the claimant Parker had conveyed all of his properties including this claim to the corporation formed by him and bearing his name; while that filed by the American Agent is to the effect that this claim was never conveyed to the corporation. This unsatisfactory state of the record will be hereinafter referred to.

*Rules of evidence*

5. For the future guidance of the respective Agents, the Commission announces that, however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as "universal principles of law", or "the general theory of law", and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted.

6. As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure. On the contrary, it holds that it is the duty of the respective Agencies to cooperate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented. The Commission denies the "right" of the respondent merely to wait in silence in cases where it is reasonable that it should speak. To illustrate, in this case the Mexican Agency could much more readily than the American Agency ascertain who among the men ordering typewriting materials from Parker and signing the receipts of delivery held official positions at the time they so ordered and signed, and who did not. On the other hand, the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting. While ordinarily it is incumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be.

7. For the future guidance of the Agents of both Governments, it is proper to here point out that the parties before this Commission are sovereign Nations who are in honor bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them. The Commission, therefore, will confidently rely upon each Agent to lay before it all of the facts that can reasonably be ascertained by him concerning each case no matter what their effect may be. 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 by the Commission in reaching a decision. The absence of international rules relative to a division of the burden of proof between the parties is especially obvious in international arbitrations between Governments in their own right, as in

those cases the distinction between a plaintiff and a respondent often is unknown, and both parties often have to file their pleadings at the same time. Neither the Hague convention of 1907 for the pacific settlement of international disputes, to which the United States and Mexico are both parties, nor the statute and rules of the Permanent Court of International Justice at The Hague contain any provision as to a burden of proof. On the contrary, article 75 of the said Hague convention of 1907 affirms the tenet adopted here by providing that "The parties undertake to supply the tribunal as fully as they consider possible, with all the information required for deciding the case".

8. In the present case, the sufficiency of the proof has been challenged (a) with respect to the sale and delivery by the claimant of typewriters and supplies to the Mexican Government, which involves (b) the power of the individual purporting to represent said Government to bind it.

9. The allegations of sales made and deliveries effected to a designated agent at a designated place on the dates and at the prices specified and the failure of the Mexican Government to make payment are supported by the affidavit of the claimant, and the Mexican Agent has offered no evidence in rebuttal. The facts alleged are peculiarly within the knowledge of the respondent Government, which should make a full disclosure thereof. It is suggested that due to disturbed conditions or otherwise many of the records of that Government have been destroyed or misplaced, but it should seem that the respondent could at least definitely state whether or not the individual to whom claimant alleges he made deliveries was in its employ at the time and place designated and the actual or apparent scope of his authority. But whether the individuals to whom deliveries were made had, or had not, authority to contract for Mexico, certain it is that if the respondent actually received and retained for its benefit the property which the claimant testifies he delivered to it, then it is liable to pay therefor under a tacit or implied contract even if the individual to whom delivery was made had neither express nor apparent authority to contract for it.

10. Especially on account of the difficulty of ascertaining whether a person acting for either Government was entitled to do so, there has been embodied in Article I of the Treaty of 1923 a provision conferring jurisdiction over claims originating from acts of officials "or others acting for either Government". Reading this provision in connection with that contained in the first clause of Article I, the Commission is of the opinion that this provision should be so construed as to include all claims against one Government by the nationals of the other for losses or damages suffered by such nationals or by their properties, even when there is no evidence that they originate from acts of competent authorities, whether officials or others with a limited jurisdiction, but where there is merely evidence that they originate from acts of others acting for either Government. Where the regularity of a government administration is doubtful, as the administration of Huerta 1913-1914, the quantum of proof required might be greater than in the case of an entirely regular and well-established Government (compare Moore's *Arbitrations*, 3561). But in this case, the Mexican Agency has contented itself with the mere denial of authority without offering any evidence in support of such denial or throwing any light on the actual facts.

11. As pointed out in the foregoing paragraph No. 4, the proof with respect to the ownership of this claim is meager and unsatisfactory. While the Mexican Agent has failed to prove to the satisfaction of the Commission that

claimant Parker has sold and conveyed this claim to a Mexican corporation and hence it might be justified in making an award in favor of the United States on behalf of the claimant, nevertheless the Commission is not satisfied with the evidence which has been presented to it on this issue, although the truth may be readily and definitely established.

*Interlocutory decision*

12. The Commission therefore decides the several questions presented in accordance with the foregoing opinion, but expressly reserves its decision with respect to the ownership of this claim and the amount thereof. The Agents are requested to cooperate in discovering the facts with respect to the ownership of this claim and the interest, if any, of the claimant Parker or the Compañía Parker S. A. or others therein and file evidence herein on or before July 1, 1926, fully disclosing such ownership. The Commission suggests that this evidence may take the form of a stipulation of facts signed by both Agents. Should it appear that this claim is the property of the Compañía Parker S. A. or other Mexican corporation in which the claimant Parker has a substantial and *bona fide* interest, an allotment by such corporation to the claimant Parker made in accordance with the Treaty provisions may be filed and will be considered by the Commission.

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GEORGE W. HOPKINS (U.S.A.) *v.* UNITED MEXICAN STATES.

(*March 31, 1926. Pages 42-51.*)

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RESPONSIBILITY FOR ACTS OF DE FACTO GOVERNMENT.—EFFECT OF DECREES OF NULLITY.—NON-PAYMENT OF MONEY ORDERS. Respondent Government *held* responsible for non-payment of money orders of Huerta Government on ground they involved acts of an unpersonal character. Responsibility for acts of Huerta Government of a personal character will depend on whether at the time in question it had control over a major portion of the territory and a majority of the people of Mexico. Decrees of nullity subsequently issued by Carranza Government *held* not binding on the tribunal.

NON-RECOGNITION BY CLAIMANT GOVERNMENT AS ESTOPPEL. Claimant Government *held* not estopped by its non-recognition of Huerta Government to present claim involving acts of such Government.

PRIVILEGED STATUS OF ALIENS UNDER INTERNATIONAL LAW. The fact that a decision of the tribunal may result in extending to an alien a privilege not accorded Mexican nationals under Mexican law will not prevent the tribunal from reaching such decision, if it be dictated by international law.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 161; Annual Digest, 1925-1926, pp. 229, 232, 417; British Yearbook, Vol. 8, 1927, p. 180.

*Comments:* Edwin M. Borchard, "Decisions of the Claims Commissions, United States and Mexico," Am. J. Int. Law, Vol. 20, 1926, p. 536 at 541; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 229.

This case is before this Commission on the Mexica Agent's motion to dismiss.

1. It is put forward by the United States of America on behalf of George W. Hopkins, who was born and has ever remained an American national. The claim is based on six postal money orders aggregating 1,013.40 pesos alleged to have been purchased by the claimant from the Mexican Government at its postoffices of Mazatlán, Sinaloa, and Guaymas, Sonora, between April 27, 1914, and June 8, 1914, inclusive. It is alleged that all of these money orders were in due time presented to the Mexican authorities and payment was refused by them. The ground of the motion to dismiss is that these money orders were issued by the Huerta administration, which was illegal, that the acts of such administration did not bind Mexico, and that therefore these orders can not be made the basis of a claim before this Commission against the United Mexican States.

#### *Status of Huerta administration*

2. In considering the character and the status of the Huerta régime this international tribunal will look to the substance rather than its form, a substance which is not difficult to discover notwithstanding the flimsy garb of constitutional power under which it undertook to masquerade. There is no room to doubt but that the assumption of power by Huerta was pure usurpation. From being the military commander of the capital, charged with the protection of the administration of President Madero against the revolutionary activities of Generals Reyes and Díaz to overthrow it, Huerta went over to Madero's enemies (February 18, 1913); he declared himself provisional president while Madero lawfully was in power (February 18, 1913, at 2 p. m. and 9 p. m.); he imprisoned both President Madero and Vice-President Pino Suárez and compelled them to tender their resignations (February 19, 1913, about 8 a. m.); he forced the provisional acting president, Lascurain, to appoint him, Huerta, the ranking minister in office (February 19, 1913, at 10 a. m.), and immediately thereafter forced him to resign (February 19, 1913, at 11 a. m.); he had his arbitrary acts confirmed by a congress from which his antagonists had fled and which could not muster a quorum (February 19, 1913, at 11.20 a. m.); and he contrived to procure recognition in some quarters as the constitutional provisional president through the suppression of press news so that the manner of his forcibly seizing the reins of government should not be known. The supreme court felicitated Huerta on his assuming office prior to the assassination of Madero and his associates and before the court could have known of the methods used to seize the office. The governors of the States which recognized Huerta were, most of them, either the partisans of Reyes and Díaz with whom Huerta conspired or had been placed in power by Huerta directly after the state stroke. It is not for an international tribunal to assume that events so abhorrent as these are only to be viewed from their "legal" aspect and that uncovering the real facts means an intrusion of "moral" or "sentimental" considerations on the sacred ground of law. Nor is there reason for alleging that in so judging the Commission infringes upon Mexico's sovereignty over

its domestic affairs, for the Mexican Government itself, through its Agency, invites the Commission to do so.

3. Before considering the question of the validity or nullity of acts done by or contracts entered into with a government administration of this character it is necessary to state at once the impossibility of treating alike all acts done by such an administration or all transactions entered into by an individual with it. There seems to be a tendency both in jurisprudence and in literature to do so, to declare that all acts of a given administration, the legality of which is doubtful, must have been either valid or void. Facts and practice, however, point in a different direction.

4. The greater part of governmental machinery in every modern country is not affected by changes in the higher administrative officers. The sale of postage stamps, the registration of letters, the acceptance of money orders and telegrams (where post and telegraph are government services), the sale of railroad tickets (where railroads are operated by the Government), the registration of births, deaths, and marriages, even many rulings by the police and the collection of several types of taxes, go on, and must go on, without being affected by new elections, government crises, dissolutions of parliament and even state strokes. A resident in Mexico who cleans the government bureaus or pays his school fee to the administration does not and can not take into consideration the regularity or even legality of the present administration and the present congress; his business is not one with personal rulers, not one with a specific administration, but one with the Government itself in its unpersonal aspect.

5. The difficulty of distinguishing between the Government itself and the administration of that Government arises at the point where the voluntary dealings and relations between the individual and the government agencies assume a personal character in support of the particular agencies administering the government for the time being. To this class belong voluntary undertakings to provide a revolutionary administration with money or arms or munitions and the like. But the ordinary agencies, departments, and bureaus of the Government must continue to function notwithstanding its principal administrative offices may be in the hands of usurpers, and in such a case the sale and delivery to these necessary and legitimate agencies of supplies, merchandise, and the like, to enable the Government itself in its unpersonal aspect to function is a very different transaction from one having for its object the support of an individual or group of individuals seeking to maintain themselves in office. The character of each transaction must be judged and determined by the facts of the particular case.

6. A similar distinction arises in the field of international law. There are, on one side, agreements and understandings between one nation and another changing or even subverting its rulers, which are clothed with the character of a free choice, a preference, an approval, and which obviously undertake to bear the risks of such a choice. There are, on the other hand, many transactions to which this character is alien. Embassies, legations, and consulates of a nation in unrest will practically continue their work in behalf of the men who are in control of the capital, the treasury, and the foreign office—whatsoever the relation of these men to the country at large may be. Embassies, legations, and consulates of foreign nations in such capital will practically discharge their routine duties as theretofore, without implying thereby a preference in favor of any of the contesting groups or parties. International payments (for a postal union, etc.) will be received from such Government; delegates to an international conference will often be accepted



from such Government. Between the two extremes here also there is a large doubtful zone, in which each case must be judged on its merits.

7. Facts and practice, as related to the Huerta administration in Mexico, illustrate the necessity of a cleavage in determining the validity or nullity of its acts.

8. In the field of international relations the distinction is apparent. Where pre-existing relations with government agencies continued under such circumstances as not to imply either approval or disapproval of the new administration or recognition of its authority these transactions must be treated as government transactions and binding on it as such rather than transactions had with a particular administration. The routine diplomatic and consular business of the nation continued to be transacted with the agencies assuming to act for the Government and which were in control of the foreign office, the treasury, and the embassies, legations, and consulates abroad. Even the United States, though placing its stamp of disapproval in the most unmistakable manner on the act of Huerta in usurping authority, kept its embassy in Mexico City open for the transaction of routine business, entrusting it to a *chargé d'affaires*, and maintained its consulates throughout Mexico. Such relations, so maintained, were entirely unpersonal; they constituted relations with the United Mexican States, with its Government as such, without respect to the status of the individual assuming to act for the Government.

9. This distinction was recognized in the decisions made by the Carranza administration as to the legality of the acts of the Huerta administration. Such acts as the registration of births, deaths, and marriages were practically undisturbed, because they were performed in the orderly functioning of the Government quite independent of the recognition or nonrecognition of the individuals exercising authority. These were unpersonal acts of the Government itself as an abstract entity. It does not matter for the present argument, and it is not for the Commission to decide, whether the terms of the Carranza decree of July 11, 1916, are or not in all things to be commended; it is noticed here only to point out that it recognized the distinction between transactions with and by the Government itself and transactions with and by the Huerta administration.

10. The same cleavage was recognized in connection with the financial transactions of the Huerta administration by later administrations of the Government of Mexico. The series of Mexican bonds issued during the Huerta régime, the proceeds of which were applied to the payment of the interest on the pre-existing debt of Mexico, have been uniformly recognized as valid, while other series of the same issue, the proceeds of which are claimed to have been applied to the maintenance in power of the Huerta administration or to the purchase of arms, munitions, and the like, have been repudiated. The Commission here expresses no opinion with respect to the application made by Mexico of the principle invoked in recognizing as valid one series of bonds and repudiating another series of the same issue. The latter is referred to here only to point out that the principle which the Commission applies in this case has been recognized and invoked by the Government of Mexico under administrations of unquestioned regularity and validity.

11. It is clear that the sale by the Mexican Government to and the purchase by the claimant Hopkins of postal money orders falls within the category of purely government routine having no connection with or relation to the individuals administering the Government for the time being. The facts as developed in the Memorial and the briefs, which are not contested by the Mexican Agent, aptly illustrate the necessity of the distinction here

made between acts of the Huerta administration in its personal character and acts of the Government itself in its unpersonal character. From the facts so developed it appears that at the very time these postal money orders were issued the greater part of the States of Sonora and Sinaloa, from which they issued, was dominated by Carranza as First Chief of the Constitutional Army, while the City of Mexico, on which the orders were drawn, was dominated by Huerta. Yet the post offices in these two States under the domination of Carranza continued to issue money orders of the United Mexican States upon the postmaster in the Federal District of Mexico. In other cases that have been submitted to this Commission it is apparent that the government agencies functioning under the Huerta administration continued to carry out obligations under pre-existing contracts and otherwise functioned without reference to the change in the administration. It also appears that when Huerta seized the reins of government which in his capacity as provisional president he undertook to administer he did not change the government machinery as it had been set up under President Madero, which continued to operate in all its parts in the service of the people, and the great majority of the personnel of all of the bureaus and agencies of the Government remained unchanged and continued to discharge their duties to and in the name of Mexico. At no time did the government machinery cease to function, notwithstanding the change in the personnel of some members of its executive branch. To the extent that this machinery acted in the discharge of its usual and ordinary functions or to the extent that it received benefits from transactions of an unusual nature, Mexico is bound.

12. But it by no means follows that if the contracts of the claimant Hopkins, evidenced by postal money orders, should be treated as contracts with the Huerta administration in its personal aspects Mexico is not bound by such contracts. The question then arises. How far can an administration which seizes the reins of government by force and is illegal in its inception bind the nation? It will be borne in mind that an administration of illegal origin either operates directly on the central authority by seizing, as Huerta did, the reins of the Government, displacing the regularly constituted authorities from their seats of power, forcibly occupying such seats, and extending its influence from the center throughout the nation; or it comes into being through attacking the existing order from without and step by step working toward the center. The acts of an organization of the latter type become binding on the nation as of the date territory comes under its domination and control *conditioned* upon its ultimate success. The binding force of such acts of the Huerta administration as partook of the personal character as contradistinguished from the Government itself will depend upon its real control and paramountcy at the time of the act over a major portion of the territory and a majority of the people of Mexico. As long as the Huerta régime was in fact the master in the administration of the affairs of the Government of Mexico its illegal origin did not defeat the binding force of its executive acts (award of 1901 in the Dreyfus case between France and Chile, Deschamps et Renault, *Recueil international des traités du XX<sup>e</sup> siècle*, an 1901, 394). Once it had lost this control, even though it had not been actually overthrown, it would not be more than one among two or more factions wrestling for power as between themselves. Even while still in possession of the capital and therefore dominating the foreign office, the treasury, and Mexico's representatives abroad, its acts of a personal nature could not ordinarily bind the nation from the moment it apparently was no longer the

real master of the nation. It is unnecessary in this case for the Commission to determine the exact time between February, 1913, and July, 1914, the turning point was reached in the ebbing power of Huerta. During the months of February (last half), March, and April, 1913, Huerta's power was paramount in the north, the center, and the south of Mexico notwithstanding uprisings in several States. The Huerta administration was not accorded recognition by any foreign Government after June 1, 1913. During the period from January to July, 1914, inclusive, Huerta's power rapidly diminished, and it is not improbable that the alleged insult offered the American Flag in March, 1914, resulting in America's military occupation of Veracruz was an unsuccessful endeavor on his part to turn the tide in his favor by appealing to the Mexican people to rally to his support against a foreign "enemy" (?) It therefore follows that in every case submitted to this Commission in which acts of the Huerta administration in its personal aspect are involved the Commission must consider the particular facts in that case and decide upon the actual binding force upon the Mexican Nation of such acts.

*The Carranza decrees of nullity*

13. As the Commission holds that the contracts between the Government of Mexico and Hopkins, evidenced by the postal money orders which it issued to him, are unaffected by the character of the Huerta administration and are binding upon the United Mexican States as such, the question presents itself whether this binding force has from an international viewpoint been subsequently destroyed by the decrees issued by Carranza on February 19, 1913, and July 11, 1916. The Commission has no hesitancy in answering both questions in the negative. The first decree, being that of one State of the Union, Coahuila, could have no possible effect on or modify either the rights or duties of the Union itself. The second decree, even when considered as subsequently invested with the character of a law by the Mexican Congress, could not possibly operate unilaterally to destroy an existing right vested in a foreign citizen or foreign State or a pre-existing duty owing by Mexico to a foreign citizen or foreign State. The fact that it follows that foreign citizens may enjoy both rights and remedies against Mexico which its municipal laws withhold from its own citizens is immaterial as will be hereinafter pointed out in paragraph 16.

14. From the foregoing the Commission concludes that Hopkins' contracts are unaffected by the legality or illegality of the Huerta administration as such, that they bind the Government of Mexico, that they have not been nullified by any decree issued by Carranza, and that they have not been and can not be nullified by any unilateral act of the Government of Mexico.

*Nonrecognition as an estoppel*

15. Has the American Government forfeited its right to espouse Hopkins' claim because in 1913 it warned its citizens against the "usurper" Huerta and never recognized his administration? The Commission holds that such warnings and such failure to recognize the Huerta administration cannot affect the vested rights of an American citizen or act as an estoppel of the right of the American Government to espouse the claim of such citizen before this Commission (see the award of Honorable William H. Taft, Sole Arbitrator between Great Britain and Costa Rica, October 18, 1923, reported in 18 (1924) American Journal of International Law, at pages 155-157).

The position assumed by the American Government under the administration of President Wilson was purely political and was binding, even on that administration, only so long as it was not modified. It was an executive policy, which, so long as it remained unmodified and unrevoked, would close to the American Government the avenue of diplomatic interposition and intervention with the Huerta administration. It temporarily, therefore, rendered this remedy—diplomatic interposition or intervention—unavailable to an American citizen but it did not affect a vested *right* of such citizen. But nonrecognition of the Huerta administration by the American Government under the Wilson administration was not dependent upon Huerta's paramountcy in Mexico. It meant that, even if it were paramount, it came into power through force by methods abhorrent to the standards of modern civilization, that it was not "elected by legal and constitutional means", and hence, while the *Government* of Mexico continued to exist and to function, its *administration* was not entitled to recognition.

*Privileged status of foreigners*

16. If it be urged that under the provisions of the Treaty of 1923 as construed by this Commission the claimant Hopkins enjoys both rights and remedies against Mexico which it withholds from its own citizens under its municipal laws, the answer is that it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws. The reports of decisions made by arbitral tribunals long prior to the Treaty of 1923 contain many such instances. There is no ground to object that this amounts to a discrimination by a nation against its own citizens in favor of aliens. It is not a question of discrimination, but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens.

*Decision*

17. From the foregoing opinion it follows, and the Commission decides, that the allegations contained in the memorial filed herein bring this claim within the jurisdiction of this Commission. Assuming that such allegations are true, the Government of Mexico is bound to pay the claimant the postal money orders declared upon. The motion of the Mexican Agent to dismiss is therefore overruled. The running of time for filing the Answer has been suspended from December 16, 1925, to March 31, 1926.

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THE HOME INSURANCE COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.*(March 31, 1926. Pages 51-59.)*

INSURER AS CLAIMANT. No issue as to jurisdiction raised by tribunal in claim by insurer.

RESPONSIBILITY FOR LOSSES INCURRED IN GOVERNMENT OCCUPATION OF RAILWAYS. Respondent Government *held* not responsible in its capacity as operator of railways for shipment lost due to acts of revolutionary forces; *held* obliged, nevertheless, to refund excess transportation charges.

RESPONSIBILITY FOR ACTS OF FORCES.—ACTS OF REVOLUTIONARY FORCES.—FAILURE TO PROTECT. No responsibility *held* to exist when reasonable measures were taken in suppression of revolution.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 157; Annual Digest, 1925-1926, p. 211.

1. This claim is asserted by the United States of America on behalf of the Home Insurance Company, an American corporation, against the United Mexican States to recover the sum of \$23,050.00 with interest thereon from May 28, 1924, on which date it is alleged the claimant paid under two policies of insurance the principal sum mentioned to Westfeldt Brothers, of New Orleans, Louisiana, an American mercantile partnership, composed wholly of American nationals, to indemnify them for losses in transit of two cars of coffee, one originating at Huixtla, Chiapas (Mexico), the other originating at Tapachula, Chiapas (Mexico), both destined to New Orleans via Puerto México, Veracruz (Mexico).

2. The record as submitted is in some respects meager and incomplete and in other respects contradictory and confusing, but, giving due weight to the facts proven and their necessary implications, the Commission finds the facts as follows:

3. On November 23, 1923, Westfeldt Brothers of New Orleans placed an order with El Emporio del Café, S. A., of Mexico City, Mexico, a Mexican corporation, for one car of coffee of the kind and grade and at the prices stipulated, to be paid for by the sight draft of El Emporio del Café, S. A., on Westfeldt Brothers at New Orleans, "insurance cared for by Westfeldt Brothers".

4. On November 27, 1923, Westfeldt Brothers placed another order with El Emporio del Café, S. A., for another car of coffee of different grades and prices, to be insured and paid for by the sight draft of El Emporio del Café, S. A. on Westfeldt Brothers at New Orleans, "insurance cared for by Westfeldt Brothers".

5. On November 30, 1923, in pursuance of the order of November 23, 1923, a car of coffee was shipped from the station of Huixtla, with ultimate destination New Orleans, covered by a through bill of lading issued by the National Railways of Mexico, consigned to shipper's order notify Westfeldt Brothers, New Orleans, and routed by the National Railways of Mexico via Puerto México and the Munson Steamship Line.

6. On December 4, 1923, in pursuance of the order of November 27, 1923, another car of coffee was shipped from the station of Tapachula, likewise

covered by a through bill of lading with ultimate destination New Orleans, consigned and routed in the same way as the shipment mentioned in the preceding paragraph.

7. Both of these cars arrived at Puerto México on December 5, 1923, and on the following day the coffee was removed from the cars and placed in the railroad warehouse to await the arrival of a steamer of the Munson Line for transshipment to New Orleans.

8. The rail lines over which these shipments moved and the warehouse into which the coffee was removed and stored at Puerto México were operated by the Government of Mexico, which at that time had taken over and was operating all or practically all of the rail lines in the Republic of Mexico, most of which were owned by private corporations.

9. At the request of Westfeldt Brothers the claimant herein as of December 1, 1923, issued at Mexico City, through its manager for Mexico, a policy of insurance covering the first shipment, and on December 5, 1923, issued a like policy of insurance covering the second shipment, both in the usual form for the indemnification of Westfeldt Brothers against loss in transit, with the usual limitations not necessary to notice here. Attached to each of said insurance policies in the form of a rider was a "War and Riot Clause" extending to Westfeldt Brothers, in consideration of an additional premium, indemnity against loss caused by "Rioters, Civil Commotion, Rebellion, Insurrection, Military Invaders, Military or Usurped Power or Martial Law, Intervention by Foreign Power or Powers, Robbery by Persons or Bands who take property by Force", but excluding from such coverage "any Acts or Proceedings of the Civil and/or Military Representatives of the Constituted Authorities for the time being".

10. Thereafter, on January 15, 1924, in consideration of an additional premium, the insurance under both of these policies was extended effective as and from January 12, 1924, to cover "loss of and/or damage to the property insured directly caused by Confiscation, Detention or Sequestration by the Constituted Authorities for the time being, whether local or Federal."

11. On or about December 5, 1923, a program was decided upon under the leadership of Adolfo de la Huerta having for its object the overthrow of the administration of President Obregón of Mexico. On December 6 de la Huerta publicly warned Obregón that he would meet the same fate as his predecessor (Carranza) if he continued in his present course, and soon thereafter it was reported that the military forces in several Mexican States, notably Chihuahua, Tamaulipas, Veracruz, Puebla, Jalisco, Michoacan, Guerrero, Oaxaca, Tabasco, Campeche, and Yucatan were in revolt against the Obregón administration and that the Federal officeholders in those States had been replaced by the adherents to the revolutionary movement. Adolfo de la Huerta was a man of influence and had a large following in Mexico. He had taken a prominent part with Carranza when the latter was First Chief of the Constitutionalist Army in launching and prosecuting an ultimately successful revolution against the Huerta administration in 1913 and 1914; later he, with General Calles and others, led a successful revolution resulting in the overthrow of the Carranza administration, after which de la Huerta became Provisional President; after the election of Obregón as President, de la Huerta became his Finance Minister in a cabinet in which General Plutarco Elias Calles held the portfolio of Minister of the Interior. In the fall of 1923 acute friction developed between de la Huerta and Calles, the latter an active and the former a passive candidate for the presidency. This developed into friction between de la Huerta and Obregón. On Sep-

tember 14, 1923, de la Huerta tendered his resignation as Finance Minister, which was immediately accepted. On October 18, 1923, he publicly announced his candidacy for the presidency, which was followed by charges by his political enemies of extravagance and misconduct in office as Finance Minister, which charges were publicly supported by President Obregón. The heat of political contest resulted in riots and bloodshed. A convention of the Cooperative Party was attended by more than 2,500 delegates from every State and territory except Lower California, including a majority of the Chamber of Deputies. On November 23, 1923, this convention repudiated Calles and Obregón, two of the founders of the party, by choosing de la Huerta as its candidate for the presidency. He also had the support of several other political parties. With this strong political following de la Huerta took the field to forcibly overthrow the Obregón administration, which he claimed had been and was disregarding the legislative and judicial departments of the government and had armed political agitators to do its bidding without respect for life, liberty, or property. General Calles withdrew as a candidate for the presidency and took the field against de la Huerta and his followers in defense of the Obregón administration. By the middle of December the opposing armies were reported to be lined up on a 65-mile front in the State of Puebla. On December 15, 1923, the city of Puebla, the third largest in Mexico in point of population, was evacuated by the government troops and entered the next day by the followers of de la Huerta. The cities of Mérida and Progreso, both in Yucatan, were also reported to have fallen into the hands of the revolutionists. By the end of December, 1923, the revolutionists had advanced practically two-thirds of the way from Veracruz to Mexico City. About this time General Obregón took supreme command of his army and prepared to advance to Veracruz. The Government of the United States placed an embargo on all arms, ammunitions, and supplies destined to the rebel forces. At that time de la Huerta had set up at Veracruz an organization which he proclaimed as the provisional government of Mexico. Apparently from this time on de la Huerta experienced difficulty in raising funds with which to prosecute his campaign, and his organization began to crumble. His forces were defeated at Esperanza in January and on February 11, 1924, the Federal forces recaptured Veracruz. So vigorously were the operations against the insurgents prosecuted that by April, 1924, the revolution was practically suppressed. It appeared from the final message of President Obregón, delivered September 1, 1924, that the armed rebels had numbered approximately 56,000 including 25,000 deserters from the army, and that the suppression of the revolution had cost the Federal Government more than 60,000,000 pesos.

12. Among those who had deserted the Federal forces in December, 1923, to become followers of de la Huerta was Brigadier General Benito Torruco, who from time to time, between February 1 and March 10, 1924, seized at Puerto México the two carloads of coffee above-mentioned which were stored in the railroad warehouse at that port. He gave receipts therefor to the Terminal and Customs Agent of the railway there signed by him as "The General of Division, Chief of the Military Operations on the Isthmus".

13. While it does not appear that the rebel forces at and contiguous to Puerto México were numerically strong, it does appear that they were sufficiently strong to cut off all communication from Puerto México from December 6, 1923, to April 2, 1924. It further appears that prior to these

seizures the Terminal and Customs Agent of the railroad at Puerto México made an unsuccessful effort to forward this coffee to New Orleans by the steamship *Sveland*, as no steamer from the Munson Line was available for its transportation.

14. Based on the foregoing findings of fact, the conclusions reached by the Commission follow:

15. The contention that this Commission is without jurisdiction to hear and decide this case because it is predicated on the nonperformance of a contract obligation, and that claims of this nature are not embraced within the Treaty in pursuance of which this Commission is constituted, is rejected for the reasons set forth in the Illinois Central Railroad Company case, docket No. 432, this day decided by this Commission.

16. It is for each nation to decide for itself whether or not it will engage in owning and/or operating railroads or other transportation facilities. In this case it appears that at the time of the losses here complained of the Government of Mexico had taken possession of and was operating the railroads located in the territory under its jurisdiction. As such it was performing a governmental function, but it by no means follows that its liability as a carrier of freight and passengers for hire was in any respect greater than or different from that of a private corporation operating the same railroads. In its capacity as carrier Mexico, as between it and the owner of the goods carried, was subject to the laws of the Republic applicable to other public carriers. Under those laws it received and promptly and safely transported to Puerto México the shipments of coffee the loss of which gave rise to this claim. It was prepared to deliver these shipments to the Munson Line in accordance with the terms of the through bill of lading, but the Munson Line had no ship available to receive them at that port. The railroad's agent made an unsuccessful attempt to forward the coffee by another ship. Because of the cutting off of Puerto México from all mail and transportation communication with the outside world from December 6, 1923, to April 2, 1924, it was not possible for the carrier to move the coffee to a place of greater safety or to communicate with either the shipper or the purchaser. That Westfeldt Brothers as well as the claimant herein knew of the actual or threatened disturbed conditions in the territory through which those shipments must move in transit is evidenced by the fact that Westfeldt Brothers paid an additional premium in the first instance for war-risk insurance excluding acts of the constituted authorities and some five weeks later, but prior to the seizure of the coffee, they paid an additional premium to the claimant for insurance against loss caused by "confiscation, detention, or sequestration by the constituted authorities for the time being, whether local or federal". The de la Huerta revolution had been launched. General Torruco was in command of its military forces at Puerto México and contiguous territory when Westfeldt Brothers procured this extension of insurance coverage from the claimant. Thereafter the coffee was seized and confiscated by General Torruco in his capacity as "Chief of the military operations on the Isthmus". Under the laws of Mexico a public carrier for hire is not liable for the loss or damage to shipments in its possession resulting from "*casos fortuitos*", which includes acts of revolutionary forces, without negligence on its part. In these circumstances the Commission decides that the Government of Mexico is not liable in its capacity as carrier for the loss of the shipments of coffee here involved.



17. But the Government of Mexico in its sovereign capacity owed the duty to protect the persons and property within its jurisdiction by such means as were reasonably necessary to accomplish that end. A failure to discharge that duty resulting in loss or damage to an American national would render it liable here, and the claim against it of such American national, if espoused and presented by the Government of the United States of America, would fall within the jurisdiction of this Commission. The question then arises in this case, Did the Government of Mexico fail in the discharge of its duty as sovereign to take all reasonable measures to protect the coffee in question. The Commission decides that the record as presented discloses no such failure. The de la Huerta revolt against the established administration of the Government of Mexico—call it conflict of personal politics or a rebellion or a revolution, what you will—assumed such proportions that at one time it seemed more than probable that it would succeed in its attempt to overthrow the Obregón administration. The sudden launching of this revolt against the constituted powers, the defection of a large proportion of the officers and men of the Federal Army, and the great personal and political following of the leader of the revolt, made of it a formidable uprising. President Obregón himself assumed supreme command. Through the vigorous and effective measures taken by the Obregón administration what threatened at one time to be a successful revolution was effectually suppressed within a period of five months from its initiation. General Torruco, who seized and personally receipted for the coffee in question was the military commander of the de la Huerta forces on the Isthmus, including Puerto México and the country contiguous thereto. He succeeded in holding this territory on behalf of the revolutionists under de la Huerta and against the established authorities of the Obregón administration. Communication between Puerto México and the outside world was cut off during a period of nearly five months. In these circumstances the Commission finds that on the record submitted the Government of Mexico, then under the administration of President Obregón, did not fail in the duty which in its sovereign capacity it owed to Westfeldt Brothers to protect their property.

18. From the record it appears that Westfeldt Brothers paid the Government of Mexico the through-freight charges on the shipments of coffee in question from the points of origin to New Orleans and that the claimant has reimbursed Westfeldt Brothers for such payment. The Government of Mexico in its capacity as carrier has performed the service which it contracted to perform up to Puerto México but not further. It is therefore obligated to pay to the claimant the division of the through-freight charges from Puerto México to New Orleans, for which payment has been made but no service rendered. Upon the Government of the United States filing with this Commission on or before May 1, 1926, evidence satisfactory to the Commission of the amount due claimant under this decision an award will be entered for such amount in favor of the United States of America on behalf of the claimant against Mexico. Further than this, the Commission finds, the Government of the United Mexican States is not obligated to pay any amount to the Government of the United States of America on account of the claim herein presented.

19. Had the loss herein complained of occurred within the period from November 20, 1910, to May 31, 1920, inclusive, it would seem that the claim would have fallen within the jurisdiction of the Special Claims.

Commission constituted in pursuance of the Special Claims Convention between the United States and Mexico signed September 10, 1923, and effective through exchange of ratifications February 19, 1924. Articles II and III of that convention have no counterpart in the convention under which this Commission is constituted. It is not for this Commission to express any opinion with respect to the liability of Mexico under the evidence as presented by this record if the terms of the Special Claims Convention were applied thereto. It is proper, however, to call attention to the radical difference in the terms of the two conventions and to expressly state, for the guidance of the respective Governments, that what is said in this decision and opinion can have no application to cases falling within the terms of the Special Claims Convention.

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FABIAN RIOS (UNITED MEXICAN STATES) *v.* UNITED STATES  
OF AMERICA.

(*March 31, 1926. Pages 59-61.*)

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PROCEDURE, MOTION TO DISMISS.—RESPONSIBILITY FOR ACTS OF FORCES.—

MILITARY ACTS. While respondent Government would not be responsible for losses resulting from shell fire in taking possession of Veracruz, decision on motion to dismiss for lack of jurisdiction *suspended* in order that allegations of other circumstances of loss may be developed and supported.

*Comments:* Edwin M. Borchard, "Decisions of the Claims Commissions, United States and Mexico," *Am. J. Int. Law*, Vol. 20, 1926, p. 536 at 542.

This case is before this Commission on the American Agent's motion to dismiss.

1. The claim is put forward by the United Mexican States on behalf of Fabian Rios, who was born and has ever remained a Mexican national, to recover damages in the sum of 6,000 pesos. The pertinent allegation in the Memorial follows:

"That during the battles of the 21st and 22nd of the month and year above stated, fought with the invading forces of the American Government, he was compelled to abandon his residence, because several shells shot by the ships of war of the said Government, fell near his residence. That after having abandoned his home, three of those shells struck his very house, totally destroying his furniture and personal belongings, and what was left of his household and personal articles was stolen by the soldiers and by the populace."

2. The motion to dismiss challenges the jurisdiction of the Commission to hear and decide this case because the losses complained of resulted from the acts of the armed forces of the United States in taking military possession of Veracruz in April, 1914, and not from the administrative acts of the American authorities after the occupation had been accomplished. If it were clear that the Memorial did not allege any damage resulting from the administrative acts of the American authorities, then the motion would be sustained under the previous decisions of this Commission in *El Emporio del Café* case (Docket No. 281), the *Gonzales*

case (Docket No. 290), and the Lopez case (Docket No. 903), and for the reasons therein stated.

3. But while the allegations in the Memorial are inconsistent and confusing, they must be taken as confessed for the purposes of this motion, and the Commission can not say with certainty that there is no claim for loss or damage suffered by claimant after the military possession of Veracruz had been accomplished. While the Memorial does allege that the American shells which struck claimant's house when the Americans were in the act of taking possession of Veracruz totally destroyed "his furniture and personal belongings" and while it is difficult to understand how after such total destruction there was anything "left of his household and personal articles" to be "stolen by the soldiers and by the populace" due to the lax administration by the American authorities after possession had been accomplished, nevertheless, in view of these ambiguous allegations the Commission is not justified in sustaining the motion to dismiss.

4. The Mexican Agent is given leave to file an amended memorial, with full evidence in support thereof, within thirty days from this date, setting out the facts with greater particularity and reconciling these inconsistencies. A failure to take full advantage of this leave will result in the dismissal of the case.

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JOHN B. OKIE (U.S.A.) *v.* UNITED MEXICAN STATES.

(*March 31, 1926. Pages 61-64.*)

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IMPROPER COLLECTION OF GOVERNMENTAL CHARGES. Claim for collection of fees arising in connexion with imports, which authorities had agreed to waive, *allowed*.

1. This claim is put forward by the United States of America on behalf of John B. Okie, who was born and has ever remained an American national. From the record it appears that on January 17, 1920, Okie, who was engaged as a sheep breeder in Texas, applied to the Mexican Government through its Department of Finance and Public Credit, for authority to import Merino sheep into Mexico. Unfortunately neither this original letter nor a copy thereof has been produced. It was answered, however, on January 29, 1920, by the Department of Finance and Public Credit of the Mexican Government, a copy of which answer follows:

[Translation]

(To be sent under registered mail)

Federal Executive Power, Mexico, Dept. of Finance & Public Credit, Dept. of Customs Service, Sec. 1, Group 1, No.

Subject: Fixing conditions for temporary importation of ewes through Villa Acuña.

To J. B. OKIE,

670 So. Orange Grove Ave.,

Pasadena, Cal., U. S. A.

Your communication of the 17th inst. at hand, requesting authorization to import 24,000 Merino ewes, of high grade, coming from the State of Texas,

with the idea of having them permanently in Mexico and having the shearing done here, selling the wool in the country; and in reply would state that this Department grants your request under the following conditions:

First: The number of head to be 20,000 and up.

Second: The total importation of same should be made prior to the 30th day of June of this year, and without the collection of any charges.

Third: If for causes of force major you should have to export the stock in question prior to June 30, 1921, you are authorized to do so, the Government collecting the amount of 50 cents per head, as fee for pasturage.

Fourth: After the lapse of one year from July 1st next, the sheep will be considered as definitely nationalized and will be subject to the export duties involved, and you will be governed by the laws now in force on this subjects

The foregoing has been communicated to the Customs House at Villa Acuña for compliance in so far as it may apply.

Constitution and reforms,

Mexico, Jan. 29, 1920.

By order of the Secretary,

CHIEF CLERK.

2. On February 21, 1920, Okie made his first importation into Mexico of something over 13,000 head of sheep on which he was required to pay consular fees and inspection and sanitary fees which he paid under protest.

3. On March 15, 1920, Okie addressed both the Secretary of Finance and Public Credit and the Secretary of Foreign Relations calling their attention to the contract which he claimed to have with the Government of Mexico for the importation into Mexico of 20,000 and upward head of sheep without the imposition of any charges, advising the amount of consular fees and inspection and sanitary fees which were paid by him under protest and respectfully requesting a refund thereof. He added "as I am to make by the 20th of May another importation of 15,000 head of sheep through this same customs house, I would ask that you order that the charges made on this first lot be omitted on all others for which I would thank you in advance".

4. Okie received a reply to these communications from the Department of Foreign Relations of the Mexican Government dated March 30, 1920, reading:

[Translation]

Federal Executive Power, Mexico, Dept. of Accountancy and "Glosa"

Number 1267. Volume 63, Page 5

Matter: I acknowledge receipt of your letter of the 15th inst.  
Department of Foreign Relations.

To Mr. V. G. Okie, Acuña, Coahuila.

I acknowledge receipt of your letter to the Secretary of the Treasury and Public Credit, and beg to inform you that as soon as the said Department issues the proper instruction this Department of Foreign Relations will give orders in connection with the case to our Consul at Del Rio with regard to the reimbursement of the duties to which you refer.

I assure you of my sincere consideration.

Constitution and reforms.

Mexico, March 30, 1920.

Alberto C. FRANCO,  
*Acting Chief Clerk.*

5. When on March 29, 1920, Okie imported into Mexico the second herd, consisting of 11,500 sheep, like charges for consular fees and sanitary fees were imposed and paid by him under protest. The total fees paid by him on both herds aggregated 5,890.38 pesos.

6. The claimant asks an award for this amount with interest thereon. As far as the Commission can infer from the incomplete evidence submitted, Okie and the Mexican authorities placed a different interpretation on the contract evidenced by the correspondence above referred to. As Mexico had at that time imposed no import duties on sheep and as a permit to import sheep was not required by its laws, Okie seems to have interpreted the words found in the letter to him of the Mexican Department of Finance and Public Credit, dated January 29, 1920, "without the collection of any charges" as applying to all government taxes, fees, or charges of any nature. The Mexican Government on the other hand contends that under its constitution and laws its officers are without the power to remit any taxes or fees imposed by law and that the words quoted in effect was a mere statement that import duties did not exist.

7. In considering which party was responsible for this misunderstanding, the Commission finds that the entire fault lay with the Mexican officials. When the Mexican Treasury Department on January 29, 1920, with full knowledge of the nonexistence of import duties on sheep, wrote to Okie, the sheep breeder, granting authority to import sheep without paying any "derechos", they certainly did not convey to him the understanding that the Government meant "derechos de importación" only. Okie's letter of March 15, 1920, asked for refund under his contract of consular fees and inspection and sanitary fees and that the border customs-house authorities be instructed not to impose such fees on the second shipment which he intended to make in May. When, with this letter before it, the Mexican foreign office wrote Okie on March 30, 1920, that as soon as the Treasury Department "issues the proper instruction this Department of Foreign Relations will give orders \* \* \* with regard to the reimbursement of the duties to which you refer", Okie could not possibly have understood from this letter that the particular fees mentioned in his letter could not under the law be refunded to him. He was justified in assuming that no such fees would be demanded on the second shipment which he notified the Mexican authorities he intended to make and which he notified the Mexican authorities he intended to make and which he actually made during the month of May. Therefore, the misunderstanding between the parties and the resultant damage sustained by Okie was due entirely to the fault of the government officials resulting in injustice to Okie. Under the express terms of the Treaty under which this Commission is constituted the Mexican Government must therefore indemnify him.

8. Okie, however, was not justified in understanding that the Mexican Government would do more than waive any charges collected by or for the account of the Government itself and which would ordinarily find their way into the Mexican treasury. From the 5,890.38 pesos paid by Okie should be deducted such fees as were paid to the veterinary expert who was not an official of the Mexican Government for his service in inspecting the sheep. An award will be made against Mexico for the balance with interest thereon. The Agencies are requested to submit to the Commission on or before July 1, 1926, a statement, if practicable, in the form of a stipulation of the facts signed by both Agents, disclosing the amount for which an award will be made under this decision.

9. As the claim was liquidated as to amount on May 29, 1920, the date of the last payment, the award will bear interest at the rate of 6% per annum from that date.

*Interlocutory decision*

10. For the reasons stated the Commission decrees that the Government of the United Mexican States is obligated to pay to the United States of America on behalf of John B. Okie an amount to be ascertained in accordance with the foregoing opinion with interest on such amount at the rate of 6% per annum from May 29, 1920. Upon the filing by the Agents of the report requested a final award will be entered.

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NICK CIBICH (U.S.A.) *v.* UNITED MEXICAN STATES.

*(March 31, 1926. Pages 65-67.)*

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RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.

Claim for money of which police took possession when claimant was arrested but which was never returned, *disallowed* in absence of proof of lack of reasonable care on part of authorities.

*Cross-reference:* Annual Digest, 1925-1926, p. 220.

1. This claim is asserted by the United States of America on behalf of Nick Cibich, a young naturalized American citizen, who on the evening of May 23, 1923, being drunk in the streets of Pánuco, Veracruz (near the very center of the oil district of Tampico), was locked up in a cell by the police until the next morning, to sleep himself sober. His money, either to the amount of \$460 or \$475, was taken from him by the chief of police for safe-keeping; but was stolen during the night by a gang of liberated prisoners and faithless policemen, and therefore could not be returned to him the next morning. The United States claims an amount of \$475 (which seems to have been inferred from the amount of about 950 pesos, mentioned in the first Mexican police report, and was never mentioned by Cibich, himself, before his affidavit of October 17, 1924), with interest.

2. It is significant that the United States does not make and apparently could not make any claim for false imprisonment, but seeks only to recover the amount of money alleged to have been stolen with interest thereon. The references to the failure to try the claimant for any offense and the failure to impose on him any fine for drunkenness and the negligence of the local authorities in failing to apprehend and prosecute the offenders and the fact that among the gang of thieves were faithless policemen are all mentioned merely in an effort to impute to Mexico some sort of responsibility for the crime committed within its borders.

3. It is unnecessary here to inquire under what particular provisions of the Mexican law the Pánuco police authorities were entitled to take into custody a drunken man found upon its streets. Such authority by express statute or well-established custom exists in every civilized country of which the Commission has knowledge.

4. If Cibich had not been put in jail and his money had not been taken into custody by the police, would Mexico have been held responsible

if in his drunken condition he had been set upon and robbed by a gang of thieves? There seems no reason to believe it. Or, under the same conditions would Mexico have been held responsible because of the presence, among the thieves, of two defecting policemen? There seems no reason to believe it. If he had been imprisoned, and his money withdrawn from him and locked up in a safe place, even if this place had been invaded by the thieves after having overpowered the custodian, would Mexico have been held responsible? This too must be answered in the negative. Therefore, the claimant's case must rest on the fact that the police authorities, having taken Cibich's money in custody, did not put it in a safe and well-locked place, but placed it in the drawer of a table. This fact, it is true, appears in the first police report presented immediately after the occurrence (that of May 24, 1923), and it is repeated in the testimony of January 21, 1925 (or 1924); but a report of December 24, 1924, speaks of "deposited in the safe (*en la caja*) of the police station", and mentions the keys of this safe, and Cibich's own report of May 29, 1923, before the American Consul states upon his inquiries that it had been "deposited in the safe, and locked up," and that "the keys of the safe were delivered, in his presence, to a man in charge of guarding the jail". The allegation that the police failed to use reasonable care in safeguarding the money taken into custody by them is not confirmed by any further evidence than that above-mentioned, which does not support the claim that it was placed in an open drawer (the reports say just: "*en el cajón de la mesa*" and "*en el cajón de una mesa*"), and does not entitle the Commission to build upon it the far-reaching conclusion of official malfeasance. This is particularly true as the Memorial itself, which was never amended, alleges that the money was "placed in the safe of said jail and the keys of said safe given to one of the public guards or police in charge of said jail in the presence of the said (drunken) claimant".

5. As on the record submitted the claimant was legally taken into custody and as the money he had on his person was properly taken by the police for safe keeping, and as the weight of the evidence fails to disclose any want of reasonable care on the part of the Mexican authorities in connexion with the loss of such money, it is unnecessary for the Commission to inquire into the right to assert this claim before this Commission based on the acts or omissions of the municipal officers of Pánuco.

#### *Decision*

6. The Commission decrees that the Government of the United Mexican States is not obligated to pay to the Government of the United States of America any amount on behalf of Nick Cibich on account of the claim asserted herein.

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### THE HOME INSURANCE COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.

(October 7, 1926. Page 68.)

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RESPONSIBILITY FOR LOSSES INCURRED IN GOVERNMENT OPERATION OF RAILWAYS. Claim for excess freight charges *allowed*.

1. The Commission, in its opinion rendered in this case on March 31, 1926, stated that the Government of Mexico was obliged to pay to the claimant the division of the through freight charges from Puerto México to New Orleans. The Commission added that, upon the Government of the United States filing on or before May 1, 1926, evidence satisfactory to the Commission of the amount due claimant under this decision, an award would be entered for such amount.

2. The American Agent, on April 30, 1926, filed testimony, satisfactory to the Commission, stating the division of the through freight charges from Puerto México to New Orleans to have been \$594.14 (five hundred and ninety-four dollars fourteen cents, United States currency).

3. Therefore, award is hereby given that, on account of the claim herein presented, the Government of the United Mexican States is obligated to pay \$594.14 to the Government of the United States of America.

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DAVID GONZALEZ (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(October 7, 1926. Page 69.)

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UNLAWFUL COLLECTION OF CUSTOMS DUTIES BY OCCUPYING MILITARY FORCES. Claim for double payment of export duties to Mexican authorities and occupying American military authorities *dismissed* for lack of jurisdiction.

1. The Commission, by its decision in this case rendered March 2, 1926, gave the Mexican Agent leave to file an amended Memorial within thirty (30) days from that date, "setting out facts, if any exist, constituting a wrong by the American authorities in the administration of the customs by them", and bringing the case within the principles and rules announced in the interlocutory decision in the El Emporio del Café case on the same day. The Commission stated that, in the absence of such allegations, the case would be dismissed.

2. As the amendment to the Memorial, filed March 27, 1926, does not contain any such allegation with respect to wrongful action on the part of the American authorities in the administration of the customs by them, but raises a controversy which the Commission in its interlocutory decision in the El Emporio del Café case explicitly declared to be outside its jurisdiction, the case is hereby dismissed.

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FABIAN RIOS (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(October 7, 1926. Page 70.)

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PROCEDURE, MOTION TO DISMISS. When decision on motion to dismiss was postponed in order to permit of the further investigation of facts



and introduction of further evidence but, after expiration of time allowed for this purpose, no further evidence was produced, claim *dismissed*.

*(Text of decision omitted.)*

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WELLS FARGO BANK AND UNION TRUST COMPANY (U.S.A.)  
v. UNITED MEXICAN STATES.

*(October 7, 1926. Page 71.)*

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PROCEDURE, MOTION FOR LEAVE TO FILE MEMORIAL.—AMENDMENT OF MEMORIAL. Motion for leave to file a memorial under a different name from that in the memorandum *denied* without prejudice to procedure of filing memorial on basis of memorandum followed by filing of motion to amend such memorial.

*(Text of decision omitted.)*

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L. F. H. NEER AND PAULINE NEER (U.S.A.) v. UNITED MEXICAN  
STATES.

*(October 15, 1926, concurring opinion by American Commissioner, undated.  
Pages 71-80.)*

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DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—INTERNATIONAL STANDARD. In absence of evidence establishing that action of authorities in failing to apprehend or punish those guilty of murder of American citizen amounted to an outrage or such a failure to reach international standard that would be conceded by every reasonable man, claim *disallowed*.

*Cross-references:* Annual Digest, 1925-1926, p. 213; British Yearbook, Vol. 8, 1927, p. 183.

*Comments:* Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521; Joseph Conrad Fehr, "International Law as Applied by U.S.-Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312.

1. This claim is presented by the United States against the United Mexican States in behalf of L. Fay H. Neer, widow, and Pauline E. Neer, daughter, of Paul Neer, who, at the time of his death, was employed as superintendent of a mine in the vicinity of Guanaceví, State of Durango, Mexico. On November 16, 1924, about eight o'clock in the evening, when he and his wife were proceeding on horseback from the village of Guanaceví to their home in the neighborhood, they were stopped by a

number of armed men who engaged Neer in a conversation, which Mrs. Neer did not understand, in the midst of which bullets seem to have been exchanged and Neer was killed. It is alleged that, on account of this killing, his wife and daughter, American citizens, sustained damages in the sum of \$100,000.00; that the Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits; and that therefore the Mexican Government ought to pay to the claimants the said amount.

2. As to the nationality of the claim, which is challenged, the Commission refers to the principles expounded in paragraph 3 of its opinion and decision rendered in the case of William A. Parker on March 31, 1926. On the record as presented the Commission decides that the claimants were by birth, and have since remained, American nationals.

3. As to lack of diligence, or lack of intelligent investigation, on the part of the Mexican authorities, after the killing of Paul Neer had been brought to their notice, it would seem that in the early morning after the tragedy these authorities might have acted in a more vigorous and effective way than they did, and moreover, that both the special agent of the Attorney General of Durango (in his letter of November 24, 1924), and the Governor of that State, who proposed the removal of the Judge of Guanaceví, have shared this opinion. The Commission is mindful that the task of the local Mexican authorities was hampered by the fact that the only eyewitness of the murder was unable to furnish them any helpful information. There might have been reason for the higher authorities of the State to intervene in the matter, as they apparently did. But in the view of the Commission there is a long way between holding that a more active and more efficient course of procedure might have been pursued, on the one hand, and holding that this record presents such lack of diligence and of intelligent investigation as constitutes an international delinquency, on the other hand.

4. The Commission recognizes the difficulty of devising a general formula for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty. In 1910 John Bassett Moore observed that he did "not consider it to be practicable to lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined" (*American Journal of International Law*, 1910, p. 787), and in 1923 De Lapradelle and Politis stated that the evasive and complex character (*le caractère fuyant et complexe*) of a denial of justice seems to defy any definition (*Recueil des Arbitrages Internationaux*, II, 1923, p. 280). It is immaterial whether the expression "denial of justice" be taken in that broad sense in which it applies to acts of executive and legislative authorities as well as to acts of the courts, or whether it be used in a narrow sense which confines it to acts of judicial authorities only; for in the latter case a reasoning, identical to that which—under the name of "denial of justice"—applies to acts of the judiciary, will apply—be it under a different name—to unwarranted acts of executive and legislative authorities. Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an

insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.

5 It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities at Guanaceví might have been more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task. No attempt is made to establish the second point. The first point is negated by the full record of police and judicial authorities produced by the Mexican Agent, though the Commission feels bound to state once more that in its opinion better methods might have been used. From this record it appears that the local authorities, on the very night of the tragedy, November 16, went to the spot where the killing took place and examined the corpse; that on November 17 the Judge proceeded to the examination of some witnesses, among them Mrs. Neer; that investigations were continued for several days; that arrests were made of persons suspected; and that they were subsequently released for want of evidence. The American Agency in rebuttal offers nothing but affidavits stating individual impressions or suppositions. In the light of the entire record in this case the Commission is not prepared to hold that the Mexican authorities have shown such lack of diligence or such lack of intelligent investigation in apprehending and punishing the culprits as would render Mexico liable before this Commission.

#### *Decision*

6. The Commission accordingly decides that the claim of the United States is disallowed.

#### *Separate opinion*

While concurring in the decision disallowing this claim, I find myself unable to concur fully in the statement of reasons upon which the other two members of the Commission think the award should be grounded. Because of that fact I deem it to be advisable, having in mind particularly the importance of the rules and principles of law involved in the case, to state my own views somewhat in detail.

This claim is presented by the United States against the United Mexican States in behalf of L. Fay H. Neer, widow, and Pauline E. Neer, daughter, of Paul Neer, a native American citizen, who was killed in the vicinity of the village of Guanaceví, State of Durango, Mexico, on November 16, 1924. The claim is grounded on an assertion of a denial of justice growing out of the failure of Mexican authorities to take adequate measures to apprehend and punish the persons who killed Neer. An indemnity in the sum of \$100,000.00 is asked in behalf of the claimants as heirs of the deceased.

There is no dispute regarding the material facts in relation to the killing of Neer in so far as they are disclosed by evidence. Neer, at the time of his death, was employed as superintendent of a mine at Guanaceví. At about eight o'clock in the evening of the day on which he was killed, he and his wife were proceeding on horseback from Guanaceví to their home about three miles distant from the village. When they had gone approximately a third of the distance they were stopped by a number of men who engaged Neer in conversation, which Mrs. Neer did not understand. In the midst of this conversation Neer was shot and killed. An examination of the corpse revealed that three bullets had penetrated his body. Mrs. Neer was able to furnish but very little information of value in identifying the men by whom her husband was accosted.

Some question is raised in the Answer of the United Mexican States with respect to the right of the United States to maintain the claim in behalf of the claimants. However, it is merely stated in the Answer that "the American nationality of the claimants and of the deceased Paul Neer is not duly proved in the Memorial", and in the light of what I consider to be entirely convincing evidence produced on this point I have no doubt as to the right of the United States to prefer this claim in behalf of the claimants as American heirs of a deceased American citizen.

Among the annexes accompanying the Memorial of the United States are certain affidavits. Mrs. Neer, in an affidavit made by her, states that "the Mexican Government did not make an adequate or thorough investigation of the facts connected with the murder of said Paul Neer and failed and neglected to take any adequate measures to apprehend and punish the murderers of said Paul Neer" (pp. 23-24). Herman Dauth, a resident of Guanaceví at the time of Neer's death, states in an affidavit that "to his personal knowledge no effort was made by the local authorities to apprehend the murderers and assailants, either the day following the murder or the day thereafter, but that on the third day Indian trailers were sent to the scene of the murder and discovered the exploded shells behind the stone walls". The affiant further expresses the belief that had prompt and proper methods been employed by the local authorities, the identity of the murderers of the said Paul Neer could have been ascertained (p. 27). Another affiant, John N. Brooks, Jr., an employee in general charge of the Guanaceví Unit of the *Cia. Minera de Penoles, S.A.*, situated near Guanaceví, swears that "some inquiry and search was made by the authorities of the State of Durango to ascertain who were the murderers of said Paul Neer, but to his knowledge no reward was ever offered for their apprehension and no special pains or care were taken by the authorities to apprehend and punish the murderers" (p. 29).

To refute the charge that Mexican authorities failed to take proper measures to apprehend and bring to justice the persons who killed Neer, the Mexican Government filed with its Answer a record of proceedings instituted and carried on before the Judge of First Instance of the Judicial District of Guanaceví. From this record it appears that the Judge, on November 17, the day following the killing of Neer, ordered an investigation; that on the same day members of the Court went to the place where the killing took place; that they examined the corpse which had been removed to a near-by residence, and that they then proceeded to the examination of witnesses, including Mrs. Neer. It further appears that the examination of witnesses was continued for several days; that arrests were made of certain persons suspected of the killing of Neer;

and that they were subsequently released for want of evidence implicating them in the deed.

The Agent of Mexico, in his argument before the Commission, emphasized that the Mexican authorities had complied with the forms of Mexican law in the investigation of the killing of Neer, and he asserted that the efficacy of the law had been proved in the light of experience.

The sovereign rights of a nation with regard to the enactment and execution of laws of this character within its jurisdiction is of course well understood. Vattel, in asserting a general principle in relation to these rights, adds some observations as to the respect that should be accorded to the measures employed by nations in the exercise of such rights. He says:

"The sovereignty united to the domain establishes the jurisdiction of the nation in her territories, or the country that belongs to her. It is her province, or that of her sovereign, to exercise justice in all the places under her jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country.

"Other nations ought to respect this right. And, as the administration of justice necessarily requires that every definitive sentence, regularly pronounced, be esteemed just, and executed as such—when once a cause in which foreigners are interested has been decided in form, the sovereign of the defendants can not hear their complaints. To undertake to examine the justice of a definitive sentence is an attack on the jurisdiction of him who has passed it. The prince, therefore, ought not to interfere in the causes of his subjects in foreign countries, and grant them his protection, excepting in cases where justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or, finally, an odious distinction made, to the prejudice of his subjects, or of foreigners in general." *Law of Nations*. (Chitty's edit. 1869, Book II, pp. 165-166.)

Although there is this clear recognition in international law of the scope of sovereign rights relating to matters that are subject of domestic regulation, it is also clear that the domestic law and the measures employed to execute it must conform to the requirements of the supreme law of members of the family of nations which is international law, and that any failure to meet those requirements is a failure to perform a legal duty, and as such an international delinquency. Hence a strict conformity by authorities of a government with its domestic law is not necessarily conclusive evidence of the observance of legal duties imposed by international law, although it may be important evidence on that point.

The functions exercised by the Judge at Guanaceví in investigating the death of the American citizen, Neer, and in taking steps to apprehend the persons who shot him were evidently not judicial acts in the sense in which the term judicial is generally used. The duties the Judge discharged may be said to be in a measure those of a police magistrate. However, the precise character of acts of the Judge is not a material point. The claim preferred by the United States is predicated on a denial of justice. I think it is useful and proper to apply the term denial of justice in a broader sense than that of a designation solely of a wrongful act on the part of the judicial branch of the government. I consider that a denial of justice may, broadly speaking, be properly regarded as the general ground of diplomatic intervention. This view, which has often been expressed, was well stated in the opinion rendered by Sir Henry Strong and Mr. Don M. Dickinson in the so-called "El Triunfo" case in which it was said:

"It is not the denial of justice by the courts alone which may form the basis for reclamation against a nation, according to the rules of international law.

"'There can be no doubt'—says Halleck— 'that a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.'" Ralston, *International Arbitral Law and Procedure*, p. 51; *Foreign Relations of the United States*, 1902, p. 870.

The controversial questions that arise between nations from time to time with respect to complaints of denial of justice are numerous and varied. But it is probably not so very difficult to formulate a practicable and sound standard by which to test the propriety of intervention or the right of a nation to claim pecuniary reparation in any given case.

It may perhaps be said with a reasonable degree of precision that the propriety of governmental acts should be determined according to ordinary standards of civilization, even though standards differ considerably among members of the family of nations, equal under the law. And it seems to be possible to indicate with still further precision the broad, general ground upon which a demand for redress based on a denial of justice may be made by one nation upon another. It has been said that such a demand is justified when the treatment of an alien reveals an obvious error in the administration of justice, or fraud, or a clear outrage. The thought is expressed to some extent in an opinion given by Commissioner Bertinatti in the Medina case under the Convention of July 2, 1860, between Costa Rica and the United States in which it was said:

"It being against the independence as well as the dignity of a nation that a foreign government may interfere either with its legislation or the appointment of magistrates for the administration of justice, the consequence is that in the protection of its subjects residing abroad a government, *in all matters depending upon the judiciary power*, must confine itself to secure for them free access to the local tribunals, besides an *equality of treatment with the natives* according to the conventional law established by treaties.

"Only a formal denial of justice, the dishonesty or *prevarication* of a judge legally proved, 'the case of torture, the denial of the means of defense at the trial, or gross injustice, *in re minime dubia*', (see opinion of Phillimore in the controversy between the governments of Great Britain and Paraguay) may justify a government in extending further its protection." Moore, *International Arbitrations*, Vol. 3, p. 2317.

There may of course be honest differences of opinion with respect to the character of governmental acts, but it seems to be clear that an international tribunal is guided by a reasonably certain and useful standard if it adheres to the position that in any given case involving an allegation of a denial of justice it can award damages only on the basis of convincing evidence of a pronounced degree of improper governmental administration.

In the case before the Commission no charge is made of a failure of any duty by Mexican authorities to prevent the commission of an offense. Indemnity is claimed because of the alleged neglect of the authorities to take proper measures to apprehend and punish the persons who killed Neer. It has been repeatedly asserted by international tribunals that a failure of authorities to take adequate measures of this kind renders a nation liable to respond in damages. Thus, Mr. Findlay, in the opinion written by him in the case of Amelia de Brissot, under the Convention of December 5, 1885, between the United States and Venezuela, said:

"It would be wholly unwarranted, therefore, to hold Venezuela responsible for not anticipating and preventing an outbreak, of which the persons most interested in knowing and the very actors on the spot had no knowledge. A state, however, is liable for wrongs inflicted upon the citizens of another state in any case where the offender is permitted to go at large without being called to account or punished for his offense, or some honest endeavor made for his arrest and punishment." Moore, *International Arbitrations*, Vol. 3, p. 2969.

To the same effect Commissioner Little in the opinion written by him in that case said:

"Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not. Without entering upon a discussion of the investigation instituted and conducted by her, it seems there was fault in not causing the leaders, at least, of this lawless band to be arrested. It was notorious who they were. It does not seem that any attempt was made before any local authority to bring them or any of the band to justice. Had there been a well-directed effort of that kind, or had the government's investigation disclosed their innocence, and failed to discover those actually guilty, its responsibility would perhaps have ended, assuming the investigation, as I do, was a fair and just one." *Op. cit.*, p. 2968.

See also the Poggioli Case before the Italian-Venezuelan Commission of 1903, Ralston, *Report*, p. 847, 869; Bovallins and Hedlund Cases, *Ibid.*, p. 952; case of Ruden & Company under the Convention of July 12, 1863, between the United States and Peru, Moore, *International Arbitrations*, Vol. 2, p. 1653.

It was argued in behalf of the United States that there was an unwarranted delay in steps taken to apprehend the persons who killed Neer; that the proceedings of investigation were of such a public character as to put persons implicated in the crime on guard and to enable them to escape; that detectives might have been employed to apprehend the offenders. I am of the opinion that better methods might have been used by the Mexican authorities, and that the action taken by them may well be adversely criticized.

But in the light of the entire record in the case before us I am not prepared to decide that a charge of a denial of justice can be maintained against the Government of Mexico conformably to the principles which according to my views as above expressed should govern the action of the Commission.

I accordingly concur in the decision that the claim of the United States is disallowed.

Fred K. NIELSEN,  
*Commissioner.*

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JOHN B. OKIE (U.S.A.) *v.* UNITED MEXICAN STATES.

(October 26, 1926. Pages 80-82.)

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DAMAGES, PROOF OF. Evidence considered as to amount of damages allowable under decision previously rendered by tribunal and damages finally fixed and *allowed*.

(Text of decision omitted.)

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

(October 26, 1926. Pages 82-86.)

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OWNERSHIP OF CLAIM. Evidence as to ownership of claim *held* satisfactory. Claim *allowed*.

(Text of decision omitted.)

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WALTER H. FAULKNER (U.S.A.) *v.* UNITED MEXICAN STATES.

(November 2, 1926, *separate opinion by American Commissioner, November 2, 1926. Pages 86-96.*)

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DENIAL OF JUSTICE.—ILLEGAL IMPRISONMENT. An allegation that claimant was arrested without sufficient grounds, while it may involve an international delinquency, *held* to require more evidence than claimant's statement to establish it.

LACK OF NOTICE OF GROUNDS FOR ARREST. An allegation that claimant was imprisoned for four days without knowledge of the charge against him will, if proven, be given great weight by the tribunal. Such allegation *held* not established by the evidence.

LACK OF OPPORTUNITY TO COMMUNICATE WITH CONSUL. An allegation that claimant was imprisoned and denied right to communicate with his consul for several days will, if proven, be given great weight by the tribunal. Such allegation *held* not established by evidence.

CRUEL AND INHUMANE IMPRISONMENT.—INTERNATIONAL STANDARD. Evidence *held* to establish that claimant was imprisoned under sub-standard conditions.

MISTREATMENT DURING IMPRISONMENT. An allegation that claimant was transferred from one prison to another in a manner repugnant to his self-respect and was searched *held* not a basis of claim.

MEASURE OF DAMAGES, ILLEGAL IMPRISONMENT. Measure of damages in a claim involving illegal imprisonment set at \$150.00 per day.



*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 349; Annual Digest, 1925-1926, p. 294.

*Comments:* Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521.

1. It is alleged in the Memorial and other parts of the record presented by the American Government that Walter H. Faulkner, who was born and has ever remained an American national, lived in 1915 at San Antonio, Texas, U. S. A., his profession being an interpreter's; that in the fall of said year he visited Tampico, Tamaulipas, Mexico, and from there proceeded on a business trip to Veracruz, Veracruz, Mexico, where he arrived on September 25, 1915; that at the end of said month he was waiting there for the arrival of a steamer due on or about October 2, to take him back to Tampico; that in the afternoon of September 30, 1915, he was induced to visit a police office, was submitted there to a search of his pockets and clothes without being told the charge or suspicion against him; that he thereupon was confined until October 7 in a house of detention in the center of the town where conditions were extremely bad; that he did not discover until on or after October 4 the charge or suspicion against him to be that of having circulated counterfeit Carranza money; that from October 7 till October 11 he was confined in the Allende prison in the same city, where conditions were tolerable; and that on October 11 he was released, the Judge declaring that no sufficient evidence for the charge or suspicion against him was available. For the damages sustained in his honor, time lost, and well-being he claims \$50,000.

2. The claimant complains of seven acts on the part of Mexican authorities:

- a. He was arrested without any sufficient ground;
- b. He was not told the grounds of the charge or suspicion existing against him; a fact which prevented him from proving his innocence;
- c. He was placed in a house of detention where he suffered maltreatment;
- d. He was denied for several days communication either with the American consul or with friends;
- e. He was not heard or examined until after some one hundred and two hours;
- f. He was transferred from one prison to another in a way repugnant to his self-respect;
- g. While he was in detention his hotel valise was opened and searched.

3. The Commission holds that on the face of the record the allegations under f and g cannot in themselves furnish a separate basis for complaints. They are incidental to the treatment of detention and suspicion, and if consistent with Mexican law do not in themselves contain anything contrary to international rules or duties. It is neither sustained nor proven that the authorities in applying these measures to the claimant violated the Mexican law of procedure or any other Mexican statute.

4. The allegation of the claimant that he has been placed and kept from September 30 to October 7, 1915, in a house of intolerably bad conditions (allegation c) has been challenged by stating that it is supported only by affidavits of the claimant himself; that it is impossible for the Mexican Government to rebut it because of the destruction of the records in the de la Huerta insurrection of 1923-1924; and that therefore, in

accordance with decisions of former international tribunals, the Commission should not accept as sufficient evidence these statements of the claimant alone, made as late as 1925 or 1926. The Commission, however, sees that the claimant's recent affidavits are supported by the fact that on October 4 and 6, 1915 (prior, therefore, to October 7, 1915) he wrote letters of complaint to the American consul at Veracruz, and that nothing has been adduced to militate against the contention that the jail conditions he describes really existed in the down-town house of detention at Veracruz. The Commission holds the record convincingly establishes that the claimant has been in the said house of detention from a date some days prior to the date of his first letter to the American consul (October 4) up to October 7, the date on which he entered the Allende prison.

5. The allegation made by the claimant that he was arrested without any sufficient ground (allegation a) is most difficult to decide on the face of the record. The claimant states so, allowing for no other possible reasons of charge or suspicion against him than the fact that he came from Tampico where counterfeit Carranza money was being made and issued, and that an unnamed person might have declared that he had been seen circulating counterfeit money at El Paso, Texas. The Commission does not need any theory about presumption of lawfulness of governmental acts to hold, that in the matter of justification of an arrest the mere statement of the person who suffered the arrest can not be deemed sufficient. Furthermore, the explanation given for the circumstance that the Mexican Government can not submit to this Commission extracts from its police and judicial records in the case is a reasonable one (to wit, because of their destruction in 1923-1924). The record seems to indicate that, apart from one exception (the day of first examination), the Mexican rules of procedure have been followed; it at least does not show the contrary. The same Judge, who was so careful as to tell the claimant on Saturday, October 9, 1915, that on Tuesday, October 22, the legal period for his detention would elapse and who set him free on the preceding day about noon, mentions in his decree "the proceedings had up to this time"; it is difficult to assume this Judge to have been careful about periods and forms and careless as to the main point, the existence of any ground for the investigations. The fact that the period of detention elapsed on October 12 can not be interpreted as meaning that the period of three days, provided by article 132 of the Federal Code, had been calculated from either October 7 or 8, for then it would have ceased on October 10 or 11; but it might well mean that two procedures took place, one in a local court, and the other in a military court. The claimant himself states that on or about October 5 he was heard twice, even at so late an hour as eleven p. m., which would seem to show activity on the part of the local judicial authorities, and re-examined on or about October 6, and that in the Allende prison he was examined again on October 9. Where, in case the formalities of procedure had been evidently neglected, a presumption of lack of material grounds for the detention might have had probability, it would seem reasonable—once the record gives the impression that in the main the formalities of Mexican procedure have been complied with—to suppose their having been applied to some material basis for charge or suspicion, and not to proceedings without any foundation whatsoever as required both by the Code and by the Constitution. At any rate the record can not be said to contain convincing evidence as to absence of sufficient grounds for judicial

proceedings, as would be necessary for assuming an international delinquency. The fact that nothing appears about personal steps taken in Faulkner's interest by either the American consul or the acting special representative of the State Department at Veracruz, once they had been informed, can only strengthen the impression that there might have been some ground for charge or suspicion on the part of the Mexican authorities.

6. The allegation that the claimant was not allowed for four days to know the charge or suspicion sustained against him (allegation b) must, if proven, have great weight with this Commission. It is suggested by the two letters the claimant wrote from prison to the American consul, that he was given a first hearing and information only between October 4 and October 6; a fact which would have been illegal in the light of article 98, paragraph 2, of the said Federal Code in connection with article 20 of the Mexican Constitution of 1857. It is, however, of more importance to know, whether Faulkner at the time of his arrest understood or was told what was the charge or suspicion against him, such being a matter of prime importance for any person deprived of his liberty (allegation c). If the legal period for having a regular hearing of the person under detention had been transgressed, as seems to have been the case, such transgression in itself might have found some excuse in the turbulent and unsettled character of those times and in the press of work on the authorities, and can not be deemed to amount to an international delinquency; whereas there would be scarcely an excuse if, with respect to the fact of informing the claimant about the character of his case, he had been treated with undue and unnecessary harshness. Here again, however, it is doubtful whether this serious lack of duty on the part of the authorities may be inferred from the sole statement in the claimant's letter of October 4, 1915, and whether therefore there exists convincing evidence as to this point as well.

7. The allegation of the claimant (allegation d) that he was not allowed for several days to communicate with his consul would, if proven, also have weight with the Commission. The Commission holds that a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity. It is not clear, however, from the record when and how the liberty to communicate was given the claimant; his letter of October 4, 1915, to the consul appearing, from its wording, not to have been the first communication tendered.

8. The allegation of the claimant (paragraph 4, *supra*) that he was placed for several days in a house of detention where conditions were extremely bad (repulsive filth, human excrement, no provision for sanitation, insects, rats) might have been easily negated by showing that such conditions do not exist at Veracruz or did not exist there in the fall of 1915. Making allowance for some apparent exaggerations in the claimant's presentation of facts, there is for the Commission every reason to hold that the claimant has been in this house of detention for some five days under conditions that were, for an educated man, intolerable. Maltreatment, apart from the conditions of the house, not only is not proven, but the record seems to show the contrary.

9. The Commission, eliminating from the claimant's complaints everything which might be due to misinterpretation or misrepresentation on his part, and for which the declaration of the claimant alone can hardly be considered sufficient evidence, views the fact that, as the records stands, he must be taken to have been detained for several days in a house of

detention under intolerable circumstances of indignity and inconvenience, and that possibly the harshness of this situation has been increased by the silence of the authorities for some days on the motives for his detention. Even if all other complaints were unfounded or unproven or improbable, these complaints remain, corroborated as they are by letters written from the house of detention at a time where misrepresentation might have withheld from the claimant the American Consul's assistance, and written to an American consul by a man who himself had been an American Consul. These statements of 1915 can not be rebutted by presenting them either as mere suppositions on his part or as afterthought of some ten years later. It therefore has to be examined whether either this first fact alone or these two facts combined constitute an international delinquency on the part of Mexico.

10. As the Commission expounded in its opinion in the case of L. F. H. Neer, it holds that the test lies in the application of international standards. That Mexico, just as all other civilized nations, is aware of these standards is apparent from what the claimant states about the Allende prison; the reliability of his complaints about the down-town building is even rendered more probable by the quite different manner in which he expresses himself not only on the Allende prison, but even on the "better and more healthful compartment" he occupied in the down-town building during October 6 and 7 (or 5 and 6). The Commission holds that, even in case there might have been sufficient ground for the arrest, here at any rate was a treatment of apparent international insufficiency for which the record furnishes convincing evidence and for which Mexico is liable. Whether there was sufficient ground for the arrest remains entirely doubtful; but as there certainly is not convincing evidence to the contrary, Mexico can not be held liable for an international delinquency in that respect.

11. The determination of damages to be allowed in cases of this type is necessarily uncertain. In the *Topaze* case, the umpire held after due investigation (Ralston, *Venezuela Arbitrations of 1903*, p. 331) that a sum of \$100 per day (or: not exceeding \$100 a day) "seems to be the one most usually acceptable" and "is apparently the favored allowance by arbitrators". The Commission is willing to follow these precedents, but realizing how much the value of money has changed feels bound to increase them fifty per centum. Cases of allowing damages for illegal imprisonment are most similar to the present one, and in such cases tribunals often allowed a gross sum without interest. The Commission is prepared to follow this precedent too. Calculating the amount in the manner most favorable to the claimant who alleges to have been kept for seven days in the first house of detention, the Commission holds that, on the face of the record, full satisfaction is given him by allowing \$1,050 without interest.

#### *Decision*

12. On the above grounds, the Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America on behalf of Walter H. Faulkner \$1,050 (one thousand and fifty dollars), without interest.

#### *Separate opinion*

I concur in the award of an indemnity of \$1,050.00. However, I desire briefly to indicate my views with respect to legal contentions advanced by

each Agency in this case, and to point out that my acquiescence in an award providing indemnity merely for mistreatment in one of the jails in which Faulkner was imprisoned is due to uncertainties in the record which unfortunately have not been explained. I think the case presents a grievous injury to a respectable American citizen. The facts in the case are indicated and analyzed in the opinion signed by my associates.

The claim is based on charges of false arrest and detention and mistreatment of Faulkner, who was arrested and discharged without being brought to trial. Foreigners of course are in no manner exempt from the operation of criminal laws of the country of their sojourn. The acquittal of an alien after trial does not of itself justify a demand for indemnity. And the same is true respecting the release of an alien without subjecting him to trial. But international law requires that, in connection with the execution of penal laws, an alien shall be accorded certain rights such as are guaranteed under the laws of Mexico and under the laws of civilized countries generally both to aliens and nationals. There must be some ground for an arrest, or as said in terms of domestic law, there must be probable cause; a person is entitled to be informed of the charge against him; and he must be given opportunity to defend himself. Apart from questions respecting the observance of such rights, indemnities have frequently been awarded by international tribunals in cases in which aliens have been grossly mistreated during imprisonment. It is alleged in the Memorial of the United States that none of these rights was accorded to Faulkner, and that he was illtreated while under confinement.

These charges are denied in the Answer and in the Brief filed by the Mexican Government. In the oral and in the written argument it was contended that the claimant was guilty of laches in not bringing his complaint to the attention of the Mexican Government, and contentions were advanced with respect to the burden of proof resting on the claimant to establish his case, and the insufficiency of the evidence produced to substantiate the charges made against Mexican authorities.

While the arguments with respect to the insufficiency of proof to establish charges underlying the claim were very forcefully presented, it seems to me that in a number of respects the manner in which the claim was defended revealed the weakness of the defense. The proposition advanced in the Mexican Government's Brief that "Ordinarily it is incumbent upon the party alleging a fact to introduce evidence to establish it" may readily be conceded. And it is undoubtedly true that, whenever it is sought to ground important conclusions on an affidavit filed by a person in whose behalf claim is made, it is desirable that his testimony be confirmed by the testimony of others. But it seems to me that the contentions advanced by the Mexican Government go too far in an attempt to discredit the effect of Faulkner's affidavit, and in the argument with respect to burden of proof, and also in the reliance which is placed upon a rule of municipal law and of international law relative to a presumption of the propriety of the acts of officials.

While Faulkner's affidavit was generally rejected as proof of things of which Faulkner complains, it was repeatedly cited as proof of things which it was deemed to be proper to advance in defense of the claim. It was said that the claimant has done nothing to establish that he was imprisoned in what is called in the record the "downtown jail", and such imprisonment is specifically denied, although there are several communications accompanying the Memorial which show that as early as October 4, 1915, Faulkner had been in communication with the American Consul at Veracruz com-

plaining bitterly against his imprisonment. Moreover, with a dispatch of October 7, 1915, to the Department of State, the American Consul at Veracruz transmitted copies of communications dated October 5 and 7, 1915, respectively, to the American representative at Mexico City by which it is shown that he requested that representations regarding Faulkner's imprisonment be made to the Mexican authorities. The supposition can not be indulged in that Faulkner, prior to the date on which he was placed in the Allende jail, evidently October 7, was complaining about being in what he calls a "hell hole", or that the American Consul was addressing the American representative in Mexico City with respect to the imprisonment of Faulkner when there had been no imprisonment.

With regard to the value of Faulkner's testimony I may observe that it seems to me that his affidavit shows an intent to furnish a fair and accurate statement of facts. For example, while considering himself arbitrarily imprisoned without the slightest cause, throughout the period of his detention in two different jails, he gives details indicating that his condition was somewhat alleviated when he was placed in the Allende jail.

Counsel for Mexico, while asserting the insufficiency of evidence to meet the burden of proof which he insisted rested upon the claimant, referred to the principle stated by the Commission in its opinion in the claim of William A. Parker (Docket No. 127), in which the Commission asserted it to be the duty of the two Agencies to search out and to present to the Commission all facts throwing any light on the merits of a claim.

But little adjective law has been developed in international practice. The principle just mentioned is found in the Hague Convention of 1907 for the pacific settlement of international disputes to which a large number of nations including Mexico and the United States are parties. Article LXXV of that Convention reads as follows:

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

To be sure, no provisions of the Hague Convention of 1907 are incorporated directly or by reference into the Claims Convention of September 8, 1923. But this Commission has given effect to the principle underlying Article LXXV and both Agencies have expressed their intention to observe it. In the light of that principle it seems to me that clearly the charge of mistreatment of Faulkner in the so-called "downtown jail" can not be said to have failed because of lack of substantiation in that it is supported merely by Faulkner's affidavit. Had it been desired to discredit the affidavit on this point it would doubtless have been possible to produce for that purpose evidence describing the condition of the jail.

With respect to the charge of absence of probable cause for the arrest of Faulkner, it was contended in behalf of the Mexican Government that there was no supporting evidence other than that of Faulkner's affidavit. It was said that records were destroyed, so that the Mexican Government could not furnish evidence with regard to the reasons for Faulkner's arrest. Even though written records have been destroyed, there may be persons connected with the arrest who might testify with regard to orders given or orders received with reference to Faulkner's arrest and the reasons given at the time of the arrest for that action. The steps taken by the Mexican authorities to obtain information from persons having knowledge of the arrest are discussed in some detail in the Brief filed by the United States. However, since I concur in an award of indemnity for mistreatment only, I will not discuss this point.

I desire briefly to comment upon the argument made in the Mexican Government's Brief and in the argument of counsel with respect to laches with which it was contended Faulkner was chargeable in not bringing his complaint to the attention of the Mexican Government. I am of the opinion that it is a general practice among nations to receive complaints or claims, involving what is described in terms of domestic law as tortious acts on the part of authorities, through diplomatic channels, and not directly from aliens who may consider themselves aggrieved by such acts. However, touching the contention that Faulkner was guilty of laches, so that the Mexican Government was not put on notice with regard to his complaint, it may be observed that he complained very promptly and emphatically to an American Consular officer, who in turn communicated with an American representative in Mexico City, who undoubtedly brought the matter to the attention of Mexican authorities there. Furthermore, I am of the opinion that in an international arbitration the principle of laches can be invoked for whatever its legal effect may be only with respect to the rights of nations parties to the arbitration. International tribunals have in some instances declared that one government should not call upon another government to respond in damages when such action, after a long lapse of time, clearly puts the respondent government in an unfair position in making its defense, particularly in the matter of collecting evidence, and raises a presumption of the nonexistence of a just claim which would have been presented had it ever existed. The instant claim is not a proceeding instituted by Faulkner against the Mexican Government, and the merits of the case must be determined not in accordance with some law defining Faulkner's rights against the Government of Mexico, but conformably to the relative rights of the two nations under international law. In a case coming before a commission charged with the judicial determination of cases arising since the year 1868, for which no provision has been made by the two Governments since that date, a case in which the underlying grievances were, I feel certain, brought to the attention of Mexican authorities in 1915, the right of the United States to maintain the claim can not, in my opinion, be defeated or in any way affected by a plea of laches.

Fred K. NIELSEN,  
*Commissioner.*

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LEONARD E. ADLER (U.S.A.) *v.* UNITED MEXICAN STATES.

(*November 2, 1926, separate opinion by American Commissioner, November 2, 1926. Pages 97-100.*)

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ILLEGAL IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT.—INABILITY TO OBTAIN PROPER MEDICAL CARE. Claimant alleged that ship on which he was wireless operator was unlawfully detained in Mexican port and claimant required to stay on board vessel. Claimant was permitted to leave vessel but was arrested and held during day. Claimant alleged that during period of such imprisonment he was prevented from getting proper medical care. *Held*, evidence does not establish claim for illegal arrest, detention and maltreatment.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 354; Annual Digest, 1925-1926, p. 296.

1. Claim is made by the United States of America in this case for indemnity in the sum of \$15,000.00 in favor of Leonard E. Adler, an American citizen, who, it is alleged, was wrongfully and arbitrarily arrested by Mexican authorities, held under imprisonment, and during the period of detention prevented from obtaining much needed medical assistance. The occurrences of which account must be taken in passing upon the merits of this claim are not all clearly explained either by the evidence filed with the Memorial or by that accompanying the Answer. The most important allegations in the Memorial are grounded almost solely on an affidavit made by Adler (Annex 4), the substance of which is as follows:

2. In 1917 Adler was in the employ of the Marconi Wireless Telegraph Company of America as a radio operator and was assigned for service on the Mexican steamship *Mexico*, owned by a Mexican company, which had a contract with the Marconi Company for the rental of radio apparatus installed on the vessel. When the ship arrived at Progreso, Yucatan, in the early part of December, 1917, it was boarded and taken possession of by Mexican soldiers under the command of a Mexican officer, who informed the Captain of the *Mexico* that no one would be permitted to leave the vessel. The officer stated that the vessel had been commandeered by the Mexican Government. By order of the officer guards were placed at the ship's gangway.

3. On December 30, 1917, the commander of the Mexican soldiers entered the radio cabin of the vessel and directed the transmission of a message. Adler informed the officer that the message could not be sent except upon the payment of the cost of transmission the amount of which he made known to the officer. The officer thereupon refused to pay the regular rates and ordered Adler and another operator on the vessel, Lloyd Brasher, to their cabin and placed a guard outside of the door. About January 5, 1918, the captain of the vessel received orders to proceed to Veracruz, Veracruz, Mexico, with the vessel, which arrived at that place about January 7, 1918. Some time after arriving at Veracruz Adler and Brasher were permitted to go ashore. They visited the American Consul with a view to obtaining information with respect to the detention of the ship. About half an hour after leaving the Consul's office they were arrested and brought to a police station near the wharf. They were questioned and searched, and after several hours of waiting in the station personal possessions which had been taken from them were returned, and the men were taken aboard the *Mexico*.

4. On or about January 20, 1918, Adler became afflicted with a high fever. Several abscesses appeared on his body and his right limb became swollen and gave him much pain. With Brasher he again went ashore with the intention of seeing the American Consul. On the way to the Consulate the two were arrested and once more brought to the police station, where they were questioned and searched. A Mexican soldier told them that they were suspected of being spies. They were kept at the station throughout the day without food and water. A police attaché inquired of Adler what was the matter with him, and Adler spoke of the fever and the abscesses from which he was suffering. The police attaché rendered no assistance. In the evening of January 20, possessions of the two detained men which had been taken from them were returned to them, and they were again brought aboard the vessel.



5. In March, 1918, the guard on the vessel was reduced, and the ship was ordered to proceed to Progreso. On arrival at that place Adler consulted Dr. H. E. Gimler, Public Health surgeon in the service of the United States. Dr. Gimler examined Adler and stated that he was suffering from blood poisoning and advised him to return to a hospital in New Orleans, as there were no facilities for treatment in Progreso.

6. On March 25, 1918, the vessel was released by the Mexican Government and sailed for New Orleans, where it arrived on March 28, 1918. There Adler was placed in a hospital and remained a patient for the greater part of seven months.

7. The detention of the vessel under guard of Mexican soldiers for the period stated in Adler's affidavit is corroborated by affidavits made by Brasher. (Annexes 5 and 6 to the Memorial.)

8. The record is not clear with respect to the precise character of the detention of the steamship *Mexico*. The Commission of course can not question the sovereign control of the Mexican Government over a Mexican vessel in Mexican ports. The evidence before us does not warrant a conclusion that the detention of the vessel was the result of unauthorized acts of Mexican military authorities for whose arbitrary conduct, resulting in inconvenience and severe physical injuries to Adler, the Mexican Government under international law is responsible. The question for determination therefore is, whether, following the detention of the ship, Mexican authorities forcibly compelled Adler to remain upon it and prevented him from obtaining medical treatment. With respect to this particular point the only evidence before the Commission is the affidavit of Adler. That evidence is not discredited by the conclusion we feel constrained to reach that Adler's affidavit does not furnish evidence to support a charge of false imprisonment and an aggravated degree of ill treatment.

9. It is stated in the affidavit that, on the arrival of the *Mexico* at Progreso on December 29, 1917, Mexican soldiers boarded the vessel and guarded the gangway, and that the captain of the vessel was told that no one would be permitted to leave it. A temporary measure of this kind could not in itself be the basis of a charge of wrongful imprisonment. The affidavit also contains allegations with respect to the detention of Adler and Brasher by police both at Progreso and at Veracruz and the return of the two men to the ship under escort of the police. It also appears from Adler's affidavit and from the affidavit of Brasher that the vessel proceeded to Veracruz under guard. Whatever action the guards may have taken to detain persons on board, it seems to be certain that the main purpose of the guard was to control the movements of the vessel. In the absence of positive evidence to the effect that, during the course of the detention of the ship, Adler made known to the Mexican authorities a desire to leave the vessel and to seek proper medical treatment where it might be obtained, and that he was refused permission to do so, we do not feel justified in declaring that he was clearly the victim of unwarranted arrest and detention and maltreatment for which under international law damages should be assessed against Mexico. With respect to this uncertainty in the record and with respect to whatever annoyance and inconvenience Adler may have been subjected to by being detained on shore, it may be observed that the Commission has heretofore broadly indicated a standard by which it considers it must be guided in making judicial pronouncements with respect to alleged wrongful acts of authorities directed against private persons. The Commission has expressed the view

that it can not render an award for pecuniary indemnity in any given case in the absence of convincing evidence of a pronounced degree of improper governmental administration.

*Decision*

10. In the absence of evidence of this kind in the instant case, the Commission decides that the claim must be dismissed.

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HARRY ROBERTS (U.S.A.) *v.* UNITED MEXICAN STATES.

(November 2, 1926. Pages 100-106.)

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ILLEGAL ARREST. Evidence *held* not to establish that claimant was arrested without probable grounds.

DILATORY PROSECUTION. When claimant was imprisoned for several months without trial in contravention of Mexican law, *held*, an indemnity is due.

CRUEL AND INHUMANE IMPRISONMENT. Evidence *held* to establish that claimant was imprisoned under sub-standard conditions.

INTERNATIONAL STANDARD.—EQUALITY OF TREATMENT OF ALIENS AND NATIONALS. Equality of treatment of aliens and nationals is not the test of international responsibility when aliens are not treated in accordance with the ordinary standards of civilization.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 357; Annual Digest, 1925-1926, p. 227; British Yearbook, Vol. 8, 1927, p. 184.

*Comments:* Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521.

1. This claim is presented by the United States of America in behalf of Harry Roberts, an American citizen who, it is alleged in the Memorial, was arbitrarily and illegally arrested by Mexican authorities, who held him prisoner for a long time in contravention of Mexican law and subjected him to cruel and inhumane treatment throughout the entire period of confinement.

2. From the Memorial filed by the Government of the United States and accompanying documents, the allegations upon which the claim is based are briefly stated as follows: Harry Roberts, together with a number of other persons, was arrested by Mexican Federal troops on May 12, 1922, in the vicinity of Ocampo, Tamaulipas, Mexico, charged with having taken part in an assault on the house of E. F. Watts, near Ebano, San Luis Potosi, Mexico, on the night of May 5, 1922. The claimant was taken prisoner and brought to Tampico, whence he was taken to Ciudad Valles, San Luis Potosi, where he was held under detention until he was placed at liberty on December 16, 1923, a period of nearly nineteen months. It is alleged that there were undue delays in the prosecution of the trial of the accused which was not instituted within one year from the time of his arrest, as required by

the Constitution of Mexico. These delays were brought to the notice of the Government of Mexico, but no corrective measures were taken. During the entire period of imprisonment he was subjected to rude and cruel treatment from which he suffered great physical pain and mental anguish.

3. The United States asks that an indemnity be paid by the Government of Mexico in the sum of \$10,000.00 for the wrongful treatment of the accused. It is stated in the Memorial that Roberts earned prior to the time of his arrest \$350.00 a month; that he would have earned \$6,650.00 during the nineteen months that he was under arrest; and that he spent \$1,000.00 in fees paid to a lawyer resident in the United States to assist in obtaining his release. A total indemnity is asked in the sum of \$17,650.00 together with a proper allowance of interest.

4. The evidence presented by the Agency of the United States consists of affidavits made by Roberts and by other persons; correspondence which Roberts and fellow prisoners exchanged with the American Consul at Tampico, and correspondence exchanged by the Consul with Mexican authorities and with the Department of State. The Mexican Government on its part presented records of judicial proceedings, including proceedings instituted against Roberts and others.

5. It does not appear from this evidence that the Mexican authorities had not serious grounds for apprehending Roberts and his companions. The record of the proceedings instituted by the Mexican authorities shows that at about twelve o'clock on the night of May 5, 1922, the Chief of the Detachment in the Ebano Station, San Luis Potosí, received a telephone message from Mr. Eduardo F. Watts to the effect that, at that moment, there had appeared in front of his house, which is situated on the limits of a small village, a band of outlaws consisting of several men, mounted and armed; that the officer immediately left with the men under his orders to render assistance; that, upon arriving at the house he discovered several persons in hiding; that, having seen flashes of light and heard discharges from firearms, he ordered his men to return fire, whereupon the persons lying in ambush fled and succeeded in escaping due to their being mounted; that he picked up a dead man named Monte Michaels, who was suspected of being implicated in the blowing up of a train belonging to a petroleum company; that the officer also picked up a rifle having a burnt cartridge and an unused one in the breech, a saddled mule, and other things; and that Watts furnished the information that the fugitives were three Americans. It further appears that an examination of Watts' house disclosed the impacts of several shots fired at the premises; that on May 12th, Harry Roberts and two of his companions were apprehended in the neighborhood of Chamal, where they had fled and where forces had been sent to capture them; that upon their being arrested, their preliminary statements were taken, in which they did not deny that they were the persons who were surprised by the detachment from Ebano on the night of May 5th in front of Watts' house, although they asserted that they had not gone there with criminal purposes. It is further shown by the official Mexican records that on May 15th, the prisoners were placed at the disposition of the Agent of the Federal District Attorney, who immediately ordered a preliminary investigation; that from this time until the date when Roberts was placed at liberty judicial proceedings continued, first before the First District Court of Tampico, Tamaulipas, and afterwards before the Judge of First Instance of the District of Valles, San Luis Potosí; and that in the record of the proceedings instituted before those officials there are found statements of the accused and testimony of other persons

indicating that there were grounds for suspecting that Harry Roberts and his companions had committed a crime—grounds sufficient to warrant the authorities to proceed with the arrest and trial of the accused.

6. The Commission is not called upon to reach a conclusion whether Roberts committed the crime with which he was charged. The determination of that question rested with the Mexican judiciary, and it is distinct from the question whether the Mexican authorities had just cause to arrest Roberts and to bring him to trial. Aliens of course are obliged to submit to proceedings properly instituted against them in conformity with local laws. In the light of the evidence presented in the case the Commission is of the opinion that the Mexican authorities had ample grounds to suspect that Harry Roberts had committed a crime and to proceed against him as they did. The Commission therefore holds that the claim is not substantiated with respect to the charge of illegal arrest.

7. In order to pass upon the complaint with reference to an excessive period of imprisonment, it is necessary to consider whether the proceedings instituted against Roberts while he was incarcerated exceeded reasonable limits within which an alien charged with crime may be held in custody pending the investigation of the charge against him. Clearly there is no definite standard prescribed by international law by which such limits may be fixed. Doubtless an examination of local laws fixing a maximum length of time within which a person charged with crime may be held without being brought to trial may be useful in determining whether detention has been unreasonable in a given case. The Mexican Constitution of 1917, provides by its Article 20, section 8, that a person accused of crime "must be judged within four months if he is accused of a crime the maximum penalty for which may not exceed two years' imprisonment, and within one year if the maximum penalty is greater." From the judicial records presented by the Mexican Agent it clearly appears that there was a failure of compliance with this constitutional provision, since the proceedings were instituted on May 17, 1922, and that Roberts had not been brought to trial on December 16, 1923, the date when he was released. It was contended by the Mexican Agency that the delay was due to the fact that the accused repeatedly refused to name counsel to defend him, and that as a result of such refusal on his part proceedings were to his advantage suspended in order that he might obtain satisfactory counsel to defend him. We do not consider that this contention is sound. There is evidence in the record that Roberts constantly requested the American Consul at Tampico to take steps to expedite the trial. Several communications were addressed by American diplomatic and consular officers in Mexico to Mexican authorities with a view to hastening the trial. It was the duty of the Mexican Judge under Article 20, section 9, of the Mexican Constitution to appoint counsel to act for Roberts from the time of the institution of the proceedings against him. The Commission is of the opinion that preliminary proceedings could have been completed before the lapse of a year after the arrest of Roberts. Even though it may have been necessary to make use of rogatory letters to obtain the testimony of witnesses in different localities, it would seem that that could have been accomplished at least within six or seven months from the time of the arrest. In any event, it is evident in the light of provisions of Mexican law that Roberts was unlawfully held a prisoner without trial for at least seven months. With respect to this point of unreasonably long detention without trial, the Mexican Agency contended that Roberts was undoubtedly

guilty of the crime for which he was arrested; that therefore had he been tried he would have been sentenced to serve a term of imprisonment of more than nineteen months; and that, since, under Mexican law, the period of nineteen months would have been taken into account in fixing his sentence of imprisonment, it can not properly be considered that he was illegally detained for an unreasonable period of time. The Commission must reject this contention, since the Commission is not called upon to pass upon the guilt or innocence of Roberts but to determine whether the detention of the accused was of such an unreasonable duration as to warrant an award of indemnity under the principles of international law. Having in mind particularly that Roberts was held for several months without trial in contravention of Mexican law, the Commission holds that an indemnity is due on the ground of unreasonably long detention.

8. With respect to the charge of ill-treatment of Roberts, it appears from evidence submitted by the American Agency that the jail in which he was kept was a room thirty-five feet long and twenty feet wide with stone walls, earthen floor, straw roof, a single window, a single door and no sanitary accommodations, all the prisoners depositing their excrement in a barrel kept in a corner of the room; that thirty or forty men were at times thrown together in this single room; that the prisoners were given no facilities to clean themselves; that the room contained no furniture except that which the prisoners were able to obtain by their own means; that they were afforded no opportunity to take physical exercise; and that the food given them was scarce, unclean, and of the coarsest kind. The Mexican Agency did not present evidence disproving that such conditions existed in the jail. It was stated by the Agency that Roberts was accorded the same treatment as that given to all other persons, and with respect to the food Roberts received, it was observed in the Answer that he was given "the food that was believed necessary, and within the means of the municipality." All of the details given by Roberts in testimony which accompanies the Memorial with respect to the conditions of the jail are corroborated by a statement of the American Consul at Tampico who visited the jail. Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment.

9. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of San Luis Potosí may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims can be predicated on such acts.

10. As has been stated, the Commission holds that damages may be assessed on two of the grounds asserted in the American Memorial, namely, (1) excessively long imprisonment—with which the Mexican Government is clearly chargeable for a period of seven months, and (2) cruel and inhumane treatment suffered by Roberts in jail during nineteen months. After careful consideration of the facts of the case and of similar cases decided by international tribunals, the Commission is of the opinion that a total sum of \$8,000.00 is a proper indemnity to be paid in satisfaction of this claim.

*Decision*

11. For the reasons stated above the Commission decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of Harry Roberts \$8,000.00 (eight thousand dollars) without interest.

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J. AND O. L. B. NASON AND AUBREY WILLIAMS (U.S.A.) *v.*  
UNITED MEXICAN STATES.

(November 2, 1926. Pages 106-108.)

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WRONGFUL DEATH.—RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—

DIRECT RESPONSIBILITY. Evidence *held* not to establish that decedent was wrongfully killed by Mexican customs guards or that the respondent Government condoned wrongful acts on the part of such guards.

1. The same occurrences are the basis of these two claims, and the two Agencies expressed their intention to rely in their arguments on substantially the same evidence which was not filed with both records. The Commission therefore ordered the consolidation of the claims on October 29, 1926.

2. One of these claims is presented by the United States against the United Mexican States in behalf of James Nason and Ophelia Le Barre Nason, father and mother of Hilton Nason, who was killed on December 13, 1922, on the Mexican side of the Rio Grande near Boquillas, Coahuila. The other claim is made in behalf of Aubrey Williams, who was wounded at the same time and place. It is alleged in the Memorials that the two men went on a hunting expedition on the Mexican side of the river; that they obtained some kind of permit to carry arms, written with pencil by an armed Mexican river guard (or customs guard) who signed himself Antonio Flores; that about sunset they were halted by Flores and two or more other armed men and were ordered to throw up their hands; and that thereupon Nason was shot and Williams wounded. Claim is made in the Nason case for indemnity in the sum of \$25,000 and in the Williams case in the sum of \$15,000.

3. With respect to questions of nationality raised by the Mexican Government in each of these cases, the Commission calls attention to the principles asserted in paragraph 3 of its opinion rendered in the case of William A. Parker on March 31, 1926. On the record as presented the Commission holds that it is established that the claimants were by birth, and have since remained, American nationals.

4. From evidence in the somewhat meager records in these cases it appears that the two Americans crossed over to the Mexican side of the river to hunt; that they had no legal permit to do so; that they met some Mexicans, two of them being river guards; and that there was a quarrel and a fight in which Flores and Nason were killed and Williams slightly wounded.

5. From the Memorial filed in the Nason case it would appear that the claim is based on the theory that the Mexican Government is responsible for the acts of some official or officials who wrongfully killed Hilton Nason. But there is no evidence other than the affidavit of Williams that he and his

companion obtained some kind of an informal permit; there is no other evidence that Nason was wrongfully killed; and some evidence produced by the American Agent tended strongly to show that Nason was not wrongfully and unlawfully killed. The Commission therefore must hold that the claim has not been substantiated.

6. In the Memorial filed in the Williams case it is alleged that Williams was killed by "an armed Mexican customs guard in the service of the Government of Mexico" and that "the said Government of Mexico did not punish him for the wrongful acts committed by him as set forth herein, but instead absolved him from all responsibility and condoned the wrongful acts committed by him." The record before the Commission with respect to allegations of wrongful shooting of Williams is the same as that with respect to the unsubstantiated allegations of wrongful killing of Nason. And no evidence was presented by the United States to support a charge that the Mexican Government condoned wrongful acts on the part of the customs guards. The Commission must therefore also hold that no valid claim has been established in this case.

#### *Decision*

7. The Commission accordingly decides that these consolidated claims must be disallowed.

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LAURA M. B. JANES *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

*(November 16, 1925, separate statement regarding damages by  
American Commissioner, November 16, 1926. Pages 108-131.)*

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FAILURE TO APPREHEND OR PUNISH. Evidence *held* to establish lack of diligence of Mexican authorities in apprehending killer of American citizen. Claim *allowed*.

DIRECT AND INDIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—MEASURE OF DAMAGES. Measure of damages in cases of denial of justice based on condonation theory rejected and damages instead allowed limited to such as follow from respondent Government's failure to apprehend and punish, including damages for material losses and for personal indignity and grief.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 362; Annual Digest, 1925-1926, pp. 218, 256; British Yearbook, Vol. 8, 1927, p. 184.

*Comments:* Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516; J. L. Brierly, "The Theory of Implied State Complicity in International Claims," British Yearbook, Vol. 9, 1928, p. 42; Clyde Eagleton, "Measure of Damages in International Law," Yale L. Jour., Vol. 39, 1929-1930, p. 52 at 55 *et seq.*; Joseph Conrad Fehr, "International Law as applied by U.S.—Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312 at 313; Charles Cheney Hyde, "Concerning Damages Arising from Neglect to Prosecute," Am. J. Int. Law, Vol. 22, 1928, p. 140; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 230.

1. Claim is made by the United States of America in this case for losses and damages amounting to \$25,000.00, which it is alleged in the Memorial were "suffered on account of the murder, on or about July 10, 1918, at a mine near El Tigre, Sonora, Mexico, of Byron Everett Janes," an American citizen. The claim is presented, as stated in the Memorial, "on behalf of Laura May Buffington Janes, individually, and as guardian of her two minor children, Byron Everett Janes, Jr.; and Addison M. Janes; and Elizabeth Janes and Catherine Janes."

2. Briefly summarized, the allegations in the Memorial upon which the claim is based are as follows:

3. Byron Everett Janes, for some time prior to and until the time of his death on July 10, 1918, was Superintendent of Mines for the El Tigre Mining Company at El Tigre. On or about July 10, 1918, he was deliberately shot and killed at this place by Pedro Carbajal, a former employee of the Mining Company who had been discharged. The killing took place in the view of many persons resident in the vicinity of the company's office. The local police *Comisario* was informed of Janes' death within five minutes of the commission of the crime and arrived soon thereafter at the place where the shooting occurred. He delayed for half an hour in assembling his policemen and insisted that they should be mounted. The El Tigre Mining Company furnished the necessary animals and the posse, after the lapse of more than an hour from the time of the shooting, started in pursuit of Carbajal who had departed on foot. The posse failed to apprehend the fugitive. Carbajal remained at a ranch six miles south of El Tigre for a week following the shooting, and it was rumored at El Tigre that he came to that place on two occasions during his stay at the ranch. Subsequently information was received that Carbajal was at a mescal plant near Carrizal, about seventy-five miles south of El Tigre. This information was communicated to Mexican civil and military authorities, who failed to take any steps to apprehend Carbajal, until the El Tigre Mining Company offered a reward, whereupon a local military commander was induced to send a small detachment to Carrizal, which, upon its return, reported that Carbajal had been in this locality but had left before the arrival of the detachment, and that it was therefore impossible to apprehend him.

4. It is alleged in the Memorial that the Mexican authorities took no proper steps to apprehend and punish Carbajal; that such efforts as were made were lax and inadequate; that if prompt and immediate action had been taken on one occasion there is reason to believe that the authorities would have been successful; that it was only after a money reward for the capture of Carbajal had been offered that some dilatory steps were taken to apprehend him in a nearby town where he was staying.

5. The Memorial contains allegations with respect to the earning capacity of Janes, the loss suffered by his wife and children because of his death, and their want of means of support.

6. To substantiate the allegations of fact in the Memorial of the United States and the charge that Mexican authorities failed to take effective steps to apprehend the man who shot Janes, there were filed with the Memorial certain affidavits, statements, and copies of reports of the American Consul at Tampico to the Department of State from which it appears that the consul addressed the Governor of Sonora, pointing out that the killing of other Americans in mining camps in Sonora in the past had gone unpunished and urging that the Mexican authorities take steps to apprehend Carbajal.



7. In the Answer filed by the Mexican Government it is denied, that the Mexican authorities failed to take appropriate steps to arrest and punish Carbajal. Accompanying the Answer is a certified copy of judicial proceedings showing the action taken to investigate the killing of Janes and the orders given with respect to his apprehension. Attention is also called to the use of an armed force to capture the fugitive concerning which information is given in evidence accompanying the Memorial of the United States.

8. An affidavit made by the widow of the deceased under date of February 1, 1926 (Annex 11 to the Memorial), contains information regarding the circumstances attending the killing of her husband. The details furnished are doubtless substantially correct, but like other matters contained in the affidavit are naturally based on information which she had received from others.

9. An affidavit (Annex 12 to the Memorial) was furnished by L. R. Budrow, the General Manager of the Lucky Tiger Combination Gold Mining Company, an American corporation, owners of the stock of the Tigre Mining Company. In this affidavit Mr. Budrow states that on a visit he made to El Tigre shortly after Janes' death, he obtained the impression that very limited efforts had been made by the authorities at the time to capture Carbajal and that there was a general rumor in El Tigre that Carbajal was seen at that place a few nights after the murder. The affiant attached to his affidavit a report made by R. T. Mishler, Manager of the El Tigre Mining Company on April 11, 1925, with respect to the killing of Janes. The following extract from that report doubtless states in a substantially accurate way the facts with respect to the killing of Janes and the steps taken shortly thereafter by Mexican authorities to apprehend Carbajal:

"Mr. Janes had been Mine Superintendent of the Tigre Mine for six months preceding the tragedy.

"He had had trouble with a trammer named Pedro Carbajal and had given orders for his discharge.

"Mr. Janes and his Assistant, Mr. W. H. Williams, were accustomed to hire new men at the mine office, near the entrance to No. 4 Level which is situated about a hundred yards from the American quarters in the town of El Tigre. Carbajal had requested that he be reinstated in his work on two or three evenings before the tragedy and had been refused.

"On the evening of July 10 (1918) at about 3 : 30 P. M. he again requested work and was again refused.

"After Mr. Janes and Mr. Williams had left the office and were about half way up the path leading to their quarters, Carbajal started running after them brandishing a revolver. The Americans heard him when he had almost reached them. Mr. Janes dodged by him and started to run back toward the office. Mr. Williams stood still and said 'don't shoot'. Carbajal snapped his pistol, point blank at Mr. Williams, but it failed to go off. He then turned and fired at Mr. Janes as he was running down the path. The bullet entered the back near the spine causing Mr. Janes to fall. Carbajal ran up, placed his pistol at Mr. Janes' head and fired a second shot through the brain.

"Carbajal then went down the path, threatening with his pistol, a half dozen Mexicans gathered around the office, and disappeared up the canyon.

"The Comisario was advised within five minutes after the murder and was on the spot five minutes later. He lost a half hour in getting his policemen together and insisted that they should be mounted. The Company furnished the animals and the posse left Camp about 4 : 30 P. M. They returned about 7 : 00 P.M. and reported that they had not seen Carbajal. They were also out the following day, but without results.

"It is current talk that Carbajal stayed at a ranch 6 miles south of Tigre, for a week following the murder, and that he came into Tigre on two nights during the week, but it is most difficult to prove this story.

"Later word was received that Carbajal was at a mescal (native liquor) plant near Carrizal, 75 miles south of Tigre. Both the civil and military authorities were advised of this report. Finally the Major in charge of the District was persuaded to send a small detachment to Carrizal to investigate, with the promise by the Company of a substantial reward should Carbajal be captured. On their return the detachment reported that the man had left before they arrived."

10. Doubtless the evidence accompanying the Memorial of the United States furnishes accurate information with regard to the killing of Janes, and with regard to the preliminary steps taken looking to the apprehension of Carbajal. The evidence on this firstmentioned point is substantially the same as that given by witnesses whose statements are recorded in the record of judicial proceedings accompanying the Answer. With respect to these preliminary steps, we feel justified in reaching the conclusion that they were inefficient and dilatory. From an examination of the evidence on this point accompanying the Memorial, and more particularly from an examination of the records produced by the Mexican Government, we are constrained to reach the conclusion that there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer as to warrant an award of indemnity. The grounds for such a conclusion can be shown by a brief statement of what those records reveal as to the action taken by the authorities.

11. It is shown that in the afternoon of July 10, 1918, the killing of Janes was brought to the notice of the local Judge, at El Tigre, and he appointed two men as experts to examine the body of the deceased. On the following day the Judge took the testimony of two persons employed by the El Tigre Mining Company. These men, who were not eyewitnesses of the murder, identified the corpse but gave no testimony concerning the facts of the killing. On July 12, the Judge took the statement of Guillermo A. Williams, an eyewitness of the killing. On July 13, the Judge took the statement of another eyewitness. On July 14, the statement of another eyewitness was taken.

12. On July 15, five days after the killing of Janes, when statements had been obtained from five men, the Judge, reciting that there had resulted from the proceedings up to that time sufficient merit for the prosecution of the person who killed Janes, issued an order to the *Comisario* to proceed to the capture of Carbajal.

13. On July 16, the Judge took the statement of another eyewitness to the murder. The *Comisario*, in reply to the order directing him to proceed to capture Carbajal, stated that, following immediate steps looking to the capture of Carbajal, which were unsuccessful, orders were given by means of warrants to different authorities where it was thought the accused might take refuge. On July 17, all papers in the case were forwarded by the local Judge to the Judge of First Instance of the District. The papers were received by the latter on July 22.

14. On July 30, the Judge of First Instance directed the arrest of Carbajal and on August 5, a communication in the nature of a circular was sent to the Judges of First Instance in the State of Sonora with the apparent purpose of enlisting their cooperation in the apprehension of the fugitive. This communication recited the facts with regard to the killing of Janes and the

preliminary investigations which had been conducted, and requested that the communication be returned to the Judge who transmitted it.

15. The circular was received by the Judge of First Instance at Arizpe on August 13, and by him brought to the notice of the Municipal President on August 14. On August 16, the Municipal President felt himself to be in a position to report that Carbajal was not found "in this section." The circular was evidently not received by the next Judge of First Instance on the route of transmission (the Judge at Sahuaripa) until October 14, about two months after it had reached the Judge of First Instance to whom it was originally transmitted. On October 15, it was sent to the Municipal President. On November 15, the communication was received by the Judge at Cananea and transmitted to the Municipal President on November 16. On December 3, the communication was forwarded to the Judge of First Instance at Nogales, Sonora. It thus is shown that from August 5, the date when the circular was first dispatched, until December 3, a period of about four months, the circular had reached but three judges.

16. In this manner, as shown by the record, the circular proceeded to Judges at Magdalena, Altar, Hermosillo, Ures, Guaymas, and Alamos, being received on February 12, 1919, seven months after the killing of Janes, by the Judge of First Instance at this last mentioned place. Thereupon it was returned to the Judge of First Instance at Moctezuma who had initiated its dispatch.

17. Carbajal, the person who killed Janes, was well known in the community where the killing took place. Numerous persons witnessed the deed. The slayer, after killing his victim, left on foot. There is evidence that a Mexican police magistrate was informed of the shooting within five minutes after it took place. The official records with regard to the action taken to apprehend and punish the slayer speak for themselves. Eight years have elapsed since the murder, and it does not appear from the records that Carbajal has been apprehended at this time. Our conclusions to the effect that the Mexican authorities did not take proper steps to apprehend and punish the slayer of Janes is based on the record before us consisting of evidence produced by both Governments.

18. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of Sonora may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims may be predicated on such acts.

*Measure of damages for failure of apprehension and punishment*

19. The liability of the Mexican Government being stated there remains to be determined for what they are liable and to what amount. At times international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanor. Opinions to this effect are to be found in the international awards in the Ruden & Company case (Moore 1655; under the Convention of December 4, 1868), in the Cotesworth & Powell case (Moore, 2053, 2082, 2085; under the Convention of December 14, 1872) and in the Bovallins and Hedlund cases (Ralston, Venezuelan Arbitrations of 1903, p. 953), separate opinions of seemingly the same tendency being expressed in the cases of De Brissot *et al.* (Moore, 2986, 2969; under the

Convention of December 5, 1885). The reasons upon which such finding of complicity is usually based in cases in which a Government could not possibly have prevented the crime, is that the nonpunishment must be deemed to disclose some kind of approval of what has occurred, especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty.

20. A reasoning based on presumed complicity may have some sound foundation in cases of nonprevention where a Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of nonrepression. Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country; the State, so far from having transgressed its own penal code (which perhaps not even is applicable to it), has transgressed a provision of international law as to State duties. The culprit can not be sentenced in criminal or civil procedure unless his guilt or intention in causing the victim's death is proven; the Government can be sentenced once the nonperformance of its judicial duty is proven to amount to an international delinquency, the theories on guilt or intention in criminal and civil law not being applicable here. The damage caused by the culprit is the damage caused to Janes' relatives by Janes' death; the damage caused by the Government's negligence is the damage resulting from the non-punishment of the murderer. If the murderer had not committed his delinquency—if he had not slain Janes—Janes (but for other occurrences) would still be alive and earning the livelihood for his family; if the Government had not committed its delinquency—if it had apprehended and punished Carbajal—Janes' family would have been spared indignant neglect and would have had an opportunity of subjecting the murderer to a civil suit. Even if the non-punishment were conceived as some kind of approval—which in the Commission's view is doubtful—still approving of a crime has never been deemed identical with being an accomplice to that crime; and even if nonpunishment of a murderer really amounted to complicity in the murder, still it is not permissible to treat this derivative and remote liability not as an attenuate form of responsibility, but as just as serious as if the Government had perpetrated the killing with its own hands. The results of the old conception are unsatisfactory in two directions. If the murdered man had been poor, or if, in a material sense, his death had meant little to his relatives, the satisfaction given these relatives should be confined to a small sum, though the grief and the indignity suffered may have been great. On the other hand; if the old theory is sustained and adhered to, it would, in cases like the present one, be to the pecuniary benefit of a widow and her children if a Government did *not* measure up to its international duty of providing justice, because in such a case the Government would repair the pecuniary damage caused by the killing, whereas she practically never would have obtained such reparation if the State had succeeded in apprehending and punishing the culprit.

21. It can not surprise, therefore, that both international tribunals and Governments more than once took a different view, or at least abstained from

sustaining the first view. The Commission is not aware of an international award in which the distinction has been set forth with clearness. But the Commission is aware of more than one award and governmental interposition which, in allowing or claiming damages in connection with nonpunishment of a wrongdoer, abstained from linking up the amount of these damages with the loss caused by the act of the individual. In the Glenn case (Moore 3138; under the Convention of July 4, 1868) the amount of damages was not connected with any assumption of complicity. In the Lenz case the Government of the United States, on account of nonpunishment of the culprits, only claimed "a reasonable indemnity" (March 25, 1899; Moore, Digest VI 794). In the Renton case the same Government for the same reason at the same date pleaded "gross negligence, if not complicity"—therefore leaving the assumption of complicity doubtful—and claimed a lump sum "for the murder of Renton and the failure promptly to apprehend and adequately punish the offenders," a position indicating that the Government did not consider the nonpunishment to be identical with the murder (Moore, Digest VI 794). Mr. Hyde, interpreting the policy in this respect of the Government of the United States, says: "The amount of the indemnity requested and obtained appears, at times, to have been out of proportion to the pecuniary loss sustained by the victims or their dependents *in consequence of the laches of the territorial sovereign*" (Hyde I, p. 515). And how dangerous inferences from awards which are silent on presumed complicity are is shown by the fact that, whereas the American Agency quoted the correspondence in the case of the Mexican shepherds as testimony in favor of the older doctrine, a German author quotes it as a striking example of the new one. (Schoen, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen*, 1917, p. 38)

22. The answer to the question, which of the two views should be accepted as consistent with international law in its present status, would seem to be suggested by the fact that here we have before us a case of denial of justice, which, but for some convincingly logical reason, should be judged in the same manner as any other case of the same category. Denial of justice, in its broader sense, may cover even acts of the executive and the legislative; in cases of improper governmental action of this type, a nation is never held to be liable for anything else than the damage caused by what the executive or the legislative committed or omitted itself. In cases of denial of justice in its narrower sense, Governments again are held responsible exclusively for what they commit or omit themselves. Only in the event of one type of denial of justice, the present one, a State would be liable not for what it committed or omitted itself, but for what an individual did. Such an exception to the general rule is not admissible but for convincing reasons. These reasons, as far as the Commission knows, never were given. One reason doubtless lies in the well-known tendency of Governments (Hyde, I, p. 515; Ralston, 1926, p. 267) to claim exaggerated reparations for nonpunishment of wrongdoers, a tendency which found its most promising help in a theory advocating that the negligent State had to make good all of the damage caused by the crime itself. But since international delinquencies have been recognized next to individual delinquencies, since damages for denial of justice have been assessed by international tribunals in many other forms, and since exaggerated claims from one Government as against another have been repeatedly softened down as a consequence of arbitral methods, it would seem time to throw off the doctrine dating from the end of the eighteenth century, and return to reality.

23. Once this old theory, however, is thrown off, we should take care not to go to the opposite extreme. It would seem a fallacy to sustain that, if in case of nonpunishment by the Government it is not liable for the crime itself, then it can only be responsible, in a punitive way, to a sister Government, not to a claimant. There again, the solution in other cases of improper governmental action shows the way out. It shows that, apart from reparation or compensation for material losses, claimants always have been given substantial satisfaction for serious dereliction of duty on the part of a Government; and this world-wide international practice was before the Governments of the United States and Mexico when they framed the Convention concluded September 8, 1923. In the Davy case—a case, not of unpunished crime, but of inhuman treatment of a foreigner under the color of administration of justice—the award rightly stated (Ralston, *Venezuelan Arbitrations of 1903*, p. 412) that “there is left to the respondent Government only one way to signify \* \* \* its desire to remove the stain which rests upon its department of criminal jurisprudence.” In the Maal case—a case of attack on a foreigner’s personal dignity by officials—the award rightly stated (Ralston, *Venezuelan Arbitrations of 1903*, p. 916): “The only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefore in the way if money compensation.” The indignity done the relatives of Janes by nonpunishment in the present case is, as that in other cases of improper governmental action, a damage directly caused to an individual by a Government. If this damage is different from the damage caused by the killing, it is quite as different from the wounding of the national honor and national feeling of the State of which the victim was a national.

24. The Commission holds that the wording of Article I of the Convention concluded September 8, 1923, mentioning claims for losses or damages suffered *by persons or* by their properties, is sufficiently broad to cover not only reparation (compensation) for material losses in the narrow sense, but also satisfaction for damages of the stamp of indignity, grief, and other similar wrongs. The Davy and Maal cases quoted are just two among numerous international cases in which arbitrators held this view. The Commission does not think lightly of the additional suffering caused by the fact that a Government apparently neglects its duty in cases of so outstanding an importance for the near relatives of a victim.

25. As to the measure of such a damage caused by the delinquency of a Government, the nonpunishment, it may be readily granted that its computation is more difficult and uncertain than that of the damage caused by the killing itself. The two delinquencies being different in their origin, character, and effect, the measure of damages for which the Government should be liable can not be computed by merely stating the damages caused by the private delinquency of Carbajal. But a computation of this character is not more difficult than computations in other cases of denial of justice such as illegal encroachment on one’s liberty, harsh treatment in jail, insults and menaces of prisoners, or even nonpunishment of the perpetrator of a crime which is not an attack on one’s property or one’s earning capacity, for instance a dangerous assault or an attack on one’s reputation and honor. Not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the Government’s attitude. If the nonprosecution and nonpunishment of crimes (or of specific crimes) in a certain period and place

occurs with regularity such nonrepression may even assume the character of a nonprevention and be treated as such. One among the advantages of severing the Government's dereliction of duty from the individual's crime is in that it grants an opportunity to take into account several shades of denial of justice, more serious ones and lighter ones (no prosecution at all; prosecution and release; prosecution and light punishment; prosecution, punishment and pardon), whereas the old system operates automatically and allows for the numerous forms of such a denial one amount only, that of full and total reparation.

26. Giving careful consideration to all elements involved, the Commission holds that an amount of \$12,000, without interest, is not excessive as satisfaction for the personal damage caused the claimants by the nonapprehension and nonpunishment of the murderer of Janes.

#### *Decision*

27. On the above grounds, the Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America \$12,000.00 (twelve thousand dollars), without interest, on behalf of Laura May Buffington Janes, widow of Byron Everett Janes, and Elizabeth Janes, Catherine Janes, Byron E. Janes, Jr., and Addison M. Janes, their children.

#### *Separate statement regarding damages*

All members of the Commission are in entire accord with respect to the analysis of the facts of the case from which we have drawn the conclusion, as has been stated, that there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer of Janes as to warrant an award of indemnity. However, I think it is advisable to indicate in a separate statement my views relative to the contentions advanced before the Commission as to the principles that should govern us in determining the amount of a pecuniary award.

The subject of the measure of damages in a claim like the instant case, involving a charge of neglect in the apprehending and punishing an offender, was discussed in briefs filed by the two Agents and in oral arguments.

The position of the Agency of the United States with reference to this question is that in such a case a State is responsible in damages sufficient to compensate the claimant for the injuries flowing from the wrongful act of the individual, and that this responsibility rests upon the offending State because by its failure to act it condones and ratifies the wrongful act, thereby making the act its own. (American Brief, p. 3.)

The position of the Mexican Agency with regard to the question at issue may be indicated by the following extract from its Brief (p. 12):

"III. In that case responsibility can only be demanded by a foreign State when negligence is so serious and so frequent as to endanger the safety of foreigners and the guaranties to which they are entitled.

"IV. This responsibility can not be heard by the Commission because it has no jurisdiction.

"V. The same act may motivate a responsibility towards the victim of the crime or its next of kin, but only in so far as it can be shown that this negligence and not the crime itself has directly caused the damage which can be ascertained in money.

"VI. The measure of damages whenever this responsibility is involved, must be exclusively ascertained with reference to the law of the place where the act took place. The Mexican laws do not recognize moral damage and therefore, even though it had been shown that the claimants in the instant claim had justified a moral damage, this can not be a matter which can be ascertained in a pecuniary way.

"VII. These moral damages in no wise can be assessed, since they are in essence exclusively punitive."

International law imposes on a nation the obligation to take appropriate steps to prevent the infliction of wrongs upon aliens and to employ prompt and effective measures to apprehend and punish persons who have committed such wrongs. There is no dispute between the two Agencies with regard to these requirements of the law. In the instant case indemnity is asked for on the ground of the neglect of authorities to take proper measures to arrest and bring to justice the person who killed Janes. The contention of the Mexican Agency advanced in this particular case, to the effect that the Commission is without power to redress by a pecuniary award an international delinquency growing out of a failure of a Government to live up to solemn obligations of this kind, I consider to be a remarkable contention, supported by no authority. It is interesting to note that it appears that this contention has been advanced in no other case among the large number of similar cases filed by both Agencies. And it is a particularly pertinent fact that numerous cases have been brought to the attention of the Commission in which the Mexican Government has alleged liability on the part of the United States in substantial amounts for the failure to apprehend and punish persons who have committed wrongful acts against Mexicans in the United States. For example, in the Diaz claim (Docket No. 293) it is stated on pages 1 and 2 of the Memorial:

"The lenity of the American authorities in regard to the institution of due legal process, to the discovery of the guilty party and to his punishment, constitutes a true denial of justice, which is a justification of the right of Cataline Balderas de Diaz, the mother of the man slain, and injured by the loss of her son, to demand compensation, and she was dependent on him for a living and such injury has not been made good to her. She grounds her petition on Article I of the Convention concluded between Mexico and the United States on September 8 1923.

"Taking into account the probable life expectancy of Mauricio Diaz, the claimant estimates the damage suffered by her at \$50,000.00 Mexican Gold, or the equivalent thereof in dollars."

The subject of damages is always a difficult one in international arbitrations. It seems to be clear that international tribunals can not apply rules by which to assess damages as definite as the rules by which domestic tribunals are governed in civil cases. A contention that an international tribunal such as that created by the Convention of September 8, 1923, has no power to award damages in cases like the present one prompts a consideration of the functions of international tribunals and of international practice, particularly as it is revealed by the decisions of arbitral tribunals in the disposition of claims similar to the instant case.

International controversies which diplomacy fails to solve may be settled by resort to force or by judicial methods. This Commission is charged with the judicial determination of all claims of the nationals of each Government against the other arising since July 4, 1868, excepting certain claims incident to recent revolutions in Mexico. It is the function of the Commission to pass



upon these cases in accordance with rules and principles of international law imposing like obligations on the two countries and securing rights that inure to the benefit of their respective nationals. I do not consider that this Commission is impotent to afford redress of a substantial character in cases like the present one in which there has been a failure to carry out a solemn obligation imposed by international law. This view is convincingly supported by the declarations of foreign offices in diplomatic exchanges, the writings of authorities on international law, and the rules and principles repeatedly stated and applied by international tribunals. In dealing with the question raised by the Mexican Agency in the pending case, I consider the decisions of arbitral tribunals to be of especial importance. The action taken by such tribunals reveals what I regard as sound reasoning upon which from time to time appropriate disposition of international controversies has been grounded. I deem it to be proper that weight should be attached to rules and principles that have often been formulated and applied in the light of experience, and not to reject them, unless, of course, we are convinced that they are unsound or that they have been given a wrongful application.

Rules and principles of law are not formulated in terms of pure logic. All rules are in a measure arbitrary, and the criterion of the value of any rule is the extent to which its advantages outweigh its disadvantages. Assuredly the theory repeatedly advanced that a nation must be held liable for failure to take appropriate steps to punish persons who inflict wrongs upon aliens, because by such failure the nation condones the wrong and becomes responsible for it, is not illogical or arbitrary. Certainly there is no violence to logic and no distortion of the proper meaning of the word "condone" in saying that a nation condones a wrong committed by individuals when it fails to take action to punish the wrongdoing. It seems to be equally clear that, irrespective of what may be the particular facts of any given case, a nation may logically be charged with responsibility for crime when it is shown that proper punitive measures have been neglected. The degree of fault attributable to a nation will, of course, depend upon the facts of each given case. A community protects itself against crime by police measures to prevent offenses against the law and by appropriate measures to punish wrongdoing. The prevalence of crime has often been ascribed to lax police measures and to a dilatory and ineffective administration of criminal jurisprudence resulting in the failure to apprehend criminals, in inadequate punishment, or in no punishment at all. Correspondence which has been exchanged between the Government of Mexico and the Government of the United States with respect to controversies pending for arbitration, and which is included among the records of the Commission, shows that each Government has from time to time pointed out the danger to the safety of its nationals of a lax administration of justice. It is clear that arbitral tribunals in assessing damages for the failure of authorities to punish wrongdoers have taken account of the damage caused by the wrongful acts of the culprits for which Governments have been held responsible. The opinions of some tribunals reveal that they have also taken account of other elements of damages, and I am of the opinion that that may properly be done. There are further considerations pertinent to the question of the responsibility to which a nation may be held for failure to punish crime. International law recognizes the right of a nation to intervene to protect the interests of its nationals in foreign countries, through diplomatic representations, and through instrumentalities such as those afforded by international tribunals. It seems to be clear that the recognition of this right is fundamentally

grounded on the often asserted theory that an injury to a national is an injury to the State to which the national belongs. If this theory were not sound it is difficult to perceive why the existence of this right of intervention should be recognized with regard to a limited number of persons within the territorial jurisdiction of a sovereign nation which is broadly described by Mr. Chief Justice Marshall in the opinion written by him in the case of *The Exchange* (7 Cranch, 116, 136) in which he said:

"The jurisdiction of the Nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."

A nation has a right to insist upon the observance of obligations of international law which in a certain sense, undoubtedly qualify so far as aliens are concerned, those plenary sovereign rights which, as described by Chief Justice Marshall, a nation may exercise with regard to the persons and property of its own nationals. An alien has a right to rely upon an observance of rights which are secured to nations by international law and which inure to his benefit. Persons dependent upon him have that right, and international tribunals have the power to award redress for the disregard of such rights. These elementary principles are referred to in the extracts from Dr. Anzilloti's discussion of the responsibility of the State under international law quoted in the Mexican Agency's Brief. These extracts do not appear to support the contention of nonresponsibility advanced in the Brief. Dr. Anzilloti distinguishes between the obligations of a State to private individuals under domestic law and the responsibility of a State to another State under international law. He points out that individuals can not commit acts in contravention of international law. He argues that therefore the commission of such acts can not in itself be a violation of that law. But, of course, he does not deny, but expressly emphasizes, the duty of the State to vindicate rights that are secured by international law and that inure to the benefit of private individuals.

When questions are raised with respect to the failure to observe obligations of international law relative to punishment of wrongdoers, and when redress is sought for the delinquency growing out of such failure, the use of the term "punitive" with respect to the nature of the redress that may be afforded seems to be somewhat inapt. If the view is taken that a wrong to a national is a wrong to the State, it may perhaps be said that measures of redress for such wrongs are always in a sense punitive. But international tribunals in making pecuniary awards in cases like the present one do not appear to have considered that they were distinctly concerned in such cases as distinguished from other cases with the infliction of a penalty of what has sometimes been called "smart money". They have obviously considered that they were affording proper compensatory redress in satisfaction of wrongs.

Without any detailed discussion of the particular facts of numerous international precedents, international practice with regard to the rules and principles which have governed international tribunals in assessing damages in cases like the present one may be briefly indicated.

A single passage from the writings of a distinguished French author may be cited as illustrative of the views expressed by numerous well-known writers on international law with respect to the obligations of the law involved in a case of this character and the responsibility of a nation for their observance. Pradiér-Fodéré, in discussing this subject, says:

"En somme, les actes privés des nationaux n'engagent pas en principe la responsabilité de l'État auquel ces nationaux appartiennent, mais l'État dont le gouvernement approuve et ratifie les actes de ses ressortissants, ou qui refuse de réparer le dommage causé par un de ses sujets, de châtier lui-même le coupable, de le livrer pour être puni, devient en quelque sorte l'auteur de l'injure commise, se rend comme complice de l'offense, et autorise pleinement la partie offensée à faire remonter la responsabilité des actes offensants ou dommageables à celui qui se les est volontairement et sciemment comme appropriés." (Traité de Droit International Public, 1885, Vol. I, p. 336.)

\* \* \* \* \*

"Mais, d'un autre côté, la nation ou le souverain ne doit point souffrir, que les citoyens fassent injure aux sujets d'un autre État, moins encore qu'ils offensent cet État lui-même \* \* \* parce que les nations doivent se respecter mutuellement, s'abstenir de toute offense, de toute lésion, de toute injure, en un mot de tout ce qui peut faire tort aux autres. Si un souverain, qui pourrait retenir ses sujets dans les règles de la justice et de la paix, souffre qu'ils maltraitent une nation étrangère dans son corps ou dans ses membres, il ne fait pas moins de tort à toute la nation que s'il la maltraitait lui-même \* \* \* Cependant, comme il est impossible à l'État le mieux réglé, au souverain le plus vigilant et le plus absolu, de modérer à sa volonté toutes les actions de ses sujets, de les contenir en toute occasion dans la plus exacte obéissance, il serait injuste d'imputer à la nation ou au souverain toutes les fautes des citoyens \* \* \* Mais si la nation ou son conducteur approuve et ratifie le fait du citoyen, elle en fait sa propre affaire; l'offensé doit alors regarder la nation comme le véritable auteur de l'injure, dont peut-être le citoyen n'a été que l'instrument. Si l'État offensé tient en sa main le coupable, il peut sans difficulté en faire justice et le punir. Si le coupable est échappé et retourné dans sa patrie, on doit demander justice à son souverain. Et puisque celui-ci ne doit point souffrir que ses sujets molestent les sujets d'autrui, ou leur fassent injure, beaucoup moins qu'ils offensent audacieusement les Puissances étrangères, il doit obliger le coupable à réparer le dommage ou l'injure, si cela se peut, ou le punir exemplairement, ou enfin, selon les circonstances, le livrer à l'État offensé pour en faire justice \* \* \* Le Souverain qui refuse de faire réparer le dommage causé par son sujet ou de punir le coupable, ou enfin de le livrer, se rend en quelque façon complice de l'injure et en devient responsable." (Ibid. pp. 615-616 <sup>1</sup>)

<sup>1</sup> Translation: In short, the private acts of citizens do not in principle bind the responsibility of the State to which these citizens belong, but the State whose government approves and ratifies the acts of its nationals, or that refuses to repair the damage caused by one of its subjects, or itself to punish the guilty person or to deliver him up for punishment, becomes in a certain measure the author of the injury committed, renders itself an accomplice to the crime, and fully justifies the offended party in placing the responsibility for the offensive or injurious acts upon the party which has, as it were, voluntarily and consciously assumed responsibility therefor.

\* \* \* \* \*

"But on the other hand the nation or sovereign must not allow their citizens to do injury to the subjects of another state, much less to offend that state itself \* \* \* because nations must respect one another, refrain from doing anything that may offend, hurt, or injure, in a word anything that may wrong others. If a sovereign who should be able to hold his subjects on the paths of justice and peace should allow them to ill treat a foreign nation as a body, or in the person of its members, the injury he does to that nation is no less than if the illtreatment was at his own hands \* \* \*. Yet, since the state, even though the best regulated, the sovereign, even though the most vigilant and absolute, can not restrain at will all the acts of a subject, or to hold him on every occasion to the most exact obedience, it would be unfair to charge the nation or the sovereign with all the misdoings of the citizen \* \* \* But if the nation or its head

See to the same effect Vattel, *Law of Nations* (1758) Book II, pp. 161-162; Twiss, *The Law of Nations*, 2d ed. (1875), Part 2, Par. II, p. 20; Martens, *Traité de Droit International* (1883), Vol. I, p. 563.

The position heretofore taken by the two Governments, parties to the arbitration under the Convention of September 8, 1923, with respect to the issue now raised may be shown, apart from what is revealed through Memorials that have been filed with this Commission by each, by a brief reference to diplomatic correspondence of a kind that might be quoted at length with respect to varying situations. The correspondence reveals that both have in the past entertained views in harmony with those expressed by the authors above cited.

Thus, Secretary of State Fish, in an instruction of August 15, 1873, to the American Minister to Mexico, said:

"The rule of the law of nations is that the Government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor." (Moore, *International Law Digest*, Vol. VI, p. 655.)

From the correspondence between Secretary of State Fish and Mr. Mariscal, Mexican Minister to the United States, concerning the murder of seven Mexican shepherds in Texas in 1873, it seems to be clear that the Mexican Government predicated its demand for substantial damages on the ground of a denial of justice growing out of the failure of American authorities to apprehend and punish the wrongdoers. In a note addressed to Mr. Fish under date of January 30, 1875, Mr. Mariscal said:

"In my opinion, it is also proved that there has been such denial of justice not only because during the two years that have elapsed the criminals have not been punished, nor have any decided measures been taken for their detection, but because the prevalence of lawlessness and the inertness or powerlessness of the authorities near the scene of the crime are plainly shown by a multitude of facts and have been recognized by the executive of the State."

\* \* \* \* \*

"As to the indemnity for the families of the shepherds which is likewise solicited by Lozano, he being duly authorized to do so, I think it should be fixed at twenty thousand dollars for each one; and for this there would be no lack of precedents, to which I think it now unnecessary to refer." (Foreign Relations of the United States, (1875), Part II, p. 957.)

In the *Poggioli* case before the Italian-Venezuelan Commission of 1903, the Commission considered a number of complaints on the part of the

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approves and ratifies the act of the citizen, it makes it its own act; the offended party must then regard the nation as the true principal of the injury of which the citizen perhaps was but the tool. If the offended state has in hand the offender there is no difficulty about his doing justice and punishing him. If the offender has escaped and returned to his mother country, the sovereign must be asked to do justice, and since that sovereign must not allow his subjects to molest or wrong the subjects of another sovereign and, much less, boldly offend the foreign powers, he must compel the offender to make amends for the damage or insult, if it can be done, or subject him to exemplary punishment, or, according to circumstances deliver him up to the offended state for the proper administration of justice \* \* \*. The sovereign who should refuse to cause the damage done by his subject to be repaired or to punish the offender or surrender him is in a manner making himself an accessory to the injury and becomes responsible therefor."

claimant against the Venezuelan Government, one of them relating to the failure of Venezuelan authorities to apprehend and punish four persons who had made an attempt upon the life of the claimant in 1891. In discussing this matter, Umpire Ralston said in part:

"Reviewing the authorities. it seems to the umpire that this case differs from those cited from Moore's *Arbitrations*, in that it is sustained by the clearest proof following distinct allegations and that there has been in fact a denial of justice by the administrative authorities of the State; that the considerations herein narrated come within the language of Calvo, who finds responsibility 'in case of complicity or of manifest denial of justice.' for there certainly was complicity on the part of the officials and denial of justice as set out; that the criterion suggested by Bonfils was exactly met by the administrative refusal to grant relief when the local government failed to take ordinary and necessary precautions and allowed the offenses complained of to go unpunished after becoming known; that the State of Los Andes. during the years in question in the language of Creasy, was 'habitually and grossly careless and disorderly in the management of its own affairs'; that by its failure to make reparation or punish the guilty, Venezuela has, through the fault of Los Andes. rendered itself 'in some measure an accomplice in the injury' and has become 'responsible for it,' and that according to Hall, the acts complained of being 'undisguisedly open and of common notoriety' and being of importance, the State 'is obviously responsible for not using proper means to repress them,' and has not inflicted 'punishment to the extent of its legal powers.' " (Ralston, *Report*, p. 869.)

In the case of *Cotesworth and Powell* under the Convention concluded between Great Britain and Colombia on December 14, 1872, there is an extended discussion in the elaborate opinion written by the Commissioners of illegal official acts resulting in damages to the claimants. But it is clear from the opinion that the responsibility of Colombia and the award of damages in this case for property losses resulting from illegal acts, in the amount of \$50,000.00, were predicated, not upon the abuses of judicial authorities, but upon an amnesty by which the offending officials were relieved of liability for their wrongful acts. This is shown by the following excerpts from the opinion;

"One nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a public concern, and the injured party may consider the nation itself the real author of the injury. And this approval, it is apprehended, need not be in express terms; but may fairly be inferred from a refusal to provide means of reparation when such means are possible; or from its pardon of the offender, when such pardon necessarily deprives the injured party of all redress. \* \* \*

"He (the Commissioner) places this responsibility of Colombia solely upon the consequences of the amnesty, thus adhering, as he conceives, to the well-established principle in international polity, that, by pardoning a criminal, a nation assumes the responsibility for his past acts." (Moore, *International Arbitrations*, Vol. II, pp. 2082, 2085.)

Volume III of Moore's *International Arbitrations* contains the following account of the *Glenn* case under the Convention of July 4, 1868, between the United States and Mexico, decided by Sir Edward Thornton, the Umpire:

"Margaret Glenn made a claim for herself and her minor children for the murder of her husband and son, and the robbery of their bodies. This incident took place on November 1, 1858, about 2 o'clock, p. m., within two leagues of the city of Saltillo, on the road to Monterey. The murder and robbery were committed by a squad of soldiers under a sergeant and corporal. It was alleged that these persons were under the orders of a person who was a lawyer in Saltillo

and a deputy in the National Congress, but the participation of this person the umpire did not consider sufficiently proved. But the umpire found that there was a denial of justice in the failure to bring to trial those who committed the act of violence, by which means their guilt or innocence might have been established. On the ground of this lack of action on the part of the judicial authorities, the umpire made an award in favor of the claimants for \$20,000 in Mexican gold" (p. 3138).

The *Piedras Negras* claims under the same Convention furnish an interesting illustration of a case in which an arbitral commission, in assessing damages because of the failure of the United States to punish a band of persons who invaded Mexico from Texas, predicated its award on the damages caused by the wrongful acts of the culprits. The Commission pointed out that authorities of the United States had made no effort to arrest the offenders, which it was stated could easily have been done, and explained that the Commission arrived at its award of \$50,000.00 as stated by Dr. Moore, "by making what seemed to be just and equitable allowances to such claimants as appeared to have suffered by the burning and pillaging of the town."

In the *Davy* case before the British-Venezuela Commission of 1903, in which it seems clear that liability on the part of Venezuela was predicated on the failure to prosecute persons who had injured the claimant, the Umpire, in making an award mentioned several elements of damage of which he considered that account might properly be taken. He said in part:

"It was also the opinion of the honorable Commissioner for Venezuela that the crime was fully atoned when the guilty parties had been prosecuted and punished—a fact which he confidently believed had occurred and of which he felt sure he could give satisfactory evidence before the tribunal. It appeared that preliminary steps had been taken looking to that end, and the evidence adduced at each preliminary inquiry is a part of the testimony used in this case. These preliminary steps had given the President of Venezuela knowledge of the wrong committed, the necessity of punishment commensurate to the offense, and the names of the offenders. The Umpire has no question that the honorable Commissioner for Venezuela has been diligent in his efforts to obtain record evidence that there had been both prosecution and punishment of the guilty ones, but it has been without avail, and there is left to the respondent Government only one way to signify its regard for individual freedom, its abhorrence of such proceedings as are detailed in this case, and its desire to remove the stain which rests upon its department of criminal jurisprudence through the untoward and wicked practices of those who engaged in this conspiracy against the person and liberty of the claimant and the honor of their country. Too great regard can not be paid to the inviolability of the one and the sacred qualities of the other. The measure of damages placed upon such a crime must not be small. It must be of a degree adequate to the injury inflicted upon the claimant and the reproach thus unkindly brought upon the respondent Government. These invaded rights were in truth priceless, and no pecuniary compensation can atone for the indignities practiced upon the claimant; but a rightful award received in ready acquiescence is all that can be done to compensate the injuries, atone for the wrong, and remove the national stain." (Ralston, *Report*, p. 412).

(See also with respect to this subject of elements of damage the opinion of Ralston, Umpire, in the *Di Caro* Case, Ralston, *Report*, pp. 769-770.)

The international precedents to which reference has been made above are typical of the very considerable number cited in the American Brief. By decisions of international tribunals substantial damages have repeatedly been awarded because of the neglect of authorities to employ prompt and efficient measures to apprehend and punish offenders. No case was cited in the Mexican Government's Brief in which an award of a different kind had

been made. As has been observed above, demands for indemnities in substantial sums have been made in cases of this kind filed by both parties to this pending arbitration. I do not consider that the Commission is powerless to award damages of a substantial nature in cases of this character which often involve odious features of discrimination prompted by prejudice against aliens.

It is asserted in the Mexican Government's Brief that the measure of damages in such cases must be exclusively ascertained with reference to the law of the place where the acts underlying a claim in a given case were committed; that Mexican laws do not recognize "moral" damage and that even though it had been shown that the claimants in the instant case had justified a "moral" damage, this is a matter which can not be settled in a pecuniary way. International law is a law for the conduct of nations grounded on the general assent of the nations of the world. The law is therefore, of course, the same for all members of the family of nations. Obviously it can only be modified by the same processes by which it is formulated, namely, by general assent of the nations. It does not seem possible to conceive of a situation in which a single nation could by a municipal enactment denying a right of redress, relieve itself from making compensation for failure to observe a rule of international law.

In the light of the reasons stated above, I concur in the award requiring that the United Mexican States pay to the United States of America the sum of \$12,000 (twelve thousand dollars) without interest.

Fred K. NIELSEN,  
*Commissioner.*

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J. W. AND N. L. SWINNEY (U.S.A.) *v.* UNITED MEXICAN STATES.

(November 16, 1926, separate opinion by American Commissioner, undated.  
Pages 101-136.)

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DENIAL OF JUSTICE.—WRONGFUL DEATH.—DIRECT RESPONSIBILITY.—RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DILATORY PROSECUTION.—FAILURE TO APPREHEND OR PUNISH.—INTERNATIONAL STANDARD OF JUSTICE. Evidence *held* to establish that decedent was needlessly killed by customs guards and that there was undue delay in prosecution of, and failure to punish, such guards.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 562; Annual Digest, 1925-1926, p. 214.

1. This claim is presented by the United States against the United Mexican States in behalf of J. W. Swinney and N. L. Swinney, parents of Walter G. Swinney, a young American citizen, who in the afternoon of Sunday, February 5, 1922, while engaged in a trapping expedition on the Río Bravo or Río Grande del Norte, at a point not remote from Nuevo Laredo, Tamaulipas, Mexico, was shot from the Mexican bank by two armed Mexicans, and who died the next morning in the hospital at Laredo, Texas, U.S.A. One of these two Mexicans, Urbano Solís—a rural judge in the service

of the municipality of Nuevo Laredo—was arrested on or about February 5, 1922; the other one, José Maria Cruz—a rural police of the same municipality—was arrested on or about February 7, 1922, released before the end of February, but rearrested on March 8, 1922, at the instance of the American consul; both of them were finally discharged and released on November 15, 1922, without any trial being held. It is alleged that the death of said Walter Swinney caused to his parents (the claimants), American nationals, damages in the sum of \$25,000; that the Mexican authorities showed an unwarrantable neglect and indifference in investigating the case and prosecuting the culprits; and that on account of this unlawful killing and denial of justice Mexico ought to pay to the claimants the said amount with interest thereon.

2. A challenge of the nationality of the claim has been withdrawn during the oral hearing of the case.

3. The occurrence was as follows: Solís had supervision over the river in regard to smuggling endeavors, and on the very day of the occurrence the attention of him and his colleagues had by their superiors been drawn to the fact that rumors were being heard about probable attempts of revolutionaries to cross near the places under Solís' supervision. His part of the river was one of those where crossing the river with goods and using either the Mexican or the American bank as an entry port was forbidden. In the afternoon of that Sunday, Solís accidentally saw the boats of Swinney and his older companion McCampbell on the river, and wondering whether their business was lawful, went to take his helper Cruz from his house and go to the spot. When about 4 p.m. they discovered Swinney peaceably floating down the river, in a boat which in reality contained nothing besides himself and his firearms, they contend that they took him for a man who was there in contravention of the laws which it was especially their duty to enforce; their suspicion was strengthened by the fact that Solís, on his previous accidental discovery of the two boats, had thought the other boat loaded. This first contention is not disproven by the evidence; neither is the contention that Swinney refused to obey Solís' summons to come nearer in order to give the necessary explanations, and instead of doing so rowed to the opposite bank. Theoretically it might be doubted whether Swinney recognized the two Mexicans as river guards (customs guards) or similar officials; but anyone in these parts may be supposed to know that the river is being carefully watched by armed officials and that the presence on the river bank of officials seeking information of occurrences on and near the river is on both sides extremely likely. The second allegation of the two officials, however, is that, after Swinney disobeyed the summons, Solís shot in the water to frighten him, whereupon Swinney shot at them three times and a second shooting on their part followed which was in self-defense and mortally wounded him. By that time Swinney was near the American bank and was taken out of the water by his companion; the rural judge Solís went at once to the competent authority at Nuevo Laredo, to give a full account of what had happened and place himself at the hands of justice.

4. The Commission, though mindful of the special task of Solís and of the special instructions given him quite recently, is far from satisfied that the shooting which ended in this tragedy was not reckless. There is every reason to doubt whether Swinney in his boat shot at the Mexican officials. The record mentions the inspection of Swinney's pistol, first by the witness Rodríguez and afterwards by the American consul, vice-consul and undertaker, disclosing that it could not have been used. A statement purporting



to have been made by McCampbell to the effect that Swinney fired from the American bank, after he had been wounded but not before that time, occurs in the consul's report of February 9, 1922, but does not appear in McCampbell's own affidavit of September 28, 1923. It is not clear from the record why Swinney looked like a smuggler or a revolutionary at that time and place, and how the Mexican officials could explain and account for their act of shooting under these circumstances, even when they considered him committing an unlawful act in crossing from one bank to another (a fact they did not see). Human life in these parts, on both sides, seems not to be appraised so highly as international standards prescribe. In the light (among other things) of the correspondence between the Governments of Great Britain and the United States relative to the reckless killing in 1914 on the Canadian border of the United States of one Walter Smith, who, while engaged in unlawfully shooting ducks, did not obey a summons of soldiers of the Canadian militia but rowed away (*Foreign Relations*, 1915, pp. 414-423), the Commission holds that this killing of Swinney has been an unlawful act of Mexican officials.

5. As to investigation of the case reported to them by Solís himself, there is from the record no reasonable doubt that the Mexican judicial authorities acted with a laches which must strike painfully not only those interested in the deceased men, but anyone who learns what happened. If the American consul had not been active for several months and if, as a consequence thereof, the Mexican authorities had not at last gathered some evidence on both sides, it is difficult to see how they would have obtained other information than the statements made by their own men. It is alleged and not negated, that the Mexican authorities during the first weeks only heard the two Mexican officials involved in the tragedy, Solís and Cruz; that they made no endeavor to hear the two American eye-witnesses—Swinney's companion, Philip McCampbell, who had been present at the event, and one Ignacio Rodríguez, who had seen the dying man (whom he did not know before), had talked with him, and had helped to have him taken to the hospital; that these authorities only examined the eye-witnesses on the strong and repeated insistence both of the American consul at Nuevo Laredo and the American embassy at Mexico City, and only as late as March 17, 1922 (McCampbell), and May 15, 1922 (Rodríguez); that they re-arrested Cruz on the same insistence; that the public prosecutor at Nuevo Laredo did not act (and then negatively) until July 5, 1922, nor the Attorney General at Ciudad Victoria, Tamaulipas, until November 14, 1922. A request from the American embassy to the Mexican Government to have the case brought to trial (May 16, 1923) had no effect. In a case so tragic as the killing of an innocent young foreigner, granted even that the officials who killed him may have considered their act justified, these facts should have been either negated or explained.

6. As to the discharge and release of the guilty parties, distinction ought to be made between the action taken by the public prosecutor at Nuevo Laredo and that of the Attorney General of the State. Once evidence gathered on the indefatigable insistence of the American consul, the prosecutor at Nuevo Laredo stated that there was reason to assume that the officials acted in what they believed to be the discharge of their official duty, whereas with respect to their claim of self-defense no positive conclusion could be reached. Instead of leaving the difficult decision on these points to an impartial tribunal, the prosecutor at least did not use the unproven self-defense as an argument, but based his decree of discharge and release exclusively on article 34, clauses XIV and XV, of the Penal Code (relating

to acts of officials in the exercise of their official capacity), thereby showing that he did not feel sufficiently convinced of their having acted in self-defense. The Attorney General, on the contrary, in confirming the first decree, discharged Solís on account of clause VIII of said article, which exclusively relates to self-defense. If the Mexicans in mortally wounding Swinney acted in self-defense, the case would have been different from their shooting a man who only did not approach, but rowed away; in his decision the Attorney General merely discarded the statements opposing those of his national officials, who at the same time were the accused. The Commission has great difficulty to understand why the royal road of an open trial has been avoided.

7. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of Tamaulipas may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims may be predicated on such acts.

8. The Commission considering among other things the financial support the deceased man gave the claimants, their prospects of life, and the character of the delinquency involved holds that the claimants have suffered damages to the extent of \$7,000 because of the killing of their son by Mexican authorities. For allowing interest on this amount the Commission finds no ground.

#### *Decision*

9. The Commission accordingly decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America \$7,000 (seven thousand dollars), without interest, in behalf of Jesse Walter Swinney and Nancy Louisa Swinney.

#### *Separate opinion*

I concur in the award of \$7,000.00 without concurring entirely in the grounds for the award stated in the opinion signed by the other two Commissioners.

Fred. K. NIELSEN,  
*Commissioner.*

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#### FRANCISCO QUINTANILLA (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(November 16, 1926, *separate opinion by American Commissioner, undated.*  
*Pages 136-140.*)

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DENIAL OF JUSTICE.—ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.  
—DEATH DURING CUSTODY.—FAILURE TO APPREHEND OR PUNISH. Where evidence established that deputy sheriff and three other men took decedent into custody, that decedent was later found dead by side of road, and that no one was prosecuted for such death, claim *allowed*.

MEASURE OF DAMAGES, WRONGFUL DEATH. Measure of damages in case involving wrongful death *held* to include satisfaction due parents for loss suffered by international delinquency committed by respondent

Government. No allowance made for loss of support when evidence was lacking on this point.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 568; Annual Digest, 1925-1926, p. 224; British Yearbook, Vol. 8, 1927, p. 185.

1. This claim is presented by the United Mexican States against the United States in behalf of F. Quintanilla and M. I. Perez de Quintanilla, Mexican nationals, father and mother of Alejo Quintanilla, a young man, who was killed on or about July 16, 1922, not far from Edinburg, Hidalgo County, Texas, U.S.A. On July 15, 1922, about 5 p. m., said Alejo Quintanilla in a lonely spot had lassoed a girl of fourteen years, Agnes Casey, who was on horseback, and thrown her from the horse; she screamed, and the young Mexican fled. She told the occurrence to her father, Tom Casey, with whom Quintanilla had been employed some time before; the father the next morning went to lodge his complaint with the authorities, first to Edinburg (the County seat), where he did not find the sheriff, and then to Donna, where he found the deputy sheriff, one Sam A. Bernard. According to the record, this deputy sheriff with three other men, whose names are not mentioned, went to Quintanilla's house, took him from it, and the deputy sheriff with one Walter Weaver placed him in a motor car and drove with him, first to Casey's house, where they put on a new tire, and then in the direction of Edinburg to take him to the county jail. On July 18, 1922, about noon, Quintanilla's corpse was found near the side of this road, some three miles from Edinburg, traces showing that he had been taken there in a motor car. Bernard and Weaver were accused by the Mexican Consul at Hidalgo, Texas, and were accordingly arrested, but released on bail; Bernard's appointment as a deputy sheriff was cancelled by his sheriff on July 22, 1922. The public prosecutor made investigations and submitted the case to the Grand Jury, but the Grand Jury deferred it from 1922 to 1923, from 1923 to 1924, and never took action upon it. The Memorial alleges that the killing has caused to Quintanilla's parents losses and damages to the amount of 49,932.00 Mexican gold pesos, and that as these damages originated in acts of an official of the State of Texas, combined with a denial of justice, the United States is liable for them.

2. It appears from the record that Quintanilla was taken into custody on July 16, 1922, by a deputy sheriff of the State of Texas, to put him at the disposal of the judicial officers; it is left uncertain whether this official was provided with any authorization to take Quintanilla from his house and arrest him. The United States Government never reported what this deputy sheriff did with Quintanilla after he had taken him under custody. The young man apparently never reached the county jail. The deputy sheriff may have changed his mind and set him at liberty, and after that Quintanilla may have been murdered by an unknown person. An enemy of Quintanilla may have come up and taken him from the car. The companion of the deputy sheriff, who was not an official, may have killed Quintanilla; or the two custodians may have acted in self-defense. The United States Government has been silent on all of this. The only thing the record clearly shows is that Quintanilla was taken into custody by a State official, and that he never was delivered to any jail. The first question before this Commission, therefore, is whether under international law these circumstances present a case for which a Government must be held liable.

3. The Commission does not hesitate to answer in the affirmative. The most notable parallel in international law relates to war prisoners, hostages,

and interned members of a belligerent army and navy. It would be going too far to pretend that a Government taking into its custody either war prisoners or hostages or interned soldiers is responsible for everything which may happen to them; but there can be no reasonable doubt that it may be called to account for them, that it is obligated to account for them, and that under international law it can not exculpate itself by merely stating that it took these men into custody and that thereafter they have disappeared without leaving any trace. The Hague Conventions of 1907 are silent as to hostages; but as to war prisoners and persons assimilated to them (detained newspaper correspondents, etc.) they contain explicit provisions for the application of this principle (articles 13, 14 and 16 of the fourth Hague Convention of 1907) and the provisions of the fifth and thirteenth Conventions of 1907 concerning the treatment of interned army and navy men would be meaningless if the respective Governments were not obligated to account for the men they took into their custody. The case before this Commission is analogous. A foreigner is taken into custody by a State official. It would go too far to hold that the Government is liable for everything which may befall him. But it has to account for him. The Government can be held liable if it is proven that it has treated him cruelly, harshly, unlawfully; so much the more it is liable if it can say only that it took him into custody—either in jail or in some other place and form—and that it ignores what happened to him.

4. The question then arises whether this duty to account for a man in Governmental custody is modified by the fact that the custodian himself is accused of having killed his prisoner and, as an accused, can not be made to testify against himself. The two things clearly are separate. If the Government is obligated to state what happened to the man in its custody, its officials are bound to inform their Governments. It might be that the custodians themselves perish in a calamity together with the men in their custody, and therefore can not furnish any information. But if they are alive, and are silent, the Government has to bear the consequences. The Commission holds, therefore, that under international law and under Article I of the Convention of September 8, 1923, the respondent Government is liable for the damages originating in this act of a State official and resulting in injustice.

5. It is useless to inquire whether, apart from this liability, the United States might have been held responsible for a denial of justice in this case. The Commission confines itself to stating that nothing in the record shows that the prosecuting officer has ascertained who were the four men that took Quintanilla from his house, what were their motives for so doing, and what was to be learned from an inspection of the car in which Quintanilla was transported. If the prosecuting officer had information as to these points, the secrecy of the investigations before the Grand Jury can not explain the silence of the American Agency on all of these points.

6. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of Texas may give rise to claims against the Government of the United States. The Commission is of the opinion that claims can be predicated on such acts.

7. Considering that satisfaction is due to the parents of Quintanilla for the loss suffered by the international delinquency committed, and taking into account that the record does not show how much of his earnings went to his parents, the Commission, on the data presented in the Memorial, considers these damages not to exceed an amount of \$2,000, without interest.

*Decision*

8. The Commission accordingly decides that the Government of the United States of America is obligated to pay to the Government of the United Mexican States \$2,000 (two thousand dollars) in behalf of Francisco Quintanilla and Maria Ines Perez de Quintanilla, without interest.

*Separate opinion*

I concur in the award of \$2,000.00 without concurring in the grounds for the award stated in the opinion signed by the other two Commissioners.

Fred K. NIELSEN,  
*Commissioner.*

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D. GUERRERO VDA. DE FALCÓN (UNITED MEXICAN STATES)  
*v.* UNITED STATES OF AMERICA.

(November 16, 1926. Pages 140-143.)

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RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—FAILURE TO APPREHEND OR PUNISH. Respondent Government *held* responsible for killing of Mexican subject by soldiers guarding the border.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 566; Annual Digest, 1925-1926, p. 220.

1. This claim was filed by the United Mexican States against the United States of America in behalf of Dolores Guerrero, widow of Gregorio Falcón, and of Bartolo, Apolonio, Domingo, and Mónica Falcón, children of the deceased Falcón, a Mexican citizen, who, on May 5, 1919, at about 10.30 A. M., was wounded by bullets fired by two American soldiers from the American side of the Rio Grande at a point near the ranch called Las Barreras while he was, it is alleged in the Memorial, bathing together with another Mexican named Félix Villarreal. Falcón died in the afternoon of the same day. American military and civil authorities made an investigation of the occurrences connected with the killing of Falcón. The soldiers were not brought to trial, but they were admonished for having fired on unarmed persons, although it was believed that they did so without intention to hit. It is alleged that the death of Gregorio Falcón caused his widow and his children, Mexican citizens, damages in the amount of 18,518.40 pesos, Mexican currency; that the American authorities improperly failed to bring the guilty persons to trial, and that on account of this wrongful death and a denial of justice the United States should pay an indemnity in the aforementioned sum, together with interest from May 5, 1919, to the time of payment. The record discloses the following facts: Sergeants John Smith and John Floyd, of the Fourth Cavalry of the United States Army, had been directed, on May 5, 1919, to patrol the river in the locality where the shooting occurred with the object of preventing smuggling and other transgressions of the law. Sergeant Smith, during the course of the investigation conducted

by the military authorities, testified that while the two soldiers were making an inspection on the banks of the river they saw through long-distance field glasses a naked man who was swimming towards the Mexican side and also several mounted men on the Mexican shore. Evidence on this point is not entirely clear. Sergeant Floyd stated that "About a half mile this side of that place (Barreras) we noticed a bunch of men trying to cross the river." Both soldiers also mentioned three men who were in the river naked, while evidence produced by the Mexican Government refers to but two men. It appears that the soldiers, believing that the men in the river were engaged in smuggling, approached them and directed them to halt. Falcón and Villarreal did not obey the order, whereupon Sergeant Smith fired a shot in the air to cause them to stop. The soldiers testify that they were thereupon immediately fired on from the Mexican side by mounted men; that they (the soldiers) retreated, dismounted, and returned to answer the fire in self-defense, and also directed some shots at the men who were in the water. It further appears that about fifty shots were exchanged in this manner while Falcón and Villarreal were approaching the Mexican shore, and that Falcón had to be assisted out of the water by Villarreal, he having been wounded by one of the bullets fired from the American side. While the two soldiers asserted that the men in the river were towing some floating cases, Falcón and Villarreal deny this, and there is no other evidence bearing on the point. It also appears uncertain whether the two Mexicans had been in the American side of the river. The only evidence upon this point is the statement of Juan Muñiz, a man who was on the American side at the time the occurrences in question took place, and who stated that "he had heard that two men had passed his ranch, coming from the vicinity of Mission, and that they had crossed the river." This same Muñiz testified that he had heard shots, "but that he did not know who shot first," a statement which might be interpreted in the sense that there were shots fired from both sides of the river, or that there were shots only from the American side and that Muñiz did not notice which of the two American soldiers had fired first.

2. Mexican authorities also investigated the occurrences in question and brought the results of their investigation to the notice of the Mexican Consul at Rio Grande, who, on May 12, 1919, communicated them to the Ambassador of Mexico in the United States, who brought them to the notice of the Department of State. The American military authorities, without bringing Smith and Floyd to trial, declared them innocent of crime on the ground that they had acted in the discharge of their duty in attempting to prevent smuggling, and that even if they had made an error in firing the first shot in the air, it was natural that they should return the fire of the Mexicans in order to protect themselves from shots being fired from the Mexican side.

3. Even though it be assumed that Falcón and Villarreal were engaged in smuggling, and that American soldiers were fired upon from the Mexican side, the Commission must consider the death of Falcón to be wrongful. It appears from the record that American military regulations forbade the firing on unarmed persons suspected of smuggling or crossing the river in places where passage was not authorized. (Bulletin No. 4 of February, 11 1919.) The soldiers may have believed themselves justified in using firearms to prevent smuggling or in returning a fire from the Mexican side. However, it appears they disregarded American military regulations which were evidently intended to prevent such unhappy occurrences as those underlying this claim. And according to the testimony of Sergeant Smith, they directed

fire against naked and defenseless Mexicans who were in the river thereby causing the death of Falcón.

4. In view of the results of the investigation made by American civilian authorities it seems to the Commission to be somewhat odd that the soldiers should not have been brought to trial. Apart from this point, however, the Commission is of the opinion that the killing of Falcón was a wrongful act for which damages may be assessed in the amount of \$7,000.00 without interest.

*Decision*

5. The Commission therefore decides that the Government of the United States of America must pay to the Government of the United Mexican States the sum of \$7,000.00 (seven thousand dollars) without interest, on behalf of Dolores Guerrero, widow of Gregorio Falcón and Bartolo, Apolonio, Domingo and Mónica Falcón, children of the deceased Falcón.

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LINA BALDERAS DE DÍAZ (UNITED MEXICAN STATES) *v.*  
UNITED STATES OF AMERICA.

(*November 16, 1926. Pages 143-146.*)

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**DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.** When the evidence failed to show that the American authorities were guilty of gross negligence in failing to apprehend those guilty of murder of a Mexican subject, claim *disallowed*.

1. Claim is made by the United Mexican States in this case for damages in the sum of 50,000 Mexican gold pesos or the equivalent thereof in currency of the United States, suffered by Catalina Balderas de Díaz, mother of Mauricio Díaz, a Mexican citizen, who was killed on February 8, 1920, in the city of San Antonio, Texas. It is alleged in the Memorial that the "lenity of the American authorities in regard to the institution of due legal process, to the discovery of the guilty party and to his punishment, constitutes a true denial of justice, which is a justification of the right of Catalina Balderas de Díaz, the mother of the man slain, and injured by the loss of her son, to demand compensation, as she was dependent on him for a living and such injury has not been made good to her." The sum claimed is estimated as having been suffered by the mother of the deceased taking into account his probable life expectancy.

2. The evidence accompanying the Memorial, in addition to that bearing on questions of nationality, consists of:

(1) The record of the inquest conducted with respect to the killing of Díaz which recites that the deceased came to his death on the eighth day of February, 1920, from a wound caused by a bullet from the firearm in the hands of some person whose name is unknown: and

(2) Copies of certain correspondence consisting of a communication sent by the Mexican Consul at San Antonio to the Mexican Ambassador at Washington, in which the Ambassador was informed that Díaz had been killed and that the Consul had written concerning the matter to the Sheriff

of Bexar County, Texas: the communication addressed by the Consul to the Sheriff requesting such information as the latter might have regarding the case; and the reply of the Sheriff to the Consul in which the latter was informed that Díaz was murdered by parties unknown to the police; that several persons suspected of the crime had been arrested; that the guilty persons had not been apprehended; and that the investigation would be continued.

3. The allegation in the Memorial with respect to a denial of justice resulting from a failure of American authorities to take proper steps looking to the apprehension and punishment of the person who killed Díaz raises for determination the question whether there is before the Commission convincing evidence of clearly wrongful conduct on the part of the authorities in neglecting their duty to bring to justice the person who killed the Mexican citizen Díaz. Since the Memorial is accompanied by no evidence whatever of such wrongful action on the part of the authorities, the Commission must look to the evidence filed by the United States to ascertain if the charge of a denial of justice is substantiated in the light of that evidence.

4. Accompanying the Answer of the United States is an affidavit made by F. N. Flores, Deputy Sheriff of Bexar County, who states that an investigation of the killing of Díaz showed that the deceased, who was a chauffeur, was engaged by two soldiers to drive them in an automobile; that two or three days after Díaz had been so employed two soldiers were arrested and brought to the police station at San Antonio; that two or three chauffeurs who operated cars from the same location as that from which Díaz operated were brought to the station to identify the soldiers; that no one was able to identify the two soldiers, who were later released; that every effort was made to find the guilty persons, but such efforts were not successful; and that no complaint was filed and no indictment returned in connection with the murder, as the guilty persons could never be located. The Answer is further accompanied by an affidavit made by O. W. Kilday, a detective in the employ of the City of San Antonio, Texas. Kilday states in this affidavit that he knows that the city and county officers made prompt efforts to apprehend the guilty persons, and that all of the city detectives were called to work on the case. He describes the difficulty in making investigations of the crime, due to the fact that the persons who hired Díaz had not been identified and that there were no clues which could be followed. He states that, two soldiers having been suspected, an investigation was also made by military authorities who worked in conjunction with civil authorities at San Antonio; that many soldiers were arrested and brought to the police station, and efforts were made to identify them as men who had hired the car driven by Díaz. It is pointed out in the affidavit that at the time of the commission of the crime there were probably forty thousand American soldiers stationed at the military posts in and around San Antonio.

5. Subsequent to the filing of the Answer, the American Agent filed some newspaper accounts with respect to the killing of Díaz; another affidavit of O. W. Kilday describing the activities of the police to apprehend the slayer of Díaz; an affidavit of similar purport made by Sam Street, a detective in the employ of the San Antonio police department; and an affidavit made by S. J. Maloukis, an investigator in the service of the military authorities.

6. The evidence presented by the United States does not show that there was gross negligence on the part of the American authorities in the matter of apprehending the person who killed Díaz, but does show the contrary. Even if all of the testimony furnished by the American Agency should be



regarded as unreliable—and it may be observed that no attempt was made to discredit it as such—there would still be no evidence showing negligence on the part of the authorities.

*Decision*

7. The charge of a denial of justice made in the Memorial is therefore not sustained, and the Commission accordingly decides that the claim must be disallowed.

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MACEDONIO J. GARCÍA (U.S.A.) *v.* UNITED MEXICAN STATES.

(*November 23, 1926. Pages 146-149.*)

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**JURISDICTION.** Claim for loan to Adolfo de la Huerta, Governor of Sonora, for assisting in revolutionary movement, *held not per se* outside jurisdiction of tribunal. Loan being payable after period covered by *compromis* held outside jurisdiction of tribunal.

**LOAN TO OFFICIAL.** Evidence *held* insufficient to establish responsibility of respondent Government for loan to official.

1. This claim is made by the United States of America against the United Mexican States in behalf of Macedonio J. García, an American citizen, to obtain the payment of \$161,000.00 with interest from May 31, 1920, in settlement of loans said to have been made by the claimant, the amount of \$150,000.00 being delivered on or about March 30, 1920, to Adolfo de la Huerta, Governor of Sonora, and the sum of \$11,000.00 being delivered in two parts, one of \$5,000.00 and the other \$6,000.00 United States currency during the month of May, 1920, to certain military officers. It is stated in the Memorial that García took a receipt for the amount of \$150,000.00 from de la Huerta "in the name of and for the United Mexican States"; that the latter agreed to repay this sum "on behalf of the United Mexican States"; that for the delivery of the other sums García also received a receipt signed by de la Huerta "acting for and on behalf of the Mexican Government"; and that de la Huerta likewise agreed to repay these sums. It is further alleged that on or about May 31, 1920, the three receipts were delivered to de la Huerta, who "for and on behalf of the Mexican Government" gave to García in exchange for the three receipts one receipt for the total sum of \$161,000.00 in which de la Huerta "on behalf of the Mexican Government promised and agreed to repay to claimant the said sum of \$161,000.00". It was argued in behalf of the claimant Government that the Government of Mexico is liable under the principles of international law to pay the sum of \$161,000.00 loaned to de la Huerta, who, in accordance with the so-called "Plan of Agua Prieta," was the "Supreme Chief of the Sonora Revolution," which occurred in Mexico in the spring of 1920; that the revolution was successful and resulted in the election of de la Huerta as Provisional President of Mexico and in the subsequent election of General Obregón as President, the latter assuming office on December 1, 1920; and that the receipt given by de la Huerta to García after his election as Provisional President is conclusive proof that the loans were made, and that the Government of

Mexico is bound under principles of international law to pay the obligations of successful revolutionists.

2. In behalf of the Mexican Government it is contended that the Commission has not jurisdiction over the claim because (a) whatever may be the status of García under the law of the United States, he is under Mexican law a Mexican citizen by virtue of Mexican parentage, and (b) that the claim is excluded from the jurisdiction of the Commission as falling within the category mentioned in Article I of the Convention of September 8, 1923, of claims "arising from acts incident to the recent revolutions."

3. The American citizenship of García is proved by a record of his birth on March 2, 1879, in Cameron County, State of Texas. There was laid before the Commission a naturalization certificate showing that Macedonio García was naturalized as an American citizen on November 26, 1869, by the order of the County Court in the same county. We have no doubt that this order is a record of the naturalization of the claimant's father. Macedonio García having been naturalized as an American citizen on November 26, 1869, the Mexican Government was obligated at that time, pursuant to Article I of the Convention concluded July 10, 1868, between the United States and Mexico, to recognize his American citizenship acquired about ten years prior to the birth of his son, the claimant in this case. Even if there were a doubt in our minds with respect to the status of Macedonio García, we are of the opinion that the right of the United States to intervene in behalf of the son could not be challenged solely on the basis of the telegram of October 13, 1923, before the Commission, which was transmitted by the Mexican Consul at Brownsville to the Mexican Agent in which telegram it is stated that Macedonio García was born in 1847, in Matamoros, Tamaulipas.

4. The receipt bearing date of May 31, 1920, for \$161,000.00, which is signed "The Supreme Chief of the Revolution, Adolfo de la Huerta," translated, reads as follows:

"I hereby declare that Macedonio J. Garcia, has furnished the amount of \$161,000.00 in the way of a loan for assisting the revolutionary movement which I have the honor to be the head of, and which should be paid when the federal public Hacienda is found to be in a favorable situation for making this reimbursement."

5. It is argued in behalf of the United States that it is unmistakably shown by this receipt that payment of the obligation to which it refers was not due until subsequent to May 31, 1920; that it follows that the claim based on the nonpayment of the obligation did not arise between November 20, 1910, and May 31, 1920, the period which, according to the Claims Convention of September 10, 1923, embraces claims arising during recent revolutions and disturbed conditions. in Mexico. We take that view, and therefore do not sustain the contention raised by the Mexican Agency that the claim comes within the category of claims "arising from acts incident to the recent revolutions."

6. In behalf of the respondent Government it has been argued that, it being assumed that money was loaned by García as described in the Memorial, that act was a participation by him in Mexican politics as a result of which, under international law he lost the right to invoke the protection of the United States, and the latter has no right to intervene in the case. Arbitral decisions were cited to support this contention. The Commission is of the opinion that no question of jurisdiction can properly be raised by the contentions made in behalf of the Mexican Government on this point which

is one the pertinency of which could only be considered in connection with the question of the validity of the claim under international law.

7. We deem it to be unnecessary to consider this matter, for the reason that, apart from other questions raised in the case, we are of the opinion that the evidence before the Commission in relation to the interesting transactions in question does not justify an award such as that asked for by the United States. The only evidence produced by the claimant Government other than that relating to the nationality of the claimant, is an affidavit made by the claimant and the receipt of May 31, 1920, signed, "Adolfo de la Huerta." There is no definite evidence throwing light on the contents of the receipts said to have been given by de la Huerta for the sums of \$150,000.00, \$6,000.00, and \$5,000.00, respectively; there is no definite evidence whether such sums were actually delivered and to whom; and apart from García's affidavit there is no evidence whether all of these three sums were originally loans or contributions. Excepting the claimant's affidavit there is no evidence to authenticate the receipt of May 31, 1920, signed "Adolfo de la Huerta." Finally, it is important to note that, while in the Memorial there is an allegation of liability for an overdue obligation evidenced by the receipt of May 31, 1920, the receipt recites that the sum of \$161,000.00 should be paid when the Federal Public Treasury is found to be in a favorable situation for making reimbursement. It has not been shown to the Commission that, it being assumed that the receipt evidences an obligation binding on the Mexican Government, it rests with the claimant to fix the time of payment according to his views of the conditions of the Public Treasury. And we do not consider that it would be within the province of the Commission to make any determination with reference to that point.

#### *Decision*

8. For the reasons stated above, the claim is disallowed.

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THOMAS H. YOUMANS (U.S.A.) *v.* UNITED MEXICAN STATES.

*(November 23, 1926. Pages 150-159.)*

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RESPONSIBILITY FOR ACTS OF FORCES.—DIRECT RESPONSIBILITY.—MOB VIOLENCE.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—FAILURE TO PROTECT. Mexican military forces, under command of officer, instead of protecting American citizens attacked by mob, opened fire on Americans, as a result of which all were killed either by armed forces or by mob. No one appeared to have been punished for the crime, though some prosecutions were begun. Claim *allowed*.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 571; Annual Digest, 1925-1926, p. 223; British Yearbook, Vol. 8, 1927, p. 184.

*Comments:* Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521.

1. Claim for damages in the amount of \$50,000.00 is made in this case by the United States of America against the United Mexican States in behalf of Thomas H. Youmans, the son of Henry Youmans, an American citizen, who, together with two other Americans, John A. Connelly and George Arnold, was killed at the hands of a mob on March 14, 1880, at Angangueo, State of Michoacán, Mexico. The occurrences giving rise to the claim as stated in the Memorial are substantially as follows:

2. At the time when the killing took place Connelly and Youmans were employed by Justin Arnold and Clinton Stephens, American citizens, who were engaged under a contract with a British corporation in driving a tunnel, known as the San Hilario Tunnel, in the town of Angangueo, a place having a population of approximately 7,000 people. The work was being done by Mexican laborers resident in the town under the supervision of the Americans. On the day when these men were killed Connelly, who was Managing Engineer in the construction of the tunnel at Angangueo, had a controversy with a laborer, Cayentano Medina by name, over a trifling sum of about twelve cents which the laborer insisted was due to him as wages. Connelly considering the conduct of the laborer to be offensive, ejected the latter from the house in which Connelly lived and to which Medina had come to discuss the matter. Subsequently Medina, who was joined by several companions, began to throw stones at Connelly while the latter was sitting in front of his house and approached the American with a drawn machete. Connelly, with a view to frightening his assailant, fired shots into the air from a revolver. The American having withdrawn into the house, Medina attempted to enter, and his companions followed. Connelly thereupon fired at Medina with a shotgun and wounded him in the legs. Soon the house was surrounded by a threatening mob, which increased until it numbered about a thousand people. Connelly, Youmans, and Arnold, realizing the seriousness of their situation, prepared to defend themselves against the mob. Connelly's employer, Clinton Stephens, on hearing shots, went to the house and learned from Connelly what had happened. Upon Stephen's advice Connelly undertook to surrender himself to the local authorities, but was driven back into the house by the mob. The attack against Connelly when he endeavored to surrender to police authorities was led by Pedro Mondragón, a person styled the "Jefe de Manzana," with whom Connelly had been on friendly terms. Stephens, followed by a part of the mob, proceeded to the *Casa Municipal* and requested the Mayor, Don Justo Lopez, to endeavor to protect the Americans in the house. The Mayor promptly went to the house, but was unable to quiet the mob. He then returned to his office and ordered José Maria Mora, *Jefe de la Tropa de la Seguridad Pública*, who held the rank of Lieutenant in the forces of the State of Michoacán, to proceed with troops to quell the riot and put an end to the attack upon the Americans. The troops, on arriving at the scene of the riot, instead of dispersing the mob, opened fire on the house, as a consequence of which Arnold was killed. The mob renewed the attack, and while the Americans defended themselves as best they could, several members of the mob approached the house from the rear, where there were no windows and set fire to the roof. Connelly and Youmans were forced to leave, and as they did so they were killed by the troops and members of the mob. Their bodies were dragged through the streets and left under a pile of stones by the side of the road so mutilated as scarcely to be recognizable. At night they were buried by employees of the Mining Company in its cemetery at Trojes.

3. On the morning following the murder of the Americans, Federal Troops arrived and established order. On March 17, the Government of the State was directed by the President of Mexico to take all possible measures to discover those who were responsible for the murders. Of the thousand or more who made up the mob, court action was instituted against about twenty-nine. Only eighteen of this number were arrested, but the record discloses that several were released on nominal bail, and were not apprehended after their release. Five were condemned to capital punishment, but their sentences were modified. This action of the court was to no avail; when it was taken one had died, and the remaining four left town before they could be arrested. Seven were acquitted. The cases of six others were discontinued, and the charges against the remaining eleven were left open in the year 1887 for prosecution when they might be apprehended.

4. There appears to be no reason to doubt the substantial accuracy of the allegations in the Memorial upon which the claim is predicated. Some contention is made in the brief filed by the respondent Government to the effect that it is not proved by evidence in the record that the Mexican authorities were chargeable with negligence in the matter of protecting the men who were killed; or that soldiers participated in the assault on the men; or that proper efforts were not made to apprehend and punish the persons participating in the attack. We do not agree with that contention. In reaching conclusions respecting material facts we are confronted by no serious difficulties resulting from absence of or uncertainties in evidence. The riot took place in the day time. About one thousand persons participated. The incidents of the riot were therefore, of course, well known throughout the town. Pertinent facts are fully revealed by information collected and gathered immediately after the riot, by reports from American diplomatic and consular officers in Mexico, and by communications exchanged between the American Legation at Mexico City and the Mexican Foreign Office. Copies of official Mexican judicial records and other records accompany the Mexican Answer and throw considerable light on the character of the various steps taken to bring to justice the guilty persons. It is pertinent to note that counsel for Mexico in oral argument did not challenge the substantial accuracy of the evidence upon which the allegations in the Memorial with respect to the occurrences out of which the claim arises are based. However, mention may be made of some of the principal parts of that evidence.

5. Accompanying a despatch of April 2, 1880, from the American Legation at Mexico City to the Secretary of State at Washington (Annex 34), is a lengthy communication sent to the Legation by Arthur B. Kitchener, Director of the Trojes Mining Company. That communication furnishes detailed information with respect to the incidents of the riot as they are described in the Memorial, and it contains the statement that the writer and Mr. Stephens had "several witnesses who saw the soldiers later on fire on the Americans." With a despatch of May 18, 1880, from the American Minister at Mexico City to the Department of State (Annex 36), was enclosed another lengthy communication addressed by Mr. Kitchener to the Minister in reply to a request made by the latter for information regarding the steps taken by Mexican authorities to bring to justice the persons implicated in the murder. Mr. Kitchener furnishes details with regard to the arrest of a number of persons and the release on what he calls "nominal bail" of some of those who had been taken into custody. He mentions two cases in which the bondsmen of men so released were common workmen of no property or position; another case in which the bondsman was a shopkeeper.

He expresses great dissatisfaction with the manner in which the investigation of the crime was conducted. Evidence which undoubtedly is of much value in furnishing reliable information concerning the facts relative to the riot is found in a report (Annex 39) transmitted to the Secretary of State at Washington under date of May 16, 1881, by Mr. David H. Strother, American Consul General at Mexico City, who visited Angangueo for the purpose of making an investigation of the murder. Although his investigation was made a year after the riot, it seems reasonable to believe that the facts in relation to the tragedy were so vividly in the minds of persons with whom the Consul General came into contact that he was able to obtain accurate and comprehensive information. From the Consul General's report it appears to be clear that he performed his work faithfully and with the sole purpose of ascertaining the truth. The manner in which he proceeded and the sources of his information may be shown to some extent by the following extract from his report:

"In conducting any investigation of the subject in hand I thought it advisable to conceal my official character and the motive of my visit, believing that I could thus obtain a more full and impartial statement of the facts. In this way I gathered evidence from Mexicans, English and Americans, all agreeing in the main facts and confirming generally the statements we have had heretofore. Some of the persons with whom I conversed were well acquainted with all the principal parties concerned and eye witnesses of some of the facts which they narrated. All told their stories clearly and dispassionately and seemed fairly to express the settled convictions of thinking men on events, which occurring more than a year before had been carefully sifted and conclusively established."

6. With respect to the participation of the soldiers in the attack on the Americans the Consul General said:

"It is believed by those who seem well acquainted with all the circumstances, that the appearance of the troops on the ground in behalf of public order, would of itself alone have been sufficient to have quelled the riot and put an end to all further turbulent and unlawful proceedings, but to the astonishment of all, they at once took position and opened fire on the Americans in the house. This act encouraged the mob to reopen their attack with redoubled fury. The soldiers continued their fire until they had expended their ammunition killing George Arnold by a shot through the head."

7. In submitting certain conclusions at the end of the report Mr. Strother stated:

"That there would in all probability have been no fatal results from the riot had it not been for the unaccountable and scandalous conduct of the State troops."

8. The American Minister at Mexico City in his despatch of April 2, 1880, reported to his Government that upon receiving telegraphic information regarding the murder of the Americans at Angangueo, he brought the matter to the attention of the Mexican Foreign Office in a communication of March 16, 1880, in which he expressed the feeling of assurance that such prompt and energetic measures would be taken by the Mexican Government as the circumstances of the case might require. In an instruction of April 20, 1880 (Annex 35), Secretary of State Everetts directed the Minister to express to the Mexican Government, without any reference to the question of private indemnity in advance of more complete information, the confident expectations on the part of the Government of the United States that nothing would be omitted in the matter of bringing the offenders to the strictest justice

according to law. Following the receipt of Consul General Strother's despatch of May 16, 1881, the Department of State, in an instruction dated November 4, 1881 (Annex 40), directed the American Minister at Mexico City to bring to the attention of the Mexican Government claims which had been presented to the Department by relatives of the three murdered men. The Department in this communication emphasized the participation of the troops in the riot and with respect to this point said:

"These troops, at a moment when they had the mob under control, and when the complete quelling of the riot seemed an immediate possibility, in utter disregard of the obligations of their office as preservers of the peace and with wanton and deliberate violation of law, opened fire on the three Americans, instantly killing one and joining with the infuriated mob in the inhuman slaughter of the other two who were fleeing for their lives from their burning cabin, which had been deliberately set fire to over their heads.

"It seems almost needless to remark that such conduct on the part of soldiers or police, under orders to preserve the peace and protect the lives and property of peaceable inhabitants, on the plainest principles of international law and independent of the treaty stipulations between the two nations, which are contravened by such proceedings, renders the Government in whose service they are employed, justly liable to the Government of the men, whose lives were thus wantonly and needlessly sacrificed."

9. Under date of May 15, 1882, the Mexican Foreign Office addressed a communication to the American Legation denying all liability with respect to these claims (Annex 41). The Minister for Foreign Affairs, Señor Mariscal, challenged the right of the United States to intervene in the cases on the ground that the murdered men had not been matriculated under Mexican law. He asserted that there had been no negligence in the matter of giving protection to the men and denied that evidence had been furnished to prove that soldiers participated in the attack on the Americans. A reply to the Mexican Government's note was made at considerable length by the American Minister in a note of May 27, 1882, (Annex 41). In this communication the Minister referred to the participation in the riot by the Mexican officer and the men under his command as follows:

"The above-mentioned officer and soldiers under his charge confessed to having done this, alleging in excuse that they feared the vengeance of the mob had they acted otherwise. A number of the towns people were eyewitnesses of this fact. Amongst others, I may mention the following: Don Guillermo Zercero 2; Diputado de Minería, an owner of mines and smelting works in the town; Don Justo Lopez, president of the Ayuntamiento of Anganguco; Don Ruperto Menchaca, butcher, well known to the Company and Antonio Alamio, store-keeper, besides many miners and work people of the District. For above a week after the disturbance the above-mentioned Mora and soldiers were still at liberty, but were then taken into custody on evidence against them by Don Justo Lopez."

10. In an instruction of September 4, 1882, the American Minister was informed that the Government of the United States did not deem it to be advisable to press the cases further at that time.

11. The claim made by the United States is predicated on the failure of the Mexican Government to exercise due diligence to protect the father of the claimant from the fury of the mob at whose hands he was killed, and the failure to take proper steps looking to the apprehension and punishment of the persons implicated in the crime. In connection with the contention with respect to the failure of the authorities to protect Youmans from the acts of the mob, particular emphasis is laid on the participation of soldiers which is

asserted to be in itself a ground of liability. In behalf of the respondent Government it is contended that the Mexican Government and the Government of the State of Michoacán acted with due diligence in arresting and bringing to justice all persons against whom a reasonable suspicion of guilt existed; that the charge that some State troops participated in the riot is not proved by the evidence; and that, even if it were assumed that the soldiers were guilty of such participation, the Mexican Government should not be held responsible for the wrongful acts of ten soldiers and one officer of the State of Michoacán, who, after having been ordered by the highest official in the locality to protect American citizens, instead of carrying out orders given them acted in violation of them in consequence of which the Americans were killed.

12. We are of the opinion that the contentions advanced by the United States as to liability on the part of the Mexican Government are sustained by the evidence in the record. Without discussing the evidence at length, it may be stated that the Commission is of the opinion that the record shows a lack of diligence in the punishment of the persons implicated in the crime. Annex 3 accompanying the Mexican Answer reveals some interesting information with respect to the prosecution of persons who were arrested. There is not sufficient information before the Commission to warrant us in undertaking to draw any definite conclusions with respect to certain cases in which prisoners were released and other cases in which severe sentences imposed by the court of first instance were mitigated by a higher court. It may be mentioned, however, that this judicial record shows that seventeen prisoners escaped, some of them while they were at liberty on bail. Citations have been made to evidence with respect to participation of soldiers in the killing of the three Americans. We consider that evidence to be ample proof of such conduct on the part of the soldiers, and touching this point it is pertinent to note that evidence has not been adduced to disprove their guilt. It is also pertinent to note touching this point that some soldiers were arrested but were not sentenced. Evidence before the Commission does not disclose whose weapons killed the Americans, but the participation of the soldiers with members of the mob is established. It can not properly be said that adequate protection is afforded to foreigners in a case in which the proper agencies of the law to afford protection participate in murder. The claim of *Alfred Jeannotat*, under the Convention of July 4, 1868, between the United States and Mexico, was a case very similar to the present one. Speaking of the participation of soldiers in riotous acts, Umpire Thornton said:

"It has been alleged that in the above-mentioned instance the sacking was done by the released prisoners, and by a mob belonging to the population of the town; but, if it were so, it was the military force commanded by officers who put it in the power of the convicts and incited the mob to assist them in their acts of violence and plunder. It does not appear that without the arrival of the military force, which ought to have protected the peaceable inhabitants of the town, there would have been any inclination to commit such acts of violence. The umpire is therefore of opinion that compensation is due to the claimant from the Mexican Government." (Moore, *International Arbitrations*, Vol. IV 3673, 3674.)

13. With respect to the question of responsibility for the acts of soldiers there are citations in the Mexican Government's brief of extracts from a discussion of a subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law. The passage quoted, which deals with the responsibility of a State for illegal acts of officials



resulting in damages to foreigners, begins with a statement relative to the acts of an official accomplished "outside the scope of his competency, that is to say, if he has exceeded his powers." An illegal act of this kind, it is stated in the quotation, is one that can not be imputed to the State. Apart from the question whether the acts of officials referred to in this discussion have any relation to the rule of international law with regard to responsibility for acts of soldiers, it seems clear that the passage to which particular attention is called in the Mexican Government's brief is concerned solely with the question of the authority of an officer as defined by domestic law to act for his Government with reference to some particular subject. Clearly it is not intended by the rule asserted to say that no wrongful act of an official acting in the discharge of duties entrusted to him can impose responsibility on a Government under international law because any such wrongful act must be considered to be "outside the scope of his competency." If this were the meaning intended by the rule it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable. We do not consider that any of these passages from the discussion of the subcommittee quoted in the Mexican brief are at variance with the view which we take that the action of the troops in participating in the murder at Angangueo imposed a direct responsibility on the Government of Mexico.

14. Citation is also made in the Mexican brief to an opinion rendered by Umpire Lieber in which effect is evidently given to the well-recognized rule of international law that a Government is not responsible for malicious acts of soldiers committed in their private capacity. Awards have repeatedly been rendered for wrongful acts of soldiers acting under the command of an officer. (See for example the claim of *Frederick A. Newton v. Mexico*, for the theft of property by Republican troops under Colonel Rijos, and the claim of *A. F. Lanfranco v. Mexico*, for the looting of a store at Tehuantepec by armed men under the command of the *Jefe Político* of that place—Moore, *International Arbitrations*, Vol. 3, p. 2997; also the interesting case of the German sentry who at the frontier near Vexaincourt shot from the German side and killed a person on French territory, mentioned by Oppenheim, *International Law*, 3d edit, Vol. 1, pp. 218-219; and the opinion of the Commission in the *Falcón* claim, Docket No. 278). Certain cases coming before the international tribunals may have revealed some uncertainty whether the acts of soldiers should properly be regarded as private acts for which there was no liability on the State, or acts for which the State should be held responsible. But we do not consider that the participation of the soldiers in the murder at Angangueo can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer. Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts.

15. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of authorities of Michoacán may give rise to claims against the Government of Mexico. The Commission is of the opinion that claims may be predicated on such acts.

16. Claim is made in this case for damages in the amount of \$50,000.00. The Commission is of the opinion that an award may properly be made in the sum of \$20,000.00.

*Decision*

17. The Commission therefore decides that the Government of the United Mexican States must pay to the Government of the United States of America the sum of \$20,000.00 (twenty thousand dollars) without interest on behalf of Thomas H. Youmans.

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AGNES CONNELLY *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

(*November 23, 1926. Pages 159-162.*)

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COLLATERAL RELATIVES AS PARTIES CLAIMANT. Collateral relatives, namely, brothers and sisters, as well as parents, *held* entitled to claim for damages sustained as a result of death of American subject.

RESPONSIBILITY FOR ACTS OF FORCES.—DIRECT RESPONSIBILITY.—MOB VIOLENCE.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—FAILURE TO PROTECT. Claim arising under same circumstances as those set forth in *Thomas H. Youmans* claim *supra* allowed.

MEASURE OF DAMAGES, WRONGFUL DEATH. Loss of support made measure of damages in case arising out of death of American subject.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 579; Annual Digest, 1925-1926, p. 247.

1. Claim for damages in the amount of \$50,000.00 is made in this case by the United States of America against the United Mexican States in behalf of Agnes, Alice, Thomas, Mary A., and William Connelly and Ellen Edith Murphy, whose brother, John A. Connelly, together with two other Americans, Henry Youmans and George Arnold, was killed at the hands of a mob on March 14, 1880, at Anganguco, Michoacán, Mexico. The occurrences giving rise to this claim are the same as those underlying the claim of Thomas H. Youmans (Docket No. 271)<sup>1</sup>. The conclusions of the Commission with respect to the responsibility of Mexico in the claim of Thomas H. Youmans which are stated in the Commission's opinion in that case are applicable to the instant case, and in disposing of it it is necessary merely to refer to certain questions raised by the Mexican Government with respect to the status of the claimants and the right of the United States to intervene in their behalf.

2. It is alleged by the respondent Government (a) that the United States has no standing in this case, since proof of the American citizenship of John A. Connelly, the murdered man, has not been presented, and (b) that, the right of the United States to intervene in this case being assumed, damages can not be recovered in behalf of the brothers and sisters of John A. Connelly in their own right, since they are collateral relatives who were not dependent on the deceased for support.

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<sup>1</sup> See page 110.

3. From evidence in the record, we are satisfied that the American citizenship of the deceased John A. Connelly has been convincingly established. It appears that his parents lived at Lockport, in the State of New York; that an elder brother and two elder sisters were baptized at that place in the years 1852, 1853, and 1855, respectively; that John A. Connelly was born on September 26, 1856, at a place not mentioned and was baptized at Lockport on October 18, 1856. There is no reasonable doubt that he was a native citizen of the United States. It may further be mentioned however that there was introduced in evidence the record of the naturalization of Matthew Connelly, father of John A. Connelly, showing that the former was naturalized as an American citizen on June 16, 1855, that is, about a year prior to the birth of the son John.

4. The Commission is of the opinion that by the killing of John A. Connelly not only his father, but other members of his family, brothers and sisters, sustained a pecuniary loss. In taking account, as we deem it proper to do, of the indignity and grief occasioned by the tragic killing of Connelly, in which Mexican troops participated, we are mindful that brothers and sisters, and not the father alone were afflicted. The Commission is aware that it has been held in an international award that collateral relatives of a deceased claimant not dependent on him for support are not to be admitted as claimants in his place (McHugh case; Hale's Report 61-62, 240-241; Moore 3278-3279); but this situation is not present in this case. And as to the right of collateral relatives of a killed man not dependent on him for support to claim for damages sustained by his death awards differ. Bearing in mind the elements of damages of which international tribunals have taken account in similar cases (see for example, the discussion of the point in the *Di Caro* case, Ralston, *Venezuelan Arbitrations of 1903*, p. 769) we consider it proper to take cognizance of information contained in the record with respect to material support contributed by Connelly to members of his family. There is evidence to the effect that at the time of his death, four sisters, Mary A., Ellen, Agnes and Alice, aged respectively, 28, 24, 17 and 14 years, and one of his brothers, aged 11 years, were living with their father at his home, and that the deceased sent to his father to be used for the support of his brothers and sisters on an average of \$125.00 each month, and that on one occasion he had sent an additional sum of \$500.00. However, in fixing the amount of damages it cannot be assumed that had Connelly lived he would have continued throughout his lifetime to send money to his relatives though he did so when the father was alive and several children lived with him.

5. Claim is made in this case for damages in the amount of \$50,000.00. The Commission, however, is of the opinion that an award may properly be made in the sum of \$18,000.00.

#### *Decision*

6. The Commission therefore decides that the Government of the United Mexican States must pay to the Government of the United States of America the sum of \$18,000.00 (eighteen thousand dollars) without interest, on behalf of the claimants.

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J. PARKER KIRLIN *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

(November 23, 1926. Pages 162-163.)

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CONTRACT CLAIMS. Claim for non-payment of fee for legal services rendered Mexican Government *allowed*. Only issue before tribunal was as to amount payable, since liability was conceded.

(Text of decision omitted.)

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TEODORO GARCÍA AND M. A. GARZA (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(December 3, 1926, dissenting opinion by American Commissioner, undated.  
Pages 163-185.)

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RESPONSIBILITY FOR ACTS OF FORCES.—ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—WRONGFUL DEATH.—INTERNATIONAL STANDARD. Killing of Mexican subject by border patrol, under command of officer, *held* in the circumstances an act falling below the international standard.

DENIAL OF JUSTICE.—FAILURE TO PUNISH. Disapproval of sentence of court-martial by President of United States, whereby the commanding officer was restored to duty instead of dismissed from service, *held* not a denial of justice below international standard.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 581; Annual Digest, 1925-1926, p. 215; British Yearbook, Vol. 8, 1927, p. 185.

*Comments:* Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 518; Joseph Conrad Fehr, "International Law as Applied by U.S.-Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312 at 314.

1. This claim is presented by the United Mexican States against the United States in behalf of Teodoro García and María Apolinar Garza, Mexican nationals, father and mother of Concepción García, a girl of Mexican nationality, who on April 8, 1919, between 9 and 10 a.m., was killed by a shot from the American side of the Río Bravo del Norte or Río Grande, while crossing from the American to the Mexican side on a raft propelled by two men in the water, in the company of her mother and her aunt, not far from Havana, Texas, the father, a laborer, looking on from the Mexican bank. An American officer, Second Lieutenant Robert L. Guley, 4th United States Cavalry, was that morning on duty on the border with an armed patrol of four men, had discovered the raft in contravention of the laws, had fired in order to make them halt, and unfortunately had mortally wounded the young girl, who died immediately thereafter. Having been tried before a court-martial, he had been sentenced on April 28, 1919, to be dismissed from the military service, but the commanding officer at San

Antonio, Texas, in reviewing and approving the sentence, had used his right to reserve the case for the decision of the President of the United States, and the President, acting on the advice of the Board of Review, the Judge Advocate General, and the Secretary of War, had reversed the findings of the court-martial, released the lieutenant from arrest, and restored him to duty (September, 1919). It is alleged that the United States is liable both for a wrongful killing by one of its officials and for denial of justice; that the claimants sustained damages in the sum of 50,000 Mexican pesos; and that the United States ought to pay them the said amount, with interest thereon.

2. Nearly all of the facts in this case are undisputed. The raft left the Mexican side in the morning of the said day to take from the opposite side García's daughter who had been for about three years in the United States, but had fallen ill and was to be taken home, and García's wife with her sister, both of whom had been on the other side for a couple of days. All members of the party were unarmed. They crossed the river on a place where such crossing was strictly forbidden by the laws of both countries. It is not doubtful from the record that at least Teodoro García, the girl's father, knew perfectly well that this crossing was a delinquency and a risky act. Nor is it doubtful that the American officer had been especially instructed to enforce on the river border different sets of acts and/or regulations which forbade crossing, smuggling, and similar offenses. Less than two months before, however, on February 11, 1919, a military regulation had been promulgated, reading in its paragraph 7: "but firing on unarmed persons supposed to be engaged in smuggling or crossing the river at unauthorized places, is not authorized." Less than three weeks before, troop commanders had been told they would be held responsible that the provisions of said Bulletin be "carefully explained to all men." The court-martial decided that this Bulletin had been violated by the officer. The President of the United States gave a contrary decision after submission of reports which held, among other things, that the Bulletin had not been violated. The only point of some importance on which the evidence differs relates to the question, whether the raft at the time of the shooting was in the Mexican or in the American part of the stream; but for the decision to be given by the Commission this question is not material.

3. The killing and its circumstances being established, the Commission has to decide, whether the firing as a consequence of which the girl was mortally wounded constituted a wrongful act under international law. It is not for this Commission to decide whether the author could or should be punished under American laws; therefore, it is not for the Commission to enter upon the field where the American court-martial, the reviewing general at San Antonio, Texas, and the President of the United States found themselves. The only problem before this Commission is whether, under international law, the American officer was entitled to shoot in the direction of the raft in the way he did.

4. The Commission makes its conception of international law in this respect dependent upon the answer to the question, whether there exists among civilized nations any international standard concerning the taking of human life. The Commission not only holds that there exists one, but also that it is necessary to state and acknowledge its existence because of the fact that there are parts of the world and specific circumstances in which human practice apparently is inclined to fall below this standard. The Commission, in its opinion on the Swinney case (Docket No. 130), speaking of the Rio Grande, stated already: "Human life in these parts, on both sides, seems not

to be appraised so highly as international standards prescribe." Nobody, moreover, will deny that in time of active war the value of human life even outside of battlefields is underrated. Authoritative writers in the field of domestic penal law in different countries and authoritative awards have emphasized that human life may not be taken either for prevention or for repression, unless in cases of extreme necessity. To give just two quotations on the subject: the famous Italian jurist Carrara does not hesitate to qualify as an abuse of power excessive harshness employed by agents of the public force to realize an arrest, and adds that it is to such abuse that the sheriffs of Toscana owe their sad reputation (*Programma del corso di diritto criminale*, 8th edition, Vol. V, 1911, pp. 114-115; compare for an historic development Vol. I, 1906, pp. 56-60); and in *State v. Cunningham* 51 L. R. A. (N.S.) 1179, an American court said: "The highest degree of care is exacted of a person handling firearms. They are extraordinarily dangerous, and in using them extraordinary care should be exercised to prevent injury to others. \* \* \*. We unqualifiedly condemn this practice of the reckless use of firearms. Officers should make all reasonable efforts to apprehend criminals; but this duty does not justify the use of firearms, except in the cases authorized by law. Officers, as well as other persons, should have a true appreciation of the value of a human life."

5. If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of firearms. On the part of American authorities this duty for the American-Mexican border was recognized in Bulletin No. 12, May 30, 1917 ("Particularly will be punished such offenses as unnecessary shooting across the border without authority"), by paragraph 7 of our Bulletin No. 4, February 11, 1919 ("but firing on unarmed persons supposed to be engaged in smuggling or crossing the river at unauthorized places, is not authorized"), and by paragraph 20 of General Order No. 3, March 21, 1919 ("Troop Commanders will be held responsible that the provisions of Bulletin No. 4 \* \* \*, February 11, 1919, is carefully explained to all men"). In the field of international law the said principle has been recognized in the fourth Hague Convention of 1907, where article 46 of the "Regulations respecting the laws and customs of war on land" provides that in occupied territory "the lives of persons \* \* \* must be respected," article 3 of the treaty itself adding that the belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation and shall be responsible for all acts committed by persons forming part of its armed forces. In order to consider shooting on the border by armed officials of either Government (soldiers, river guards, custom guards) justified, a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighbourhood; (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound, or kill. In no manner the Commission can endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exist prohibitive laws, that enforce-

ment of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms.

6. Bringing the facts of the present case to the test of these principles, the Commission holds that, in the first place, the delinquency of crossing the river (not that of anything else or more) was sufficiently established. In the second place, the record only shows that the officer expected the delinquents to be engaged in importing barrels of the native liquor called "mezcal," all other suppositions as to atrocious acts they might have been perpetrating being mere inferences; a proportion between the supposed delinquency and the endangering of lives is therefore not established by the record. Remarks in the record relative to the "secrecy and speed with which the crime was committed," to the fact of its occurrence "at a hidden point on the border" ("a secluded and secret place") and to the status of war still existing at the time between the United States and Germany (April, 1919) can not either supply new facts, or outweigh the fact that the crossing occurred in broad daylight, between 9 and 10 a.m.; it is, moreover, stated in the record by a Mexican district judge that "the inhabitants or residents of both sides of the river \* \* \* cross every day or very frequently to the other side" without looking "for the authorized shallow parts or passages, some of which are situated thirty or forty kilometers from their place of residence." In the third place, it appears from the record that the lieutenant did what he could to reach the place where the raft would probably land on the American bank of the river, so as to be able to arrest them without having resort to firing, but that the conditions of the bank did not allow him to be there in time and that hailing was impossible; the Commission has a full comprehension of the difficulties presenting themselves to an officer who in a case like this one has instantaneously to decide what to do. In the fourth place, however, the statement that the firing merely intended to give notice to the culprits of the officer's intention to investigate their business or to arrest them does not explain why the firing took place in so dangerous a way; the record showing that while persons were "swimming in the water and clinging thereto" (to the raft), he shot in the water quite near the raft, and that the child was wounded by "one of the first shots," the lieutenant himself recognizing that he "would not have fired in that direction if he had known women and children were on the raft." The allegation made by Lieutenant Gulley that "he knew nothing about Bulletin No. 4" can have no weight with the Commission, unless in so far as it might show that he considered himself as not having measured up to the requirements of said Bulletin.

7. The Judge Advocate's report of September 18, 1919, which apparently was the basis of the President's decision of said month would seem to interpret Bulletin No. 4, February 11, 1919, so as to read that firing on delinquents is not authorized in case the official knows or reasonably should assume that the delinquents are unarmed, but that such firing is authorized in case the official sees or is justified in assuming that they are armed, the presumption being in favor of their carrying firearms. In case this interpretation had been incorporated in the judicial decision emanating from the President of the United States, or if that interpretation were indispensable to explain the President's decision, the Commission would feel bound by this interpretation of a municipal enactment by the highest municipal decision of a judicial nature in this field. But assuming it to be a right interpretation as it stands, although not specifically endorsed by the President, it could not change in any way the facts in the present case, for in applying its principles to this

claim the Commission left aside the question whether the claimants were armed or not.

8. The allegation of a denial of justice committed by the United States has no foundation in the record. In order to assume such a denial there should be convincing evidence that, put to the test of international standards, the disapproval of the sentence of the court-martial by the President acting in his judicial capacity amounted to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency. None of these deficiencies appears from the record.

9. The record leaves no doubt but that the claimants, at least Teodoro García, realized their acting in contravention of laws and regulations which had been effective since about two years. Though this knowledge on their part can not influence the answer to the question, whether the shooting was justified or not, it ought to influence the amount of damage to which they are entitled. In fixing this amount the Commission does not consider reparation of pecuniary loss only, but also satisfaction for indignity suffered. An amount of \$2,000, without interest, would seem to express best the personal damage caused the claimants by the killing of their daughter by an American officer.

#### *Decision*

10. The Commission accordingly decides that the Government of the United States of America is obligated to pay to the Government of the United Mexican States \$2,000 (two thousand dollars), without interest, in behalf of Teodoro García and María Apolinar Garza.

#### *Dissenting opinion*

I regret that I feel constrained to dissent from the views of the other two Commissioners with respect to this claim. A very small award was rendered in the case. There are instances in which an arbitral tribunal, after reaching the conclusion that there was no liability in a given case, has recommended that compensation be made by the respondent government as an act of grace. In the present case, in which I believe there is no legal liability on the part of the respondent government, I should have been glad to join in a recommendation to the Government of the United States to make compensation to the claimants in an amount larger than that of the pecuniary award. I am stating my views with regard to the law applicable to the case, first because I deem it to be desirable to analyze the charges made with respect to the proceedings conducted in connection with the trial of the army officer who shot the girl whose death gave rise to this claim, and, second, because my views apparently differ from those of the other Commissioners not only with respect to the law applicable to this case, but also with respect to the functions of the Commission in acting on a case of this character.

The claim made by the Mexican Government is based on two grounds: (1) That there was a denial of justice, as that term is understood in international law, in the action of the President of the United States in improperly setting aside the sentence of the court-martial which found an officer of the American army guilty of charges preferred against him, and (2) that the United States is liable for a wrongful act committed by that officer.



In the Mexican Memorial it is stated that "from a constitutional standpoint the power which the Hon. President of the United States has to reverse the verdict of the Court-martial, by declaring Lieut. Gulley not responsible for the crime of homicide, contrary to all the evidence on record in the proceedings, is not open to discussion; but it is beyond doubt that this decision is not conformable to the universal principles of justice, but only to those questions of expediency of a political nature, which while they assuredly comply with constitutional requirements, yet none the less transgress the Law of Nations." And in the Mexican reply it is stated that "the decision given by the President of the United States of America to the effect that Lieutenant Gulley was not responsible for the death of the little girl named Concepción García, however it may be in accordance with the Constitutional and Military laws of the latter country, violates the principles of Universal Justice accepted by all Nations and which therefore are a part of International Law." These are very serious charges, and I am of the opinion that they are the result, in part at least, of a misconception of the military law governing the proceedings in the case of Lieutenant Gulley. In the oral argument of counsel for Mexico a somewhat different aspect was given to the President's action, which was spoken of as a pardon granted to the accused.

From the American Answer with its accompanying exhibits the facts in relation to the shooting of Concepción García and the trial of Lieutenant Gulley may be briefly summarized as follows:

On the morning of April 8, 1919, Lieutenant Gulley was in charge of an armed patrol consisting of himself and four men. He was under instructions to prevent smuggling and crossing of the Rio Grande at unauthorized points, to investigate all suspicious persons and vehicles, to allow no one with firearms south of a certain military road and to report any unusual happenings. While on duty he thought he saw a raft put out from the Mexican side of the river coming towards the American side at a distance of from 2,500 to 2,800 yards from where he was. As the undergrowth was thick at the point where the raft appeared to be and prevented a good view, Gulley proceeded with his patrol about 400 yards down the river from whence he saw the raft about four or five yards from the American side moving towards the Mexican side. The river at this point is about 75 to 100 yards in width. The distance was too great to permit Gulley to see persons on board. The distance between Gulley and the raft, estimated at from 1,500 to 2,400 yards being too great to enable him to hail persons upon it, he fired about twelve shots in the direction of the raft, stating at the time he did so, that he did not desire to hit any one but merely to frighten persons on the raft, so as to cause them to return to the American side in order that he might arrest them. The sights of the rifle were set first at 1,000 yards, one-half the estimated distance to the raft, then at 1,150 yards, and finally at 1,450 yards, about three-fourths of the estimated distance, and the shots were seen to strike the water between Gulley and the raft and around the raft.

At the time of the shooting there were on the raft the wife of Teodoro García, her sister and two children of García, and in the water propelling the raft or swimming with it were two men and two women, all Mexicans, returning from the United States. The business in the United States of the four women and the children or the reason for crossing the river was not disclosed by the evidence. The two men had been engaged by García in the morning to propel the raft from the Mexican to the American side and

return. One of the children, Concepción García, had been on the American side for three years and was ill when she was returning home. Those in control of the raft, although they heard the shots and saw the bullets striking, pursued their way towards the Mexican side. One of the bullets, either ricocheting from the water or coming directly from the gun fired by Gulley, struck the child, Concepción García, in the head inflicting a mortal wound from which she died in Mexico. The accused did not know any of the persons on the raft, and neither he nor any of his men suspected at the time of the shooting that some one on the raft had been killed.

Lieutenant Gulley was brought to trial before a general court-martial which convened at McAllen, Texas, April 28, 1919. Two charges were preferred against him: (1) that he "with malice afore-thought, wilfully, deliberately, feloniously, unlawfully, and with premeditation" killed Concepción García, and (2) that he violated standing army orders by firing on unarmed persons crossing the Rio Grande at an unauthorized place. Under the first charge he was found guilty of manslaughter within the meaning of the 93rd Article of War, and he was also found guilty of the second charge, and he was sentenced to be dismissed from the Army. The reviewing authority (the Commanding General) approved the sentence, but conformably to an existing Army regulation and the 51st Article of War, he transmitted the record of the trial to the so-called "Board of Review" which rendered an opinion to the effect that Lieutenant Gulley was not under the law guilty of the charges preferred against him. This opinion, in which it is shown several high officers participated, was signed by the Judge Advocate General of the Army and approved by the Secretary of War, and was, together with the record of the trial before the court-martial, transmitted to the President of the United States pursuant to the provisions of the 51st Article of War. The President disapproved of findings of guilty and the sentence imposed on Lieutenant Gulley and ordered his release from arrest and his restoration to duty. Upon this action of the President the Mexican Agency bases the charge of a denial of justice.

By the 48th Article of War (39 Stat. L. 658) a sentence extending to the dismissal of an officer requires, in time of peace, confirmation by the President. In time of war such a sentence may, conformably to Article 51 of the Articles of War, be suspended by the competent authority pending action in the case by the President to whom, when this procedure is followed a copy of the record of the trial must be sent. If it can be imagined that in any civilized country a law could exist authorizing the setting aside of a sentence of dismissal or a sentence of death by the Chief Magistrate of the nation irrespective of the guilt of the accused person under the law, the records accompanying the Answer in the present case obviously show that no such action was taken by the President. While in time of war a commanding general may order the execution of a sentence of dismissal, he is authorized to suspend the sentence pending action by the President, and when such a course is adopted, it is clear that the President, under the system of military justice of the United States, acts in a judicial capacity. as a court of last resort, just as he so acts in time of peace, when sentences of this kind must be submitted to him before they are carried into execution. See on this point *Runkle v. United States*, 122 U. S., 543, 558. In the present case there were laid before the President as a court of last resort not only the record of the court-martial proceedings, but an opinion of the Board of Review signed by the Judge Advocate General of the army and approved by the Secretary of War. To my mind it must of course be

taken for granted that the President concurred in that opinion, in which the conclusions are submitted that Lieutenant Gulley did not commit manslaughter as defined by American law and did not violate an army regulation forbidding the firing on unarmed persons.

I am of the opinion that the Commission is bound by the President's interpretation of American law with respect to these two points. I take it that international law recognizes the right of the authorities of a sovereign nation, particularly a court of last resort, to put the final interpretation upon the nation's laws. Possibly there may be an exception to this general rule in a case where it can be shown that a decision of a court results in a denial of justice; that is, when a decision reveals an obviously fraudulent or erroneous interpretation or application of the local law. Domestic laws may contravene the law of nations, and judicial decisions may result in a denial of justice, but assuredly it is a well-recognized general principle that the construction of national laws rests with the nation's judiciary. In the opinion of the two other Commissioners some question seems to be raised whether it was necessary for the President, in order to reach the decision which he gave, to put an interpretation on Bulletin No. 4 of February 11, 1919, with respect to firing on unarmed persons. The opinion of the Board of Review deals in detail with the interpretation of this army regulation and reaches the conclusion by what appears to me to be sound reasoning that it was not violated by Lieutenant Gulley. Since, if in the opinion of the President the regulation had been violated the sentence of the court-martial could not have been disapproved, which it was, obviously the President put upon this regulation the construction that it was not violated by Lieutenant Gulley, however meagre may be the record of his specific action. The grave charge made in the oral and written arguments advanced in behalf of the Mexican Government that the action of the President was a denial of justice, in that a proper sentence of a lower court was deliberately set aside as a matter of expediency and contrary to all the evidence in the records of the proceedings, probably requires no more discussion than that given to it in the opinion of the two other Commissioners. I have, however, very briefly indicated the character of the careful proceedings that were taken in this case. A denial of justice can be predicated upon the decisions of judicial tribunals, even courts of last resort. But attempts to establish a charge that a court of last resort has acted fraudulently or in an obviously arbitrary or erroneous manner are very infrequently made. This Commission has in the past broadly indicated its views as to what is required to establish such a charge. It is probably unnecessary, in view of what has already been said with regard to the proceedings in this case to say anything more for the purpose of showing that the decision of the court-martial imposing a sentence of dismissal on Lieutenant Gulley was not set aside merely as a matter of expediency, or that the construction and application of the law by the court of last resort was neither fraudulent, nor arbitrary, nor obviously erroneous, nor an act of expediency.

The second point raised in the case before the Commission is more difficult. The charge of a denial of justice being disposed of, there remains for consideration the issue whether the deed committed by Lieutenant Gulley for which he was tried is one for which his Government is, under international law, liable to respond in damages. There is no question with regard to the rule of international law that a nation is responsible for acts of soldiers which are not acts of malice committed in their private capacity.

See the opinion of the Commission in the claim of Thomas H. Youmans, Docket No. 271, and the cases therein cited. The Commission must therefore consider the question as to what are the kinds of acts of soldiers for which a nation is responsible. International law specifically defines certain acts of representatives or agencies for which a government must answer, such as looting or wanton or unnecessary destruction of property by soldiers, and malicious or wanton taking of human life. Acts of this kind are generally also condemned and punishable under domestic law. Well defined responsibility may also be illustrated by the liability for damages caused by public vessels. In cases of collisions between public and private vessels awards have been rendered against a nation because public vessels have been found guilty of faulty navigation under the applicable rules of admiralty law. In cases of collision in territorial waters it has been asserted that the law applicable to the determination of the question of fault was the *lex loci delicti commissi*. See *The Canadienne* claim and *The Sidra* claim, American and British Claims Arbitration under the Special Agreement of August 18, 1910, Agent's *Report*, pp. 427, 452. The precise question before the Commission is whether the act of Lieutenant Gulley, held by the court of last resort not to be in violation of the law of his country, is one for which his Government is liable under international law. Whether the United States is so liable must, in my opinion, be ascertained by a determination of the question whether American law sanctions an act that outrages ordinary standards of civilization. It is conceivable that domestic laws, just as they may contravene international law in their operation on property rights of aliens may, by their sanction of personal injuries under certain circumstances, offend broad standards of governmental action the failure of observance of which imposes on a nation, as arbitral tribunals have frequently held, the liability to respond in damages under international law. A fairly close analogy to the question presented for determination in this case may be found, I think, in cases that have frequently come before international tribunals involving gross mistreatment of aliens during imprisonment. The Commission has in other cases indicated a standard by which it considers it must be guided in making judicial pronouncements with respect to alleged wrongful acts of authorities against private persons. It has expressed the view that it can not render an award for pecuniary indemnity in any case in the absence of evidence of a pronounced degree of improper governmental administration. It has made awards dismissing cases in the absence of such evidence and has rendered pecuniary awards in cases in which it considered that such evidence was found in the record.

In the present case the opinion of the majority seems to me to be grounded on a different theory as to liability. It is said in the opinion that the "only problem before this Commission is whether, under international law, the American officer was entitled to shoot in the direction of the raft in the way he did;" and that the Commission "makes its conception of international law in this respect dependent upon the answer to the question, whether there exists among civilized nations any international standard concerning the taking of human life." It is stated that, in order to consider shooting on the border by armed officials of either Government justified, "a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives

of the culprits and other persons in their neighbourhood; (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound or kill." It is further stated that "If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of fire-arms." To my mind it is not the duty of an international tribunal either to attempt in effect to formulate certain rules of criminal jurisprudence or to undertake to "obviate" acts which a tribunal may regard to be objectionable. In my opinion, it is the duty of an international-tribunal to determine whether a nation must respond in damages for acts alleged to be wrongful, and in discharging this duty a tribunal must take cognizance of and give effect to rules of law, and in cases in which unfortunately concrete rules are wanting, give proper application to principles. It must apply law to facts and pass upon acts of omission or commission in the light of rules or principles. And as I have heretofore observed, since the Commission cannot properly challenge the construction put upon penal laws of the United States by the Court of last resort in connection with the case of Gulley, it must determine whether laws under which his action was not punishable obviously fall below the standard of similar laws of members of the family of nations.

A very apposite case with respect to this point is the *Cadenhead* case decided May 1, 1914, by the Tribunal created by the Special Agreement concluded August 18, 1910, between the United States and Great Britain (Agent's Report, p. 506). I do not agree with the statement in the opinion rendered by the two other Commissioners as to the decision of the Tribunal. It is said that the claim was dismissed "because no personal pecuniary loss or damage resulting to relatives or representatives had been proven." That point is mentioned in the Tribunal's opinion. But the fundamental point in the case is concerned with the military law as construed by a military court under which a sentinel who accidentally shot a British subject while aiming at an escaping military prisoner was held not liable to punishment. Counsel for Great Britain severely criticized the army regulations under which shooting at an escaping prisoner in the manner disclosed by the record was permitted. With respect to what seems to me to have been the controlling point in the case, the Tribunal said (pp. 506-507):

"His Britannic Majesty's Government contend that this soldier was not justified in firing upon an unarmed man on a public highway, that he acted unnecessarily recklessly, and with gross negligence, and that compensation should be paid by the Government of the United States on the ground that under the circumstances it was responsible for the act of this soldier.

"The question whether or not a private soldier belonging to the United States Army and being on duty acted in violation of or in conformity with his military duty is a question of municipal law of the United States, and it has been established by the competent military court of the United States that he acted in entire conformity with the military orders and regulations, namely, section 365 of the Manual of Guard Duty, United States Army, approved June 14, 1902.

"The only question for this Tribunal to decide is whether or not, under these circumstances, the United States should be held liable to pay compensation for this act of its agent.

"It is established by the evidence that the aforesaid orders under which this soldier who fired at the escaping prisoner acted were issued pursuant to the

national law of the United States for the enforcement of military discipline and were within the competency and jurisdiction of that Government.

"It has not been shown that there was a denial of justice, or that there were any special circumstances or grounds of exception to the generally recognized rule of international law that a foreigner within the United States is subject to its public law, and has no greater rights than nationals of that country." (*Italics mine.*)

The last clause of the last paragraph above quoted may not be very happily worded, but I do not think that the learned Tribunal meant to give expression to the view that domestic laws can not contravene international law.

Domestic laws may by their operation on property rights of aliens contravene international law. And in any case in which an international reclamation is predicated upon such an infringement of the law of nations it is of course not a defense to say that a court of last resort has properly construed a law to authorize action against which complaint is made. But in reaching a conclusion whether an international delinquency has been committed in any such case, in which the decision of the court as to the meaning of the law is accepted as final, it is proper to determine whether the law has authorized or sanctioned a wrongful act. As I have observed, it is conceivable that domestic law by its sanction of personal injury may, under given circumstances, offend broad standards of governmental action which civilized nations may be expected to observe. And in a case involving an alleged personal injury permitted by domestic law of a nation, it is a proper test of the nature of the alleged wrongful act to compare the law of that nation with similar laws of other nations.

No attempt was made by counsel for the Mexican Government to make a comparison of the laws of the United States with the laws of other countries, not even with the laws of Mexico. Certain precedents were cited by counsel which it was argued furnish authority for a pecuniary award in the present case, among them the tribunal's decisions in the claims of Jesse Walter Swinney and Nancy Louisa Swinney, Docket No. 130, and Dolores Guerrero Vda. de Falcón, Docket No. 278, and the shooting in 1915 of two young Americans by Canadian soldiers in Canadian waters at Fort Erie. In my opinion none of these cases has any value in showing liability on the United States in the instant case.

In the Swinney case, a young man in a rowboat, not engaged in committing any offense, was shot by Mexican officials from the Mexican shore of the Rio Grande because, as was alleged, he did not respond to an order to come over to the Mexican side. On being hailed he explained that he was engaged in no wrongdoing. In the Falcón case the record disclosed that a soldier testified that he and a companion deliberately shot at unarmed naked persons swimming in the Rio Grande, one of whom was killed. The shooting which took place in Canadian waters was directed at two young men who were thought to be engaged in hunting ducks out of season. It seems reasonably clear that the men could have been apprehended without the use of firearms, and that, if they failed to respond to an order to come to the shore, they took but a few strokes in their boat before they were shot, one being killed and one seriously injured. In a note addressed by Secretary of State Bryan to the British Ambassador at Washington it was stated that the offense for which the arrest of the two men was sought was a minor one; that no resistance was offered or violence threatened by the injured men; that the killing and wounding were inflicted intentionally, or, if not,

through the gross and culpable negligence of the officers and soldiers in the most reckless manner in which they used their arms; and that the actions of the soldiers were without justification or excuse. It may be pertinent to note that even in these circumstances the British Government did not admit liability, but stated that "as an act of grace suitable compensation should be made to relatives of the deceased and to the injured man." And although the United States requested compensation, the British Government, instead of making such compensation to the United States, effected a private settlement with the injured persons. (*Foreign Relations of the United States*, 1915, pp. 415-423.)

In my opinion the very deplorable act committed by Lieutenant Gulley for which the United States is held responsible, has not been accurately described in the written or oral argument advanced by the Mexican Agency nor in the opinion of the two other Commissioners.

In discussing the available evidence with regard to the shooting of the little girl by Lieutenant Gulley, it is pertinent to bear in mind that we have evidence of two kinds: First, that accompanying the Answer consisting in the main of the lengthy opinion of the Board of Review analyzing the law applicable to the case, and the proceedings before the court-martial, including the evidence produced before the court, and second, the record of proceedings before Mexican judges in the State of Tamaulipas, which accompanies the Mexican Memorial.

In the opinion of the two other Commissioners brief quotations are made from the Mexican records to the effect that inhabitants on both sides of the river frequently crossed without looking for authorized shallow parts or passages. On this point, however, it seems to me that it is also pertinent to note that a judge states that "it is well known \* \* \* that on account of the war between the United States of America and Germany there were taken by the former nation drastic measures in its frontiers to avoid the entrance of spies, among which measures was that of having patrols of American soldiers survey the length of the Bravo" and "*that in spite of such orders*" (italics mine) residents of Mexico "have defied the perils and dared to cross to the American side without a permit or passport." A Mexican judge before whom a number of Mexicans appeared conducted an investigation as a result of which it may be said that he in a sense found Lieutenant Gulley to be guilty of what he called the "crime of homicide", also describing the shooting as "wickedness or as an atrocity". Before the court-martial there appeared the defendant, of course, and also both American and Mexican witnesses.

It is stated in the Mexican Brief (p. 2) that Mexican witnesses all agreed that the soldiers on the American side "fired for no reason whatsoever and thus killed the child." And in the Mexican Reply it is stated that, although technically a state of war between Germany and the United States existed at the time of the shooting, it is evident that the persons who accompanied the little girl who was killed "could not have had the intention of crossing the Rio Bravo for the purpose of causing harm or injury to the United States, for, as it is proved by the testimony of the witnesses before the American authorities, found in Annex 1 of the Memorial, the sole purpose of the family of Concepción García was to return from the American side, where they were, to the Mexican side of the river, and it was only with this purpose that the temporary raft which served to take them across was made." Leaving aside discussion of the instructions which Lieutenant Gulley had with respect to the enforcement of laws and regulations incident

to a state of war, it is very pertinent to remark with regard to this statement in the Reply that of course the officer had no knowledge as to who were on the raft or what their purposes were. He was about a mile away when he first saw the raft. He rode hurriedly towards it. He was unable to challenge the persons on board by calling to them. While he clearly had no knowledge as to the mission of the persons propelling the raft, it is proper to bear in mind that he undoubtedly had information with regard to conditions on the border such as may be briefly indicated by quoting from a report of the Commissioner General of Immigration of the United States. In one portion of this report which was made at a time when vigilance on the border was not considered to be as imperative as it was when the shooting occurred, the Commissioner quotes the following from the report of an inspector on the border:

"There is little difficulty in smuggling an alien from Mexico across the line into this country, or in the alien entering unassisted, for that matter. The river is not wide at certain seasons of the year and in some places it becomes a mere trickle. This office estimates that there are at least 100 persons living on the Mexican side opposite points in this jurisdiction who earn their living chiefly by operating illegal ferries and bringing aliens to the United States. The work of the officers here in the past two years in apprehending and destroying boats used as ferries has largely forced them to abandon their large boats made of lumber and of galvanized sheet iron and to resort to 'patos', as they are known among the smuggling fraternity, made of a willow framework tied with willow withes and covered with a cheap canvas or wagon sheet. This canvas can be tied on or taken off the frame in a moment, and then carried under a man's arm. The frame can easily be hidden in the brush, and if it should be found and destroyed, 15 minutes' work with a machete (and no one ever saw a Mexican of this class without a machete) will construct another.

"These illegal ferrymen oftener than not own a small farm on the river. When an alien, Mexican or European, gentleman, criminal, or bolshevik—it makes no difference—wants to cross, this ferryman merely removes his boat cover from his wagon or haystack where it serves him between times, proceeds to the river and pulls his frame from the brush where it has been hidden, ties on the cover, places it in the water, and is ready to, and actually does take his passengers, and often a few cases of contraband liquor also, to this country. Before placing his boat in the water he carefully spies out this side, and probably calls to some 'paisano' on this side if one is in sight, and ascertains that no 'gringo' officers are in that vicinity. Any Mexican resident on this side will cheerfully abandon his work and spend a day if necessary watching for officers, to aid this boatman, with whom he is always in sympathy, and also for the reason that this kind of work does not call for much effort. In spite of the inhibitions of section 8, or of any other section, which the ferryman is probably ignorant of and which, in any event, he would cheerfully ignore, he more often than not successfully lands his passengers and returns to the other side and safety, and his passengers go their way." (*Annual Report*, 1924, pp. 16-17.)

In another portion of the report the Commissioner says:

"This work of the mounted or patrol inspectors is attended by considerable hardship and much danger, as it is often necessary for them to remain on duty long hours without opportunity for rest or sleep, in inclement weather, and the smugglers, who very frequently transport intoxicating liquor or narcotic drugs with the aliens are desperate characters. They go armed and shoot at the command to halt in the name of the law, preferring to commit murder rather than be apprehended and face the probability of serving a prison sentence. Previous annual reports have related the details of the killing and wounding of immigration officers by smugglers." (*Ibid.*, p. 19.)



In discussing acts of soldiers for which a government may be held liable, the Mexican Brief cites an extract from a note addressed by Secretary of State Frelinghuysen to the American Minister in Peru under date of December 5, 1884, with regard to the shooting of an American citizen in Peru by a Peruvian soldier. It is pertinent to note with regard to the character of acts of this kind for which a nation may be held responsible that Mr. Frelinghuysen describes the shooting as "as act of outrageous violation, by an agent of the Government while in the line of his duty, of a right which it was his business to protect." In my opinion, Lieutenant Gulley's act, however deplorable it is—and there may be reason to consider it indiscreet—does not come within the category of acts such as that described by Secretary of State Frelinghuysen. It is stated in the Brief (p. 15) that "even granting for purposes of argument that the soldier would not be guilty of the crime, and that really the orders prohibiting him from firing on unarmed persons would be unknown to him, still it could be held that the responsibility of the United States can be clearly established in international law." In support of this contention citation is made to an account in Moore's *Digest of International Law* of the killing by Chinese soldiers of Lewis L. Etzel, an American war correspondent, and the offer of the Chinese Government to pay an indemnity of \$25,000 Mexican currency. The account of this case is very briefly given, and it is pertinent to note that the killing is described as an act of "criminal carelessness." Citation is further made in the Brief of a request made by the United States of the Honduran Government for the payment of an indemnity of \$10,000 to the relatives of Frank Pears, an American citizen, who was shot in Honduras in 1899 by a sentinel. It is proper to note with respect to this case that the United States after investigation declared that the killing of Mr. Pears "could be regarded as nothing but the cruel murder of a defenseless man, innocently passing from his office to his house." Certainly the act committed by Lieutenant Gulley cannot be regarded as "cruel murder," and after a study of the elaborate opinion of the Board of Review in which evidence and law are considered to my mind with great care and accuracy, I do not believe that the shooting can properly be described as "criminal carelessness," although I am inclined to conclude from such evidence as is available that the officer might have acted with greater discretion and prudence.

It seems to me that the statement in the opinion of the two other Commissioners to the effect that "the record only shows that the officer expected the delinquents to be engaged in importing barrels of the native liquor called 'mescal', all other suppositions as to atrocious acts they might have been perpetrating being mere inferences," fails to take account of important matters in the record to which the Board of Review attached considerable weight in arriving at its conclusions. It may be that smuggling was the principal thing which Lieutenant Gulley had in mind in endeavoring to arrest persons on the raft. It is proper, however, to bear in mind that the Board of Review calls attention to at least three kinds of laws, the enforcement of which was enjoined on patrols, namely:

1. Legislation enacted in 1918 (40 Stat. L. 559) with respect to restrictions on the entry into or departure from the United States by aliens. It could not of course be expected that legislation of this kind would be repealed many months before the Treaty of Versailles had been signed. A portion of it relating to the entry of aliens into the United States is still in effect.

(41 Stat. L. 1217) and I assume that similar legislation is generally in force throughout the world to-day.

2. Legislation with respect to prohibition on the importation of arms and ammunition into Mexico (37 Stat. L. 630).

3. Legislation regarding matters relating to immigration and smuggling.

In discussing the position in which Lieutenant Gulley was placed, the Board of Review deemed it to be proper also to take cognizance of information which is stated in the Board's opinion as follows:

"It was a matter of common knowledge that propaganda in aid of war against the United States by the German Government, as well as organized efforts to procure information of military and other value, had been actively carried on by persons who, having their seat of operations in Mexico, had been crossing and re-crossing the border for this purpose. The safety of the whole people was involved in seeing that all such acts were suppressed and the offenders brought to justice."

To be sure hostilities between the United States and Germany were suspended in April, 1919, but the conclusion of peace was far distant, and it seems to me that the Board of Review acted properly in giving at least some consideration to the duties devolving upon a soldier during the existence of a state of war.

It was enjoined upon troops engaged in patrol duty to consider themselves always on duty; that patrolling was very important and must be performed in the most painstaking manner, and that perfunctory patrols are useless.

Lieutenant Gulley saw persons violating the law of the United States—and it is not disputed that this was knowingly done. He was not in a position to apprehend them; he could not hail them by calling to them; and they did not stop, although he repeatedly fired. Unless his testimony and that of soldiers with him are considered to be false, he did not aim at the raft. It may be pitiable that he shot at all, but it should be borne in mind, as I have endeavored to point out, that the question which must be considered in the instant case is whether the laws of the United States, under which shooting in those circumstances is not unlawful, are so at variance with the laws of other members of the family of nations as to fall below ordinary standards of civilization.

In my opinion the burden must devolve on anyone making such a charge to show convincingly by comparison with the laws of other countries the iniquitous character of the laws of the country against which complaint is made. To my mind that can not be shown by brief citations from domestic law such as are given in the opinion of the two other Commissioners. Nor do I perceive the relevancy of the citation of Article 46 of the regulations respecting the laws and customs of war on land in the Fourth Hague Convention. An injunction against murder in territory under military occupation stated in five words can have no bearing, to my mind, on the propriety of domestic law dealing with the difficult subject of the use of force in connection with the repression of crime. This is particularly true in a situation such as that under consideration in which patrol officers were called upon under unusual circumstances to execute both military and civil laws. The sacredness of human life and the principle that it shall not be unnecessarily taken or endangered are recognized in the jurisprudence of the United States and are emphasized in the opinion of the Board of Review whose conclusions with respect to Gulley's action, to my mind, are not at variance with that principle. I have already indicated the view,

in which I understand the other two Commissioners concurred, that obviously no denial of justice can be predicated upon the action of the President of the United States in disapproving of the sentence of the court-martial.

Fred K. NIELSEN,  
*Commissioner.*

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JOHN B. OKIE (U.S.A.) *v.* UNITED MEXICAN STATES.

*(December 3, 1926. Pages 185-186.)*

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PROCEDURE, RECTIFICATION OF AWARD. Rectification of amount of award, as stated in Spanish text, to conform to the amount stated in English text, *ordered.*

*(Text of decision omitted.)*

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

*(December 3, 1926. Page 186.)*

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PROCEDURE, RECTIFICATION OF AWARD. Rectification of amount of award, as stated in Spanish text, to conform to the amount stated in English text, *ordered.*

*(Text of decision omitted.)*

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ILLINOIS CENTRAL RAILROAD CO. (U.S.A.) *v.* UNITED  
MEXICAN STATES.

*(December 6, 1926. Pages 187-190.)*

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CONTRACT CLAIMS. Claim for non-payment for railroad locomotives sold and delivered to respondent Government *allowed.*

INTEREST ON AWARDS. Interest on award, from date when obligation of respondent Government first arose up to date of last award to be rendered by tribunal, *allowed.*

*Cross-reference:* Annual Digest, 1925-1926, pp. 257, 258.

1. This case is before the Commission for a final decision after counsel have been heard in oral arguments on the merits. Claim was originally made by the United States of America on behalf of the Illinois Central Railroad Company in the amount of \$1,807,531.36 with interest thereon from April

1, 1925, alleged to be due in payment of the purchase price of ninety-one locomotive engines sold by the Company to the Government Railway Administration of the National Railways of Mexico under a written contract. On October 15, 1925, the Mexican Agent filed a motion to dismiss the claim, alleging, first, that the claim being based on the alleged non-performance of contractual obligations, was not within the jurisdiction of the Commission, and, second, that the obligation to pay the amount claimed not being denied by Mexico, no controversy existed for the decision of the Commission. This motion was overruled by the Commission on March 31, 1926. Subsequently certain questions were raised with respect to the right of the Mexican Agency, under the rules of the arbitration, to file an Answer on April 1, 1926, the date on which the Answer was presented for filing. It became unnecessary for the Commission to consider that matter in view of the waiver filed by the American Agent on November 18, 1926, of his right to a hearing on a motion which he filed on September 8, 1926, to reject the Answer filed by the Mexican Agent.

2. The indebtedness of the respondent Government under the contract made between the Illinois Central Railroad Company and the National Railways of Mexico under Government Administration is admitted in the aforesaid motion of the Mexican Government to dismiss the claim and in the Mexican Answer. On page 3 of that Answer it is stated that "the Mexican Agent leaves the case in the hands of the Honorable Commissioners for their decision, and only takes the liberty to request them to take into consideration the equitable reasons which the parties directly interested took into account in arriving at the private settlement referred to above." From copies of correspondence which accompany the Answer it appears that, subsequent to the filing of the claim with the Commission, steps were taken looking to a private adjustment of the Railroad Company's claim against the Government of Mexico. Whatever may be the facts with regard to this proposed arrangement between the parties to the aforesaid contract which arrangement was not consummated, it can have no bearing on the liability of Mexico in the case before the Commission to make compensation in satisfaction of obligations under the terms of the aforesaid contract. The indebtedness of the Mexican Government is admitted, and it is the duty of the Commission to render an award for the amount which has been withheld from the claimant company.

3. During the course of oral argument the Mexican Agent called attention to the provision of Article 4 of the aforesaid contract that the sale of the locomotives "is made upon condition; that it to say, that the title to said locomotives and each of the same shall remain in and shall not pass from the vendor and shall not vest in the purchaser until such time as the purchaser shall have paid all sums due by it hereunder, and shall have fulfilled completely all the terms, covenants, provisions, and conditions, herein set forth and contained, and be performed and kept by the purchaser." With respect to this point the Agent of the United States, on behalf of the American Agency and the claimant company, announced a disclaimer of title in the company to the locomotives, the subject matter of the contract.

4. By virtue of the aforesaid contract there was due the railroad company on April 1, 1925, the principal sum of \$1,472,200 and interest on deferred payments amounting to \$335,331.36, the total sum due on that date being \$1,807,531.36. The Memorial asks for the payment of this amount "with a proper allowance of interest thereon from April 1, 1925."

5. Unfortunately the Convention of September 8, 1923, contains no specific stipulation with respect to the inclusion of interest in pecuniary awards. Allowances of interest have been made from time to time by international tribunals acting under arbitral agreements which, like the Agreement of September 8, 1923, have made no mention of this subject. See for examples: Treaty of October 27, 1795, between the United States and Spain, *Malloy*, vol. 2, p. 1640; Convention of February 8, 1853, between the United States and Great Britain, *ibid*, vol. 1, p. 664; Convention of November 25, 1862, between the United States and Ecuador, *ibid*, p. 432; Convention of July 4, 1868, between the United States and Mexico, *ibid*, p. 1128. Other agreements have contained stipulations authorizing awards of interest under specified conditions and for more or less definitely prescribed periods. See for examples: Treaty of November 19, 1794, between the United States and Great Britain, *Malloy*, vol. 1, p. 590; Convention of September 10, 1857, between the United States and the Republic of New Granada, *ibid*, p. 319; Convention of December 5, 1885, between the United States and Venezuela, *ibid*, vol. 2, p. 1858; Convention of August 7, 1892, between the United States and Chile, *ibid*, vol. 1, p. 185; Special Agreement of August 18, 1910, between the United States and Great Britain, *Redmond*, vol. 3, p. 2619. None of the opinions rendered by tribunals created under those agreements with respect to a variety of cases appears to be at variance with the principle to which we deem it proper to give effect that interest must be regarded as a proper element of compensation. It is the purpose of the Convention of September 8, 1923, to afford the respective nationals of the High Contracting Parties, in the language of the convention "just and adequate compensation for their losses or damages." In our opinion just compensatory damages in this case would include not only the sum due, as stated in the Memorial, under the aforesaid contract, but compensation for the loss of the use of that sum during a period within which the payment thereof continues to be withheld. However, the Commission will not award interest beyond the date of the termination of the labors of the Commission in the absence of specific stipulations in the Agreement of September 8, 1923, authorizing such action. With respect to the Commission's conclusion touching this point, it may be noted that some conventions have contained provisions requiring the payment of awards within a year from the date of the rendition of the final award, without interest during that period. See for example: Article 15 of the Treaty of May 8, 1871, between the United States and Great Britain, *Malloy*, vol. 1, p. 707. But although it has been stipulated that interest should not be paid after the date of the last award, allowances of interest on awards up to that date have been made even in the absence of any provision authorizing them. In Hale's Report, page 21, it is stated that the Commission created by Article 12 of the Treaty of May 8, 1871, between the United States and Great Britain "ordinarily allowed interest at the rate of 6 per centum per annum from the date of the injury to the anticipated date of the final award".

6. The amount claimed in the Memorial, \$1,807,531.36, consists of the unpaid principal sum of \$1,472,200 and interest on deferred payments under the contract up to April 1, 1925, amounting to the sum of \$335,331.36. The Commission is of the opinion that the award should consist of \$1,807,531.36, the specific amount claimed, plus interest at the rate of six per centum per annum on the sum of \$1,472,200.00 computed from April 1, 1925, to the date on which the last award is rendered by the Commission.

*Decision*

7. For the reasons stated above the Commission decides that the Government of Mexico shall pay to the Government of the United States of America the sum of \$1,807,531.36 (one million eight hundred and seven thousand five hundred and thirty-one dollars and thirty-six cents) plus interest at the rate of six per centum per annum on the sum of \$1,472,200.00 from April 1, 1925, to the date on which the last award is rendered by the Commission.

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

(December 6, 1926. Page 191.)

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INTEREST ON AWARDS. Interest on award *allowed* up to date of last award.

(Text of decision omitted.)

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JOHN B. OKIE (U.S.A.) *v.* UNITED MEXICAN STATES.

(December 6, 1926. Pages 191-192.)

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INTEREST ON AWARDS. Interest on award *allowed* up to date of last award.

(Text of decision omitted.)

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J. PARKER KIRLIN *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

(December 6, 1926. Page 192.)

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INTEREST ON AWARDS. Interest on award *allowed* up to date of last award.

(Text of decision omitted.)

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WALTER H. FAULKNER (U.S.A.) *v.* UNITED MEXICAN STATES.

*(March 14, 1927. Page 193.)*

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PROCEDURE, RECTIFICATION OF AWARD. Rectification of language of Spanish text of award, to make it conform to English text, *ordered.*

*(Text of decision omitted.)*

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J. W. SWINNEY AND N. L. SWINNEY (U.S.A.) *v.* UNITED MEXICAN STATES.

*(March 14, 1927. Page 194.)*

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PROCEDURE, RECTIFICATION OF AWARD. Rectification of language of Spanish text of award, to make it conform to English text, *ordered.*

*(Text of decision omitted.)*

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L. F. H. NEER AND PAULINE E. NEER (U.S.A.) *v.* UNITED MEXICAN STATES.

*(March 14, 1927. Pages 194-195.)*

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PROCEDURE, RECTIFICATION OF AWARD. Rectification of language of Spanish text of award, to make it conform to English text, *ordered.*

*(Text of decision omitted.)*

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LAURA M. B. JANES *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

*(March 14, 1927. Pages 195-196.)*

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PROCEDURE, RECTIFICATION OF AWARD. Rectification of Spanish text of award, to make it conform to English text, *ordered.*

*(Text of decision omitted.)*

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THOMAS H. YOUMANS (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 14, 1927. Page 196.)

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PROCEDURE, RECTIFICATION OF AWARD. Rectification of Spanish text of award, to make it conform to English text, *ordered*.

(Text of decision omitted.)

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FRANCISCO QUINTANILLA *et al.* (UNITED MEXICAN STATES)  
*v.* UNITED STATES OF AMERICA.

(March 14, 1927. Page 197.)

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PROCEDURE, RECTIFICATION OF AWARD. Rectification of Spanish text of award, to make it conform to English text, *ordered*.

(Text of decision omitted.)

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JOSEPH E. DAVIES (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 23, 1927. Pages 197-205.)

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CONTRACT CLAIMS.—CLAIM *quantum meruit*.—NULLITY DECREES. Claim for payment for legal services rendered under contract made by claimant with agent of *de facto* Mexican Government *allowed*. Nullification laws of Mexico *held* to be without effect on rights of claimant. Where contract contained express limitation of authority of agent acting for Mexico, *held* claimant bound by such notice. Claim for services on a *quantum meruit* basis not made by claimant or allowed by tribunal.

*Cross-references:* Am. J. Int. Law. Vol. 21, 1927, p. 777; Annual Digest, 1927-1928, p. 207.

1. Claim is made in this case by the United States of America in behalf of Joseph E. Davies to obtain the payment of \$170,000 alleged to be due for legal services rendered by Davies under a contract concluded on or about October 11, 1920, between him and the Government of Mexico, acting through Roberto V. Pesqueira, Financial Agent of the Mexican Government in the United States. In the Mexican Government's Brief Mr. Pesqueira is also described as "confidential and financial Agent of the United Mexican States." A motion to dismiss this case on the ground that the claim, being based on an alleged non-performance of contractual



obligations, was not within the jurisdiction of the Commission, was filed by the Mexican Agent on January 27, 1926, and was overruled by the Commission on March 2, 1926. The case is now before the Commission for a final decision on the merits.

2. In the Answer filed by the Mexican Agent it is denied that Davies entered into any contract with the Mexican Government, represented by Roberto V. Pesqueira, for the performance of services as counsel by Davies for a period of years, and it is asserted that the Government of Mexico never entrusted any legal matters to the claimant.

3. There is no doubt, in the opinion of the Commission, that a contract was entered into between Davies and Pesqueira, acting in behalf of the Mexican Government. That contract is described by the claimant Government as an oral agreement the terms of which were subsequent to the making of the agreement embodied in writing. Among the evidence, which includes certain affidavits and copies of correspondence, produced by the claimant Government to establish the existence of this contract, the following communication accompanies the Memorial (Exhibit 4):

"Embajada de Mexico en los Estados Unidos de America, Washington, D. C.

CITY OF MEXICO, *October 11, 1920.*

Hon. Joseph E. DAVIES,

*Southern Building, Washington, D. C.*

DEAR MR. DAVIES: As suggested by you, I am putting our agreement into writing so that there may be no misunderstanding.

We have the conviction that my government will soon be recognized by the United States. With this recognition will come a very large amount of legal work and many serious legal problems. President de la Huerta and his associates in the Provisional Government are of the opinion, therefore, that Mexico should be represented by an efficient legal organization in the United States.

As the duly authorized representative of the Provisional Government of Mexico, I have retained you as its general counsel in the United States, the period of employment to be four years from October 1, 1920, and the rate of compensation to be \$50,000 a year, the first year payable in advance.

It is understood that you are to give all necessary time to the discharge of the business of the Government of Mexico, and that at your own expense you will make such additions to your legal organization as may be required, also that all necessary associate counsel will be employed at your expense, such amount, however, being limited to \$20,000 in any one year.

As I have explained to you, this contract is limited by one reservation. My authorization proceeds from President de la Huerta and I have no present power to bind the incoming administration of President Obregón. In event that President Obregón continues my authority, this contract will stand as drawn. If, however, President Obregón does not see fit to continue my authorities in these matters, it is understood that this agreement will be ended, at my written request, at the close of the first year; that is, on October 1, 1921.

Believe me deeply appreciative of your generous attitude in this whole matter, and accept the assurances of my high regard.

(Signed) R. V. PESQUEIRA,

*Financial Agent of the Government of Mexico  
in the United States.*

Accepted: Joseph E. DAVIES."

4. It appears from the Memorial that, on or about October 20, 1920, the Government of Mexico paid to the claimant the sum of \$10,000, currency of the United States, and on or about December 7, 1920, the sum of \$15,000. It further appears that no additional payments were made until on or about June 19, 1922, when the claimant received \$5,000. The amount for which claim is now made is \$170,000, the difference between \$30,000 which the claimant received and \$200,000, the sum which it is alleged the claimant was entitled to receive under the contract said to have been made by him with the Mexican Government.

5. We do not consider to be tenable the contention made by the respondent Government that the contract concluded between Davies and Pesqueira is a nullity, it being governed by Mexican law, under which such an agreement is void. In behalf of the United States it is contended that the contract was made in the United States and must be governed by the law of that country. We are of the opinion that there can be no question that the sum of \$20,000 is due to the claimant under the agreement, whether American law or Mexican law is applied to it. In considering the arguments advanced to support the contention that the contract is void under Mexican law the Commission can not ignore the fact that the Mexican Government paid Davies \$30,000 in three payments made at different times. No showing has been made to the Commission which would warrant it in pronouncing a nullity a contract which the Mexican Government on several occasions clearly recognized as valid.

6. The Commission does not attach importance to the contention made in behalf of the respondent Government that Davies was a public servant of Mexico subject to removal. This being our view, it is unnecessary to consider the question whether, even if Davies should be regarded as a public servant of the Government of Mexico, a claim might be maintained in his behalf as an American citizen for any money that might be due to him from the Government of Mexico.

7. Accompanying the reply brief of the Mexican Government is a statement made by Pesqueira with regard to the transaction entered into by him with Davies. In the course of this statement Pesqueira declares that the professional services of Mr. Davies came to an end on October 1, 1921, and "declarant so notified Mr. Davies verbally in view of the fact that President Obregón did not sanction the said contract for the remaining three years." It is clear from the record that no written notice of the termination of his services was given to Mr. Davies. However, we do not consider this point to be of material importance in disposing of the case. Our conclusions with respect to the award which should be rendered by the Commission are fundamentally grounded on the construction which we give to the next to the last paragraph of the letter of October 11, 1920, addressed by Pesqueira to Davies. This paragraph contains an explicit statement with regard to the limitations on Pesqueira's authority in dealing with Davies. This point does not appear to be of any particular importance with respect to the question whether a valid agreement of some kind was made by Davies with the Government of Mexico, because the latter has not denied the authority of Pesqueira to contract for the services of Davies. But the extent of Pesqueira's authority is of importance as bearing on the nature of the agreement that was made, or in other words, the precise extent to which Pesqueira bound his Government.

8. It is probably a general rule of domestic law in many countries that a state is responsible for and is bound by acts of its agents within the limits of their functions or powers as defined by the national law, but when acts are done in excess of powers or functions so defined, the State is not bound or responsible. In the brief of the United States citation is made to two opinions of international tribunals which seem to be grounded on a somewhat different theory—the claim of H. J. Randolph Hemming under the Special Agreement of August 18, 1910, between Great Britain and the United States (*Report of the American Agent*, p. 617); and the claim of Ricardo L. Trumbull under the Convention of August 7, 1892, between Chile and the United States (Moore, *International Arbitrations*, Vol. 4, p. 3569). In the Hemming case the United States was held liable to make compensation for legal services rendered by the claimant at the request of the American Consul at Bombay in December, 1894, and in February, 1895, in connection with the prosecution of persons accused of circulating counterfeit American gold coins in India. The defense of the United States rested on the proposition that the Government should not be held liable to compensate the claimant for services rendered by him which the Consul had obtained without authority from his Government. The Tribunal, in its opinion, observed that, irrespective of what was the Consul's authority to employ an attorney at the expense of the United States, the record showed that the Government became aware of Hemming's employment, did not object to it, and approved the action taken by the Consul. This finding seems to have been the basis of the Tribunal's decision. In the Trumbull case contentions advanced by the United States with respect to nonliability for unauthorized acts of an American Minister to Chile in employing a Chilean citizen in 1889 in connection with an extradition case, were overruled by the Commission. The Commission held that the United States was liable to make compensation for the services obtained by the American Minister in consideration of, as was said in the opinion, "a promise in the name of his government, which, according to the rules of the responsibility of governments for acts performed by their agents in foreign countries, can not be repudiated". It therefore appears that in neither of these two cases did the tribunal attach importance to the authority conferred upon the national representative by domestic law or regulation.

"As I have explained to you, this contract is limited by one reservation. My authorization proceeds from President de la Huerta and I have no present power to bind the incoming administration of President Obregón."

9. The cases therefore differ from the instant case in which the record reveals a very explicit notice to the claimant Davies with regard to the limitations on the authority of the Mexican representative with whom the claimant contracted. In the communication of October 11, 1920, addressed by Pesqueira to Davies it is said:

10. The decisions in the Hemming and Trumbull cases appear to emphasize the idea of protection to persons contracting with public officers who, such persons may have good reason to believe, act within the scope of their authority. The rule of domestic law with regard to nonliability for unauthorized acts of public servants is apparently grounded on the idea that the nation's interests should be protected against indiscreet, mistaken or other improper acts of its agents. It is shown by the letter of October 11,

1920, which Pesqueira addressed to Davies that Pesqueira, by giving explicit notice of the limitations of his authority, took precaution to protect the interests of his Government and to define his position clearly to Davies. The paragraph in that letter to which attention has been specifically called might have been more concisely worded. Perhaps it might be plausibly construed to mean that Pesqueira, while calling attention to his limited authority, undertook to make an agreement which should be binding upon the Mexican Government for four years, but which might be terminated at the close of the first year, and if it should be so terminated, such action should be taken by written notification to Davies. However, we must give to the language of that paragraph what we consider to be the most reasonable interpretation of which it is susceptible. That interpretation we consider is that, in all matters pertaining to the contract, Pesqueira was without authority to bind President Obregón; that he therefore bound solely the administration of Provisional President de la Huerta; and that therefore whatever Pesqueira undertook to do after the termination of the latter's administration must be considered as merely a personal undertaking on the part of Pesqueira. In other words, Pesqueira did not bind the administration of President Obregón to give notice of termination of the contract, or, failing the giving of such notice, to be bound by the contract for the full period recited by it. Pesqueira states in the letter that "*this contract is limited by one reservation*"; that his authority proceeded from President de la Huerta; and that he has "*no present power to bind the incoming administration of President Obregón*". (Italics ours.) We do not believe that these explicit statements with regard to the limited authority of Pesqueira can be considered to be modified or nullified in any way by the subsequent somewhat vague statements regarding a possible continuation of the contract, or a possible termination on notice given by Pesqueira, who at the time he wrote could not be certain that he would be in office on October 1, 1921, which in fact he was not. A few historical facts which are of record before the Commission may be briefly mentioned to throw light on the transaction under consideration. In the spring of the year 1920, Adolfo de la Huerta, a former Governor of the State of Sonora, was elected Provisional President of Mexico following the successful so-called Agua Prieta revolution, and entered upon office on June 1, 1920. Subsequently General Obregón was elected President and assumed office on December 1, 1920. From December 1, 1920, until September 14, 1923, de la Huerta was Minister of Finance. Pesqueira's services terminated in November, 1920, shortly before General Obregón assumed the Presidency.

11. There is some evidence in the record indicating that the Mexican Treasury Department was cognizant during the administration of President Obregón of the contract made between Pesqueira and Davies. However, there is not convincing evidence that that administration recognized a contract of four years' duration and availed itself in behalf of Mexico of the claimant's services. The statement in the Memorial of the United States to the effect that in June, 1922, the Mexican Secretary of the Treasury, Adolfo de la Huerta, and the claimant Davies reached an agreement during a conference that in the future payments should be made at the rate of \$5,000 each and every month until the "full amount" of \$200,000 should be paid does not appear to be convincingly supported by the evidence cited on that point.

12. Since we have reached the conclusion that by the terms of the contract made with Davies the Mexican Government's representative did not bind his Government beyond the period of the administration of Provisional President de la Huerta, it is unnecessary to consider the effect of the failure of Davies to receive the written notice which it is stated in the communication addressed to him by Pesqueira should be served on the former in case President Obregón should not approve the contract. It might have been desirable for authorities of the Mexican Government having cognizance of this contract to communicate specifically with Davies concerning it with the idea of clarifying his position and of avoiding future misunderstanding. However, in the view we take of the case, this point involves only considerations of courtesy or expediency.

13. If the Mexican Government availed itself of the services of Davies after the termination of the administration of Provisional President de la Huerta, it might be considered that Davies is entitled to some compensation on a *quantum meruit* for such services. But even if this situation were clearly shown to exist, there is not in our opinion definite evidence of services rendered upon which to base an estimate of an award on a *quantum meruit* for such services. Unfortunately there is considerable uncertainty in the evidence in the record of this case, both as to the affidavits and as to correspondence, which in some respects is both vague and meagre. We do not discredit the evidence, but in passing on the relative legal rights and obligations of parties with respect to important contractual or quasi-contractual matters, certainty and sufficiency of evidence are of course of the utmost importance. The character of services rendered by Davies was discussed to some extent in the pleadings and briefs, and in oral arguments of counsel of each Government. On the part of Mexico this point was dealt with on the theory that no valid contract was made by a Mexican representative with Davies, and that if Davies should be considered to be entitled to any compensation it could only be on a *quantum meruit*. We hold that, since a binding contract was made obligating Mexico to pay a stated sum of \$50,000 at once following the consummation of the contract, the unpaid balance of \$20,000 should be paid, and that since we are called upon solely to give effect to strict legal rights of the parties to the contract, an award can be made only for that sum with interest.

#### *Decision*

14. For the reasons stated above the Commission decides that the Government of Mexico shall pay to the Government of the United States the sum of \$20,000 (twenty thousand dollars) plus interest on that sum at the rate of six per centum per annum from October 20, 1920, the date on which the first partial payment was made on the stipulated advance payment of \$50,000, to the date on which the last award is rendered by the Commission, and additional interest at the same rate on \$5,000 (five thousand dollars) from October 20, 1920, to June 19, 1922.

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MARGARET ROPER (U.S.A.) *v.* UNITED MEXICAN STATES*(April 4, 1927. Pages 205-211.)*

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—ACTS OF POLICE.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—FINALITY OF ACTS OF INVESTIGATING MAGISTRATE. Respondent Government *held* responsible for shooting of American subject by Mexican police resulting in his death. Acts of Mexican judge in investigating the occurrence *held* not entitled to same presumption of validity as final judgment of highest court.

MEASURE OF DAMAGES, WRONGFUL DEATH. Earning capacity of decedent and financial support given claimant taken into consideration in determining amount of award for wrongful death.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 776; Annual Digest, 1927-1928, p. 223; British Yearbook, Vol. 9, 1928, p. 161.

1. Claim for damages in the amount of \$17,000 is made in this case by the United States of America against the United Mexican States on behalf of Margaret Roper on account of the death of her son, William Roper, who was drowned in the Pánuco river, at Tampico, Tamaulipas, Mexico, on March 10, 1921, as a result—it is alleged in the American Memorial—of an assault upon him and three fellow seamen, S. Weston Brown, Ernest Small, and O. Griffin, committed by Mexican policemen and Mexican private citizens. It is stated in the Memorial that the seamen, when assaulted, jumped into the water to escape by swimming to their ship, the American merchant vessel *Saxon*, and that Roper was wounded by a pistol shot and sank immediately after having been heard to utter cries of distress. In behalf of the United States it is contended that Mexico is responsible for the unlawful acts of Mexican policemen for the failure of Mexican authorities to afford proper protection to the unfortunate Americans and for a denial of justice growing out of the failure of Mexican authorities to prosecute the persons implicated in the crime committed against the seamen.

2. It is difficult to reach a definite conclusion with regard to the precise character of all the occurrences connected with the death of the seamen, but certain things appear to be clearly shown by the record: Roper, Brown, and Small, American citizens, and Griffin, whose nationality does not clearly appear from the record, all members of the crew of the *Saxon*, obtained shore leave on the evening of March 10th, when the vessel was lying at anchor in the river about a mile distant from the water front at Tampico. When about 10 o'clock p. m. the men reached a boat in which they intended to proceed to the steamer, a Mexican, Florencio González, who either for some time had been following them or suddenly came upon them, tried to prevent them from leaving. After three of the seamen, Roper, Brown, and Griffin, had entered the boat other persons arrived. During a confusion of some kind the four seamen leaped into the water. Pistol shots were fired, and Roper appears to have been wounded. Griffin, instead of endeavoring to swim to the *Saxon*, hid behind a lighter and escaped death. The Captain of the *Saxon* shortly after 10 o'clock p.m. heard shots and cries and saw

swimming toward the vessel two men, one of whom cried out twice: "It is Willie Roper, I am wounded, save me"—or words to that effect. Both men sank before assistance could be given to them. Three days after the occurrences in question the bodies of Brown and Small were found, but Roper's body appears not to have been located. Brown's corpse was in a complete state of decomposition. Medical certificates produced before the Judge at Tampico would seem to indicate that Brown and Small were not wounded. As heretofore observed, it is difficult to reach a definite conclusion with regard to the precise character of all the occurrences connected with the death of the seamen. Parts of the evidence in the record before the Commission are conflicting. From some of the evidence which is available to the Commission, mainly that furnished by the seamen Griffin, it appears that González, desiring to prevent the seamen from leaving for their vessel, blew a whistle, which brought four or five companions who were near by in the dark; that one of these men assaulted the seamen Small and felled him on the shore; and that pistol shots were directed against the seamen, who leaped into the water to save themselves, whereupon the policemen without endeavoring to ascertain what became of the seamen departed with the other Mexicans.

3. The District Judge at Tampico instituted an investigation in the early part of March, 1921, and according to evidence given before the Judge by the Mexican policeman and other Mexican citizens, the occurrences in question were substantially as follows: On the evening of March 10th a half naked American citizen accosted these Mexicans and stated that he had been robbed and deprived of his clothing by some negroes. One of the Mexican citizens (González) proceeded to the river bank and found four negroes about to embark in a boat, whereupon he undertook to detain them. Two of the men went to bring two policemen, one of whom, when he arrived, fired shots into the air to intimidate the four negroes, who jumped into the water in order to escape arrest. On the basis of the evidence produced before him, the District Judge at Tampico, in an opinion which he rendered on September 9, 1922, about 18 months after the investigation was instituted, reached the conclusion that it did not appear that there was any crime to prosecute in connection with the death of the American seamen. In this opinion the Judge also declared that there was no crime to prosecute in connection with a supposed assault committed by the seamen against the person described as a half naked American who declared that he had been robbed. This latter conclusion we think was undoubtedly sound, and we are of the opinion that if there had been reason to suspect the seamen of wrongdoing they might have been arrested without any firing of pistols or indeed without any forcible measures. It would appear that the best service the policemen might have rendered would have been to deal in a proper way with the difficulties between the seamen and the private Mexican citizens who interfered with the departure of the seamen for their vessel. The evidence appears to be conclusive that shots were fired, and there is uncontradicted testimony that at least one policeman, Cristóbal Pérez, made use of his weapon. It is also clear that pistol fire was largely, if not entirely, responsible for the action of the men in leaping into the river, where they met their death. The evidence of the Captain of the *Saxon* makes it reasonably certain that Roper was shot, or in any event, that he was fired upon by the police. In view of the things of this kind concerning which the record before us leaves no doubt in our minds, we are constrained to reach the conclusion that had it not been for the unlaw-

ful acts of the police the seamen would not have met their death. Even though the police had fired, as was testified before the Judge at Tampico, simply to "intimidate" the seamen, such action must be regarded by the Commission as improper in the light of the principles underlying the Commission's decisions in the Swinney case, Docket No. 130,<sup>1</sup> the Falcón case, Docket No. 278,<sup>2</sup> and the Teodoro García case, Docket No. 292.<sup>3</sup> In the opinions rendered in those cases the Commission discussed the reckless and unnecessary use of firearms by persons engaged in the enforcement of law.

4. It was argued in behalf of Mexico in the instant case that the Mexican Government is not responsible under international law for the acts of such minor officials as policemen. This question received consideration in the Quintanilla case, Docket No. 532, in which the Mexican Government contended that the Government of the United States was responsible for the acts of a deputy sheriff in Texas, and in which an award was rendered by the Commission in favor of the claimant. Considering the acts of the policemen in the present case in relation to the seamen, and in relation to the Mexican citizens who undertook to prevent the seamen from joining their vessel, we are of the opinion that the Mexican Government must be held responsible for the acts of the policemen. And with respect to this point we deem it particularly important to consider the comprehensive scope of Article I of the Convention of September 8, 1923, which is concerned with the jurisdiction of the Commission. In addition to a description of claims, in language similar to that frequently employed in claims conventions, there is found this additional description: "and all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice".

5. In support of the contentions made in behalf of the United States with respect to a denial of justice, it was alleged that there should have been a prosecution of Mexicans who appeared to be implicated in the deaths of the seamen, and that the investigation before the Judge at Tampico was of such a character as to reveal a purpose to exculpate those persons. This official may have complied with all the forms of Mexican law in conducting the investigation, as it was argued in behalf of Mexico he did. But we do not consider that occurrences pointing clearly to the commission of crime were adequately met by this investigation.

6. Three American citizens lost their lives under most unusual circumstances. There is evidence that some Mexican private citizens and some Mexican policemen undertook to prevent the American seamen from joining their vessel after the latter had been on shore leave. There is evidence given by one of the seamen who managed to preserve his life that one of his companions was felled by a blow on the head; that shots were fired at others who had entered a boat in which they intended to depart for their vessel; and that they leaped into the water to escape. During the course of an investigation of the death of the seamen before the Judge at Tampico, three private Mexican citizens testified to the effect that they were approached by a half naked American citizen and were informed by him that he had been assaulted and robbed by negroes who were at

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<sup>1</sup> See page 98.

<sup>2</sup> See page 104.

<sup>3</sup> See page 119.



the time near the river. These men further testified that one of them proceeded to the river bank and found four negroes about to embark in a boat whereupon he undertook to detain them; that two of the men went to bring two policemen, one of whom, when he arrived, fired shots into the air to intimidate the seamen, who jumped into the water.

7. From testimony given by Mexicans it appears that the half-naked American who had so persistently sought to obtain the arrest of negroes who had assaulted him, suddenly disappeared at the time when his presence would have been most important for the consummation of his purpose of obtaining redress. It is strange that such an important witness should not have been located by Mexican authorities. There would seem to be good reason to suppose that he could easily have been found if he were a reality. He was strikingly identified by several persons who gave testimony before the Mexican Judge, and it was testified that he could speak some Spanish.

8. The Commission believes that it has mentioned enough things shown by the record upon which to ground the conclusion that the occurrences in relation to the death of these American seamen were of such a character that the persons directly concerned with them should have been prosecuted and brought to trial to determine their innocence or guilt with respect to the death of the Americans. The conclusions of the Judge at Tampico with respect to the investigation conducted by him were treated in oral and in written arguments advanced in behalf of the Mexican Government as the judgment of a judicial tribunal. And the well-known declarations of international tribunals and of authorities on international law with regard to the respect that is due to a nation's judiciary were invoked to support the argument that the Commission could not, in the light of the record in the case, question the propriety of the Judge's finding. In considering that contention we believe that we should look to matters of substance rather than form. We do not consider the functions exercised by a Judge in making an investigation whether there should be a prosecution as judicial functions in the sense in which the term judicial is generally used in opinions of tribunals or in writings dealing with denial of justice growing out of judicial proceedings. It may readily be conceded that actions of the Judge should not be characterized by this Commission as improper in the absence of clear evidence of their impropriety. Obviously, however, the application of rules or principles asserted by this Commission in the past with respect to denials of justice will involve widely varying problems. To undertake to pick flaws in the solemn judgments of a nation's highest tribunal is something very different from passing upon the merits of an investigation conducted by an official—whether he be a judge or a police magistrate—having for its purpose the apprehension or possible prosecution of persons who may appear to be guilty of crime.

9. The Commission, considering among other things the earning capacity of the deceased and the financial support he gave the claimant, is of the opinion that an award of \$6,000 may properly be made in this case.

10. The Commission therefore decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of the claimant the sum of \$6,000 (six thousand dollars) without interest.

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MAMIE BROWN (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 4, 1927. Pages 211-212.)

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RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—ACTS OF POLICE.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—MEASURE OF DAMAGES, WRONGFUL DEATH.—FINALITY OF ACTS OF INVESTIGATING MAGISTRATE. Claim based upon same circumstances as those of *Margaret Roper* claim *supra* allowed.

(Text of decision omitted.)

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DAISY SANDERS AND ROSETTA SMALL (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 4, 1927. Pages 212-213.)

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RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—ACTS OF POLICE.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—MEASURE OF DAMAGES, WRONGFUL DEATH.—FINALITY OF ACTS OF INVESTIGATING MAGISTRATE. Claim based upon same circumstances as those of *Margaret Roper* claim *supra* allowed.

(Text of decision omitted.)

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JENNIE L. CORRIE (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 4, 1927, concurring opinion by American Commissioner, undated, concurring opinion by Mexican Commissioner, undated. Pages 213-218.)

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PROCEDURE, AMENDMENT OF MEMORIAL.—WRONGFUL DEATH, PARTIES CLAIMANT. A claim was duly filed with the tribunal by mother of deceased American subject based on his death. Mother thereafter died. Motion to amend memorial by substituting father of decedent as party claimant *allowed* notwithstanding expiration of time allowed for filing claims generally.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 782; British Yearbook, Vol. 9, 1928, p. 156.

(Text of decision omitted.)

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JOSÉ ACEVEDO AND ENRIQUE JIMENEZ GONZALEZ (UNITED  
MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(April 8, 1927. Pages 218-219.)

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PROCEDURE, CONSENT OF AGENTS TO DISPOSITION OF MOTIONS. Motions to dismiss *overruled*, with consent of two Agents, subject to right to amend pleadings.

(Text of decision omitted.)

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VIRGINIA ESTRADA VDA. DE RIVERA, *et al.*, AND OTHER  
CLAIMS (UNITED MEXICAN STATES) *v.* UNITED STATES  
OF AMERICA.

(April 8, 1927. Pages 219-220.)

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PROCEDURE, CONSENT OF AGENTS TO DISPOSITION OF MOTIONS. Motions to dismiss *overruled*, with consent of two Agents, subject to right to amend pleadings.

(Text of decision omitted.)

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WILLIAM R. TAYLOR AND OTHER CLAIMS (U.S.A.) *v.* UNITED  
MEXICAN STATES.

(April 8, 1927. Pages 220-221.)

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PROCEDURE, CONSENT OF AGENTS TO DISPOSITION OF MOTIONS. Motions to dismiss *overruled*, with consent of two Agents, subject to right to amend pleadings.

(Text of decision omitted.)

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HENRY RUSSELL AND OTHER CLAIMS (U.S.A.) *v.* UNITED MEXICAN STATES.*(April 8, 1927. Pages 221-222.)*

PROCEDURE, CONSENT OF AGENTS TO DISPOSITION OF MOTIONS. Motions to dismiss *overruled*, with consent of two Agents, subject to right to amend pleadings.

*(Text of decision omitted.)*IDA ROBINSON SMITH PUTNAM (U.S.A.) *v.* UNITED MEXICAN STATES.*(April 15, 1927, concurring opinions by Presiding Commissioner and American Commissioner, April 15, 1927. Pages 222-228.)*

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—ACTS OF POLICE.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—ESCAPE DURING IMPRISONMENT. Killing of American subject by Mexican policeman when off duty, followed by arrest of guilty and sentence of death, which was commuted by higher court to eight years, imprisonment, *held* not a denial of justice. Subsequent escape of prisoner during revolutionary disturbances, after thirty months' imprisonment, with no explanation being proffered by respondent Government for disappearance and failure to serve sentence, *held* a denial of justice for which respondent Government was responsible.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 798; Annual Digest, 1927-1928, p. 208.

*Comments:* Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521.

*Fernández MacGregor, Commissioner:*

1. This claim is presented by the United States of America against the United Mexican States demanding from the latter, in behalf of Ida Robinson Smith Putnam, an American citizen, the payment of \$53,106.50 on account of the murder perpetrated by a Mexican policeman, Eleno Uriarte, on the person of the claimant's son, George B. Putnam, an American citizen, a mining engineer, on or about July 5, 1909, in Pílares de Nacozari, Moctezuma, Sonora, Mexico. It is alleged that Mexico is responsible for a denial of justice which consisted in that an entirely unjustified penalty was imposed on Uriarte and, furthermore, in that the latter was not even made to serve such sentence. The Mexican Agency presented a motion to dismiss this claim, but withdrew it on February 11, 1926.

2. The American citizenship of the claimant was challenged by the Mexican Agency in its Answer, but this defense was not again used there-

after. I am of the opinion that the documents presented by the United States prove that this claim is impressed with American nationality.

3. The evidence contained in the record of this case is very meagre and it leaves in the dark what I consider to be the most important fact, and that is the escape of the convict, Uriarte. Nevertheless, the occurrences may be established as follows: On the date of the events, George B. Putnam attended a moving picture entertainment. At the close of the performance, Putnam went out in the street alone. It was then dark and it was raining. A few minutes after his leaving, several persons heard two shots and then a scream or moan, for which reason one of said persons went to the Chief of Police and informed him that a man had just been killed. Said Chief of Police, together with another policeman and the informant, went to the place where the shots had been heard and found the lifeless body of Putnam; there was found near it a yellow raincoat. A woman testified that after the shots, looking out through a window of her house, she saw, at a distance of about three meters, a man running with a pistol in his hand, who appeared to her as policeman Eleno Uriarte. It appears that the Chief of Police later reviewed the men under his command, all of them having answered the roll call except the aforementioned Uriarte. One of the policeman declared that he recognized as his own the yellow raincoat found near Putnam's corpse and that it was the same one which the deponent had loaned to Uriarte on the previous night. In view of the foregoing circumstances, prosecution was started, a warrant was issued for Uriarte's arrest, and upon his having been arrested three weeks later, on July 29th, 1909, he was examined by the Judge of First Instance of the District of Moctezuma, before whom the prisoner confessed his guilt, declaring that he had killed Putnam through jealousy. That when Putnam left the motion picture theatre, at about ten o'clock at night, said Uriarte told him that he wanted to have a talk regarding the affair which was still open between them. That they walked together some distance; that Putnam became incensed and attempted to throw himself on the deponent; that they both wrestled and fell; that they stood up at once, and that, then, Uriarte withdrew and, thinking that Putnam was carrying an arm, fired his gun on him twice and afterwards fled. The Commission does not have before it the complete criminal proceedings that were thereupon instituted against Uriarte, but in the record of this claim appear the decisions rendered in the first instance by the Judge of First Instance of the District of Moctezuma, on October 18, 1909, and on appeal by the Highest Court of Justice of the State of Sonora, on June 22, 1910. The lower court did not consider as proven the plea of self-defense made by Uriarte and found him guilty of homicide perpetrated without provocation and with treachery, for which it sentenced him to death. The higher court modified the decree of the court below, as it considered that the homicide had been committed during an encounter and that the treachery had not been proven, and on this ground it reduced the death sentence to eight years' imprisonment and hard labor.

4. The Memorial of the claim mentions only the trial in the first instance, and alleges that instead of shooting Uriarte at once, his execution was postponed until the first day of April, 1911, when he was liberated from prison to defend the town of Moctezuma for the Federal forces against the Revolutionists. It is further, alleged that Uriarte at once joined the latter and that he was not again apprehended by the Mexican authorities, thus escaping punishment for his crime. The evidence submitted by Mexico

in the Answer shows, as has already been stated, that Uriarte was still in prison in April, 1911, because the court of appeal had commuted the death penalty to eight years' imprisonment. A document presented by the Mexican Agency during the hearing of the case, shows that Uriarte, who had been taken out of the jail of Moctezuma, escaped on May 4, 1911, and that, upon having been re-arrested in Dolores, Chihuahua, he was sent to Sahuaripa, Sonora, and from the latter place to the penitentiary of Hermosillo, Sonora, having remained in this prison from June 3, 1912, until March 29, 1913, when he was liberated therefrom by Colonel Joaquin B. Sosa, then Military Commander of the said city of Hermosillo, and his whereabouts since that date are unknown. In view of the vagueness of the evidence with respect to the facts in connection with the escape of Uriarte, the Commission asked both Agencies to present additional evidence thereon, but the Mexican Agency was not able to add anything and the American Agency only presented two letters, which reveal the lack of success in its efforts to find new facts, and a memorandum regarding the military authorities who occupied Hermosillo, Sonora, in 1913, which makes reference, at the end, to a Colonel Ramon B. Sosa who was commanding the forces of Batamotal, to the north of Guaymas, in May, 1913.

5. The above-mentioned facts, although meagre, as heretofore noted, establish, nevertheless, the lack of responsibility of Mexico in the present case, as regards the charge imputed to her by the United States, of having violated its international duty by imposing on the slayer of Putnam a penalty out of proportion to his crime. The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country. (Case of Margaret Roper, Docket No. 183, paragraph 8.) A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law. We have now before us an appellate decision, rendered by the highest court of the State of Sonora. Nothing appears to show that the proceedings which that decision ended may have been dilatory or inadequate. The charges presented against it are based, not on facts, but on conjectures, such as inferring premeditation from Uriarte's confession that he was jealous of Putnam, and imagining that there was no self-defense due to the fact that the criminal fled after his crime. It is also charged that the Supreme Court of Sonora reduced the sentence without receiving new evidence. The courts of appeal in Mexico usually do not receive new evidence, but they study the case to see if the facts have been weighed correctly by the lower court and to see, especially, if the latter has applied to the case the corresponding legal precepts. This is what the Highest Court of Justice of Sonora did and had the right to do. Neither is the commutation itself of the death penalty to eight years, imprisonment sufficient to establish a denial of justice. The penalty is notoriously unjust only when there is imposed for a crime a penalty which does not correspond to the classification of said crime or when an unusual penalty is imposed for it. But to impose, for example, on a voluntary homicide one of the various penalties that are imposed for its different grades, aside from the death penalty, where there are doubtful circumstances concerning its perpetration, can never mean *prima facie* a wide deviation from

justice, and in no manner, on the other hand, does it involve pardon or amnesty as the American brief seems to indicate. The sentence of the Highest Court of Justice of Sonora is subject to no further examination, and the Mexican Government is not responsible on account of it.

6. The claimant Government alleges that the Mexican Government entirely failed in its obligation to punish the murderer of Putnam, as Uriarte escaped from the jail where he was imprisoned, and that he was never again apprehended. The evidence presented shows two escapes—one about 1911, after Uriarte, as alleged, had been taken out of the jail of Moctezuma to defend the town against the rebels, but he was then reapprehended; and the other about 1913, after the prisoner was taken out of the jail of Hermosillo by a Colonel Joaquin B. Sosa, no information appearing about this reapprehension. The first escape surely does not give ground for imputing responsibility to Mexico, since she apparently did everything possible to find the prisoner and to inflict on him the remaining punishment imposed. Nothing further is known concerning the second escape except the facts given above; it is not known who Colonel Joaquin B. Sosa was, to what forces he belonged (although it can be supposed that he belonged to the forces of the Constitutionalist Army, which at that time controlled the northern part of the Mexican Republic). (See George W. Hopkins case, Docket No. 39, paragraphs 11 and 12.) In the light of these vague facts it is impossible to fix precisely the degree of international delinquency of the respondent Government; but there remain at least the facts that Uriarte escaped and that Mexico had the obligation to answer for Uriarte until the termination of his sentence, and she is now unable to explain his disappearance. In such circumstances it can not be said that Mexico entirely fulfilled her international obligation to punish the murderer of Putnam, as Uriarte remained imprisoned only thirty months, more or less, and therefore Mexico is responsible for the denial of justice resulting from such conduct.

7. On the above grounds, due to the circumstances of the case, and in view of the standards set forth in paragraph 25 of the opinion rendered in the Janes case, Docket No. 168, I believe the claimant can properly be awarded the sum of \$6,000.00 (six thousand dollars), without interest.

*Van Vollenhoven, Presiding Commissioner:*

I concur in Commissioner Fernández MacGregor's opinion.

*Nielsen, Commissioner:*

I agree with the conclusions reached by Commissioner MacGregor with respect to the liability of the respondent Government. The claim preferred by the United States is grounded on an assertion of a denial of justice. The charge of a denial of justice is predicated, first, on the action of the appellate court in setting aside the death penalty imposed on Eleno Uriarte and substituting a term of eight years, imprisonment, and, second, on the failure of Mexican authorities to carry out the sentence imposed by the appellate court.

Appellate courts in some countries do not have the power to reduce the sentence of an accused person, but I do not understand that the United States finds fault with the Mexican law under which this power is vested in Mexican higher courts. Without entering into any discussion of the considerations which may have prompted the appellate court to reduce the sentence of the accused, I am of the opinion that no showing has been

made which could warrant the Commission in reaching the conclusion that the reduction of the sentence resulted in a denial of justice as that term is understood in international law.

The other point in the case, the fact that the accused did not serve the entire sentence of eight years imposed upon him raises more difficult questions. These difficulties confronting the Commission result from the scarcity and vagueness of the evidence in the record. There is evidence of fault, but nothing more. Therefore, it is, as stated in the opinion of Commissioner MacGregor, impossible to fix precisely the degree of delinquency on the part of the respondent Government. The instant case, therefore, differs materially from other cases passed upon by the Commission in which there has been considerable evidence of negligence and in which the Commission has rendered larger awards.

#### *Decision*

The Commission decides that the United Mexican States are obligated to pay to the United States of America on behalf of Ida Robinson Smith Putnam \$6,000 (six thousand dollars), without interest.

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### GERTRUDE PARKER MASSEY (U.S.A.) *v.* UNITED MEXICAN STATES.

*(April 15, 1927, concurring opinions by Presiding Commissioner and Mexican Commissioner, April 16, 1927. Pages 228-241.)*

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PROCEDURE, ADMISSIBILITY OF DEFENCE RAISED IN BRIEF NOT THERETOFORE RAISED IN PLEADINGS. It is questionable whether a defence raised for the first time in the brief, and as to which relevant facts have not been produced, may be considered by tribunal. Defence in question *held* not well founded in law in any event and hence unnecessary to be considered further.

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—MISCONDUCT AS A BAR TO CLAIM. An American subject was killed by a Mexican, who was thereafter arrested and imprisoned. The assistant jail-keeper unlawfully permitted the accused to escape. Evidence was not shown that the appropriate authorities took effective action to apprehend the accused. *Held*, the fact that the jail-keeper allowed the escape of the accused entrained responsibility on the part of respondent Government without regard to whether the jail-keeper was subsequently punished. When misconduct of any official, whatever his status or rank, results in failure of a State to perform its international obligations, it is responsible. The circumstance that deceased American subject may have been guilty of misconduct *held* no bar to claim.

*Cross-references:* Am. J. Int. Law. Vol. 21, 1927, p. 783; Annual Digest, 1927-1928, p. 250; British Yearbook, Vol. 9, 1928, p. 162.



*Nielsen, Commissioner :*

1. Claim is made in this case by the United States of America against the United Mexican States on behalf of Gertrude Parker Massey, individually and as guardian of William Patrick and John Kilbane Massey, minor children of herself and William B. Massey, an American citizen, who was killed by a Mexican citizen at Palo Blanco, Vera Cruz, Mexico. The claim is grounded on an assertion of denial of justice growing out of the failure of Mexican authorities to take adequate measures to punish the slayer of Massey.

2. On or about the fourth day of October, 1924, Massey, who was the terminal superintendent of the *Cia Metropolitana de Oleoductos, S. A.*, was killed in a building which is described in the record as a "bodega" (apparently some kind of a store) belonging to the petroleum company, by a Mexican citizen, named Joaquín R. Saenz, who was also employed by the company under the direction of Massey. It appears that the slayer fired six shots into Massey's body any one of which was probably sufficient to cause death. After the killing Saenz fled. He was captured and placed in jail at Tamiahua, Vera Cruz. Subsequently he was confined in prison at Tuxpan, Vera Cruz, from which he escaped on December 26, 1924, and he was not apprehended. The record contains copies of correspondence from which it appears that the American Consul at Tampico and the American Ambassador at Mexico City have from time to time urged that steps be taken to apprehend and punish the slayer.

3. It is stated in the Mexican Answer that Massey attempted to commit the crime of rape on the wife of Saenz, and that this offense on the part of Massey prompted Saenz to take the life of Massey. The record contains a mass of grave accusations against the character of the deceased. I am not convinced of the truth of these charges against Massey which I consider are not supported by reliable evidence. Whatever may be the facts in relation to this point, I consider them to be entirely irrelevant with respect to the pertinent legal issues in the case. In connection with the charge of immoral and illegal conduct made against Massey, the contention is made in the Mexican brief that "International law, justice, and equity preclude a claim from being set up, on the general maxim *ex dolo malo non oritur actio*, when the alien from whose death the claim arises by his own immoral, negligent, or unlawful conduct caused or contributed to cause his own death." I am not entirely clear with regard to the argument that was made that in a case of this kind law, justice, and equity "preclude" a claim from being set up. Under Article I of the Convention of September 8, 1923, the United States has the right to present this claim to the Commission. The United States invoked the rule of international law which requires a government to take proper measures to apprehend and punish nationals who have committed wrongs against aliens. The legal issue presented to the Commission is whether or not the obligations of that rule were properly discharged with respect to the apprehension and punishment of the person who killed Massey. Neither the character nor the conduct of Massey can affect the rights of the United States to invoke that rule nor can they have any bearing on the obligations of Mexico to meet the requirements of the rule or on the question whether proper steps were taken to that end. In other words, the character and conduct of Massey have no relevancy to the merits of the instant claim under international law.

4. In the Mexican brief the contention is advanced that a State is not responsible for a denial of justice, when a private individual who is under

indictment or prosecution for the killing of an alien is allowed to escape by a minor municipal officer in violation of law and of his own duty; if the State immediately disapproves of the act by arresting and punishing the officer, and reasonable measures are taken for the apprehension of the fugitive. It is asserted that an assistant jail-keeper unlawfully permitted Saenz to walk out of jail; that this minor official was arrested and strong action was taken against him; and that therefore no responsibility attaches to the Mexican Government for his misconduct.

5. No such defense with regard to the non-responsibility for the acts of the jail-keeper, and no facts regarding his conduct or steps taken to punish him for his wrongdoing are stated in the Mexican Answer. It is therefore very questionable whether the defense could properly be advanced as it was in the Mexican brief and in oral argument in which contentions were forcefully pressed by counsel for Mexico with respect to the non-responsibility of Mexico for the acts of a minor official of this kind, and whether it is proper for the Commission to consider it. However that may be, I am of the opinion that the argument made with respect to this question of responsibility for the jail-keeper is not well taken.

6. An examination of the opinions of international tribunals dealing with the question of a nation's responsibility for minor officials reveals conflicting views and considerable uncertainty with regard to rules and principles to which application has been given in cases in which the question has arisen. To attempt by some broad classification to make a distinction between some "minor" or "petty" officials and other kinds of officials must obviously at times involve practical difficulties. Irrespective of the propriety of attempting to make any such distinction at all, it would seem that in reaching conclusions in any given case with respect to responsibility for acts of public servants, the most important considerations of which account must be taken are the character of the acts alleged to have resulted in injury to persons or to property, or the nature of functions performed whenever a question is raised as to their proper discharge. As the Commission has heretofore pointed out, it appears to be a proper construction of provisions in Article I of the Convention of September 8, 1923, that uncertainty with respect to a point of responsibility was largely eliminated by the two Governments when they stipulated that the Commission should pass upon "all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice."

7. The question which has been raised in the instant case, and not infrequently in cases coming before international tribunals, is not one that can be properly determined in the light of generalities such as are frequently found in the opinions of tribunals. That this is true may be shown by a brief reference to citations of cases appearing in the Mexican brief.

8. With respect to the broad statement in an opinion rendered by Attorney General Cushing to Secretary of State Marcy under date of May 27, 1855 (7 Ops. Atty. Gen'l 229), it is pertinent to note the precise character of the Peruvian Government's claim with respect to which Mr. Cushing advised Mr. Marcy. A Peruvian vessel was stranded as a result of the unskillfulness or carelessness of a pilot in the Bay of San Francisco. While this pilot was under a measure of supervision of state authorities and was licensed by them, he was employed by the master of the Peruvian vessel, who was at liberty to pilot his own vessel or to employ an unlicensed pilot. Mr. Cushing was of the opinion that neither the state of California nor the

United States was the "guarantor, security, or assurer" of the professional acts of the pilot. It may be still more pertinent to note that the claim evidently directly grew out of a complaint against a marshal for alleged improper conduct in not recovering a judgment which had been obtained against an associated body of pilots to which the incompetent pilot belonged, and that Mr. Cushing stated that the Peruvian claimants had an adequate legal remedy in the courts. The importance which Mr. Cushing attached to the failure to exhaust local remedies (a subject with which we are not concerned in this arbitration in view of the stipulations of Article V of the Convention of September 8, 1923) is clear.

9. In the Bensley case, Moore, *International Arbitrations*, Vol. 3, p. 3016. the Commissioners stated that there was no allegation that the acts complained of were perpetrated by any person or officer "in the employment or under the control of the Mexican Government, or for whose proceedings that government was or ought to be responsible," and that "the injury sustained by the memorialist, as set forth by him, was inflicted by a municipal officer (a village alcalde) of the village of Dolores, against whom redress might have been had before the judicial tribunals of the country."

10. In the Blumhardt case, *ibid.*, p. 3146, the failure of the claimant to resort to local legal remedies against a Mexican inferior judge is clearly emphasized. The Mexican Government could not be held responsible. said Umpire Thornton, for losses when the complainant had "taken no steps by judicial means to have punishment inflicted upon the offender and to obtain damages from him," and when it was "against him that proceedings should have been taken."

11. Sir Edward Thornton, Umpire in the arbitration under the Convention of July 4, 1868, between the United States and Mexico, often rejected claims because of the failure of claimants to exhaust legal remedies. See *ibid.*, pp. 3126-3160.

12. In the Slocum case, *ibid.*, p. 3140, Umpire Thornton stated that the Mexican Government could not be held responsible for the action of a Mexican prefect in ordering the imprisonment of the claimant, who had refused to pay taxes. The Umpire declared that the claimant was not justified in refusing to pay the taxes; that payment should have been made: and that an appeal could have been made to the proper authorities for a refund of improperly levied taxes.

13. In the Leichardt case, *ibid.*, p. 3133, damages were claimed because the claimant had been arrested and mistreated at the direction of a secretary to a governor of a Mexican state. No proceedings were instituted by the claimant against this minor employee who was guilty of such peculiar action in bringing about the mistreatment of the claimant. In dismissing the case. Umpire Thornton said:

"\* \* \* it must be understood by foreigners in every country that wherever there is a fair prospect of obtaining justice by due course of law for wrongs and injuries inflicted by private persons or by 'paltry petty officers, drest in a little brief authority', like the governor's secretary, for instance, they must resort to the courts of the country, and in such cases only appeal to their own sovereign when the courts of the country refuse to do their duty, or misconceive it, or pervert justice *in re minime dubia*."

14. The Kellet case, *ibid.*, Vol. 2, p. 1862, grew out of difficulties which an American vice consul general had in Siam with Siamese soldiers. A disposition of the affair which resulted in a disciplining of the soldiers, was effected by the American Minister to Siam and an assistant legal adviser

to the Siamese Government. From the available record it does not appear that any claim for pecuniary indemnity was made by the United States in this case.

15. It is stated in the Mexican brief that in the Maal case, Ralston's *Report*, p. 914, the decision holding Venezuela responsible, was based on the fact that certain officers against whose acts complaint was made were never reprimanded or punished, and quotation is made of a statement to the effect that there had been no reprimand, punishment, or dismissal of these officers. It is pertinent to note, however, that the first reason for responsibility given by Umpire Plumley is stated in a sentence immediately preceding the statement quoted. The sentence reads as follows:

"The umpire acquits the high authorities of the Government from any other purpose or thought than the mere exclusion of one regarded dangerous to the welfare of the Government, but the acts of their subordinates in the line of their authority, however odious their acts may be, the Government must stand sponsor for."

16. The report in Moore's *Arbitrations* of the case of Pierce is very meagre. It is merely to the effect that the claimant was arbitrarily arrested by an officer of local police in Mexico; that the authorities proceeded against this official, fined, reprimanded and dismissed him from office; and that the claimant was not "under the circumstances, entitled to an award." In the light of the particular facts in this case it seems reasonable to suppose that little if any fault could be found with this decision.

17. In considering the question of a nation's responsibility for acts of persons in its service, whether they be acts of commission or of omission, I think it is pertinent to bear in mind a distinction between wrongful conduct resulting in a direct injury to an alien—to his person or his property—and conduct resulting in the failure of a government to live up to its obligations under international law. The cases which have been cited are concerned with the former; the instant case with the latter.

18. I believe that it is undoubtedly a sound general principle that, whenever misconduct on the part of any such persons, whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.

19. In an instruction addressed by Secretary of State Hay to the American Minister to Honduras under date of February 25, 1904, directing the presentation of a claim against the Honduran Government on account of the injuries inflicted on Charles W. Renton, an American citizen, and his family, is a passage that seems to be very apposite to the instant case. In that instruction Secretary Hay said:

"The liability of the Government of Honduras is believed to be fully established, however, on grounds apart from the fact that a minor official of that Government was directly concerned in the crime. While a State is not ordinarily responsible for injuries done by private individuals to other private individuals in its territory, it is the duty of the State to diligently prosecute and properly punish such offenders, and for its refusal to do so it may be held answerable in pecuniary damages. There was an inexcusable delay in initiating a judicial investigation. The first proceedings were partial and onesided. The subsequent judicial proceedings, which were the direct result of the naval investigation by the U. S. S. *Montgomery*, terminated in condemning for minor offenses persons who, the evidence before the Department shows, were guilty of a deliberate and brutal murder. And, finally, soon after the decision of the supreme court all of the murderers, with single exception of Dawe, were permitted to escape." (*Foreign Relations of the United States*, 1904, p. 363.)

20. The statement of facts in the above-quoted passage reveals clearly a failure on the part of Honduran authorities to employ adequate measures to punish wrongdoers. Compensation was made by Honduras in satisfaction of the claim.

21. Citation is made in the Mexican brief to the Neer case, Docket No. 136,<sup>1</sup> decided by the Commission. In that case it was contended in behalf of the United States that proper steps had not been taken to apprehend persons who had killed an American citizen. The Commission, while being of the opinion that more effective measures might have been employed, held that the record did not disclose evidence of such a gross degree of negligence as would warrant the Commission in finding that the Mexican Government was chargeable with a denial of justice.

22. Citation is also made in the Mexican brief to the case of Catalina Balderas de Díaz, Docket No. 293, decided by this commission on November 16, 1926.<sup>2</sup> In that case the Commission refused to sustain the charge of a denial of justice made by the Mexican Government against the Government of the United States because of the failure of authorities to apprehend the murderers of a Mexican citizen. The Commission held that not only was there no evidence in the record of "gross negligence on the part of the American authorities," but no evidence whatever of negligence.

23. I am of the opinion that the record in the instant case clearly reveals gross negligence on the part of the Mexican authorities resulting in a denial of justice. This conclusion I ground on an examination of records throwing light on the actions of authorities which the United States has alleged were improper.

24. Saenz having been arrested, certain proceedings were carried on before a Judge at Palo Blanco, a Municipal Court of Tamiahua, and the Court of First Instance at Tuxpan. The record before the Commission reveals that during the course of these proceedings statements were made by some persons who had some direct information regarding the killing of Massey. Other persons appeared and related stories that they had heard regarding incidents in the life of Massey entirely unrelated to the slaying of the deceased. For example, a Mexican officer, Lieutenant Gabriel Martínez, testified that he had had an altercation with Massey because Massey had discharged a watchman, and that he (Lieutenant Martínez) had had complaints from several persons, whose names he did not remember, that Massey was attempting to make love to their wives. The Lieutenant also mentioned, as several persons appearing as witnesses did, that it was "rumored" that Massey had had intimate relations with a certain woman whose name frequently appears in the record. The record contains statements of several persons to the effect that Massey was a man of despotic character; that he treated employees under his direction harshly; that he had had disgraceful incidents with several women; that it was rumored that he had illicit relations with a certain Mexican woman; that he was disliked by the majority of the men under him. Turning from these proceedings, we find that they were suspended because of the escape of the accused from jail.

25. There is no proper arrest and there can be no prosecution in the case of a man who is permitted by police authorities to leave prison. It is argued in behalf of the Mexican Government that the Mexican Government is relieved from responsibility for the failure to bring Saenz to justice

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<sup>1</sup> See page 60.

<sup>2</sup> See page 106.

because it arrested and punished José Refugio Vargas, the minor official responsible for the escape of Saenz, and took reasonable measures to apprehend the latter after his escape. Whatever bearing, if any, the arrest of the assistant jail-keeper, Vargas, might be considered to have on the question of Mexico's responsibility in this case, it is not a point of any material importance. With respect to this matter it may be observed, in the first place, that the record does not show that Vargas was prosecuted and punished, although there is evidence that he was arrested and spent some time in jail, and in the second place, that the conditions surrounding the imprisonment of Saenz reveal a situation of something more serious than an unexpected breach of trust on the part of a single minor official. Whether or not the keepers of jails may properly be designated as minor officials, they are assuredly entrusted with highly important duties. The point is more important than the amount or character of their official emoluments or the particular definition or designation of their position under the domestic law of their country. We find Vargas testifying during the course of the proceedings instituted against him that Saenz and three other persons charged with homicide, on one occasion requested Vargas for permission to leave the jail and that, after a conference with the Commandant of the Guard, the jail-keeper permitted the prisoner to depart. Vargas explained that he took such action because he had heretofore seen the warden of the jail do the same thing. The following extract from the testimony of Vargas, irrespective of the question of accuracy in detail, undoubtedly throws some light on conditions in the jail:

"It was about 8 o'clock on the night of the 26th of the current month when the warden of the jail left, whose name is Antonio R. Marquez, leaving the care of the jail to the speaker, and from between 10 and 11 of the same night while he was lying down the commandant of the guard, Amador, whose other name he does not know, came to him and stated that at the window which opens on court No. 2 there were parties talking, and he arose and saw that it was Joaquin R. Saenz, who stated to him that they had permission to go out to the street, Joaquin R. Saenz, Teofilo Florencia, Isaac Ovando and Felix Gamundi, the latter returning about one in the morning; that when they asked the speaker for permission to go outside he consulted the commandant of the guard and on agreement with the latter the above mentioned parties left, that the declarant allowed this to be done because prior thereto he had seen the warden do the same thing, and that by verbal order given him by the same warden for allowing to go out the said Joaquin R. Saenz, Teofilo Florencia and Gamundi, and that on the same day the warden had allowed Corporal Francisco Valenzuela to enter in order to converse with Saenz and Gamundi, the corporal inviting them to take beer, which Saenz and Gamundi accepted and took in the presence of the said warden; that upon the termination of the conversation the speaker shut Saenz and Gamundi up in the presence of the warden."

26. The record shows that Saenz, before the time when he took his final departure from jail by permission, had been allowed to leave the jail on at least one other occasion.

27. With regard to the argument made with respect to the bearing on the question of Mexico's responsibility of the steps taken to apprehend Saenz, it may be concluded that there is no evidence in the record showing that any effective action has been taken by the appropriate authorities to apprehend the accused. On this point counsel for Mexico called attention to a letter written by the Mexican Secretary of the Interior to the Governor of the State of Vera Cruz, requesting that all necessary measures be taken to apprehend Saenz and other fugitives. Citation was also made to a

communication written by the Governor of the State of Vera Cruz to the American Consul at Tampico from which it appears that certain prosecuting authorities had requested a Mexican Judge having knowledge of the case to issue the necessary orders and circular asking for the apprehension of Saenz. But there is no specific evidence that police authorities took any steps to apprehend him and no evidence of any difficulties experienced by such authorities to locate this well-known fugitive. In connection with the citation in the Mexican brief of the claim of Catalina Balderas de Díaz, it is pertinent to note that in that case the record contained evidence that there was no clue whatever to the identity of the guilty person; that military authorities and civilian police authorities had made diligent efforts to locate the guilty person; and that many persons had been arrested on suspicion.

28. In the light of the reasons which I have stated, I consider that the contentions of the United States that there was a denial of justice in this case growing out of the failure of Mexican authorities to take proper measures to punish the slayer of Massey have been established. I am of the opinion that an award of \$15,000.00 (fifteen thousand dollars) may properly be made on behalf of the claimant.

*Van Vollenhoven, Presiding Commissioner:*

I concur in paragraphs 1 to 6, inclusive, 18, 23, and 25 to 28, inclusive, of Commissioner Nielsen's opinion.

*Fernández MacGregor, Commissioner:*

I concur with the opinion rendered by Commissioner Nielsen. However, I believe proper to state that I differ with him in the estimate he makes of some of the cases cited by the Mexican Agency to support its theory of non-responsibility of States for acts of minor officials. It is not necessary to explain here my view-point regarding such cases.

I also wish to state, with respect to a denial of justice due to lack of adequate prosecution and punishment of a person guilty of murder, committed on the person of an unfortunate American citizen—denial of justice which is the international delinquency claimed in this case—that I differ somewhat with Commissioner Nielsen in a certain estimate which he seems to make of its extent. In fact, Mr. Nielsen seems to want it noted that the inadequate and improper action of the Mexican authorities is noticeable from the time that the Judges of Tamiahua and Tuxpan initiated the prosecution of the case, and even before the escape of Saenz occurs. This view is principally contained in paragraph 24 of his Opinion, as he makes a salient relation of the testimony rendered by various witnesses against the character or morality of the deceased Massey. The paragraph cited apparently contains a criticism of the procedure followed by the judge upon receiving the testimony of witnesses in the instruction of the cause, and perhaps implies that such procedure may be considered improper, applying thereto the criterion of international law.

In my opinion such criticism would be unfounded. The judicial investigation made for determining the circumstances in which the murder of Massey was committed, was in no way a deviation from Mexican law, and the system of this law is not contrary to any principle of international law. In the *Neer* case (Docket No. 136), the Commission, expressing its idea of denial of justice, said:

"It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities at Guana-

cevi might have been more effective. On the contrary, the grounds of liability limit its inquiry as to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task."

It may seem strange to one who is familiar with the opposite Anglo-Saxon practice, that in a judicial investigation, witnesses be permitted to render all the testimony they wish, without any impediment. There are, however, systems like that of Mexican law, that of French law, that of Italian law, and others of countries of Latin origin, in which the witness has that privilege and the judge the duty to respect it. The accused may present as many defense witnesses as he desires, and their testimony has only the limitation placed on its veracity by the prosecution witnesses presented by the Prosecuting Attorney, the representative of the victim, or by penal law itself when the witness is convicted of perjury. This system serves to let the judge form his conviction regarding the guilt of the accused; its object is to prepare the criminal prosecution, and its liberality is such that in some countries no penalty is imposed on a witness for false statements made during the period of instruction:

"L'information, qui se retrouve dans notre droit criminel, va servir d'élément à la conviction des juridictions d'instruction, mais non à celle des juridictions de jugement. Aussi la jurisprudence a-t-elle décidé, en se fondant sur le caractère *provisoire* de la déposition, qu'une déclaration mensongère, devant le juge d'instruction, ne saurait constituer le crime de faux témoignage." (*Précis de Droit Criminel*, R. Garraud, p. 572.)<sup>1</sup>

Mexican law does punish a witness guilty of perjury (art. 733 of the Penal Code of the Federal District similar to that of Vera Cruz). But, on the other hand, it imposes on the judge the duty to examine witnesses "whose statement may be requested by the interested parties \* \* \*" (art. 152 of the Code of Criminal Procedure of the Federal District, similar to that of Vera Cruz). It also imposes on him the duty to examine all the circumstances of the crime (art. 151); the duty to ask the witnesses if they have any cause for hatred or animosity towards the accused or the victim (art. 169).

The provisions last cited evidently serve to weigh the testimony of a given person. Hence, as much in the instruction as in the trial properly called, a witness may speak freely and he can be questioned not only by the judge, the Prosecuting Attorney, and the counsel of the defendant, but also by the jurors (articles 295, section V, and 297). Mexican law, like other systems of law already cited, leaves to the honor and conscience of the judge the use of the means which may serve to help in making the truth evident (art. 295, final paragraph).

In view of the above, and taking into account that the Commission has under its consideration only a judicial record which was not completed, I do not believe that the procedure, as followed by the Mexican judge up to the time of the escape of Saenz may be a deviation from his municipal

<sup>1</sup> "The information found in our criminal law serves as an element to conviction as to the jurisdiction of instruction, but not to that as to jurisdiction of judgment. Thus, jurisprudence, basing itself on the *provisional* character of a deposition, has decided that a false statement made before a 'juge d'instruction' could not constitute the crime of perjury. \* \* \*"



law. The system of that law is not contrary to any rule of international law; therefore, in the present case, the facts emphasized in paragraph 23<sup>1</sup> of Commissioner Nielsen's Opinion could not form the basis of a judgment of improper or strange judicial action, which action, on the other hand, unfortunately, is in my opinion clear, in view of the other facts which left the crime in question unpunished.

#### *Decision*

For the reasons stated above the Commission decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of Gertrude Parker Massey the sum of \$15,000 (fifteen thousand dollars), without interest.

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GEORGE W. JOHNSON, ARTHUR P. WHITE, EXECUTOR, AND  
MARTHA J. McFADDEN, ADMINISTRATRIX (U.S.A.) *v.* UNITED  
MEXICAN STATES. ("DAYLIGHT" CASE.)

(*April 15, 1927, concurring opinion by American Commissioner, April 15, 1927.*  
*Pages 241-254.*)

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**DIRECT RESPONSIBILITY.—ACTS OF PUBLIC VESSELS.—COLLISION IN TERRITORIAL WATERS.—PRESUMPTIONS UNDER MARITIME LAW.** A Mexican public vessel collided with American sailing ship in Mexican territorial waters during a storm. Evidence being somewhat conflicting and fault not established, *held* no responsibility on part of respondent Government. Since collision occurred in territorial waters, Mexican law *held* applicable. Presumptions existing in maritime law not found in Mexican law accordingly not applied.

**LACHES.** Defence of laches *held* not sustained.

*Cross-references:* Am. J. Int. Law, Vol. 27, 1927, p. 791; British Yearbook, Vol. 9, 1928, p. 163.

*Van Vollenhoven, Presiding Commissioner:*

1. This claim is asserted by the United States of America on behalf of the part owners (or their successors in interest) in the American schooner *Daylight*, which on the night of March 21, 1882, while at anchor outside the bar at Tampico, Tamaulipas, Mexico, was in collision with a Mexican gunboat under way, the *Independencia*. The schooner, with its cargo and the personal effects of its crew, was wrecked and lost. The United States alleges that the collision was due to culpable negligence or faulty seamanship on the part of the *Independencia* and that the Government of Mexico is responsible for damages caused by its public vessels; and therefore claims damages in the amount of \$5,948.62, with interest.

2. The main facts of the case are as follows. In the late afternoon of March 21, 1882, there were at anchor within Mexican territorial waters

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<sup>1</sup> Presumably paragraph 24 is meant.

just outside the Tampico bar an American sailing vessel, the schooner *Daylight*, and about a mile to the north of this schooner the Mexican gunboat *Independencia*. The captain of the *Daylight* had gone ashore about 3 p. m. to make entry of his ship, and had not returned. The weather had been fair and had continued so until about 7 : 30 p. m., when suddenly a strong wind from the north, shifting to the northwest, commenced to blow, which about 8 p. m. developed into a violent storm with lightning, rain, darkness and a very rough sea. The commander of the *Independencia*, which was anchored with her starboard anchor secured by two chains, deemed it advisable for the safety of his vessel to put out to sea or, at any rate, to seek a better location. Therefore the *Independencia*, with her lights burning, began to weigh her anchor and to go ahead slowly in a southern direction; but, from about 7 : 50 p.m. on, made her engines work full speed, while dragging her starboard anchor. The *Daylight*, also with burning light, and two other ships which were anchored not far off, could see the steamer approach from at least that time on; as soon as the *Daylight* noticed her, or perhaps before that time, she either filed all available chain, or made everything ready to do so. The first shock of the collision occurred some twenty-five minutes later, about 8 : 15 p.m.; all this time, or at least the latter part of it, the gunboat had been seen tacking, and one sailor from the crew of the *Daylight* (the Swedish seamen Peter Johnson) testified before the port authorities on March 25, 1882, that the gunboat at the time of the collision was "doubtless driven by the wind." It is worthy of remark that, according to the evidence, it took the *Independencia* more than half an hour to reach the *Daylight* which was anchored only one mile to the south. When the steamer had reached a distance of about ten fathoms from the *Daylight*, the officer on guard called out in English to the crew of the *Daylight*, expecting that the gunboat working under full steam might pass by the schooner without colliding if the schooner filed away more chain. The mate of the *Daylight* who replaced his captain testified on March 25, 1882, that he "supposed that the steamer was working to drive ahead." Instead, however, of advancing the *Independencia* drifted down backward and fell sternwise upon the schooner. Succeeding this first shock the commander of the gunboat ordered its engines reversed to disengage his ship, but driving back under full steam the entire length of the schooner it struck her again several times so as to tear out her bowsprit, to have her foremast entangled in the yards of the gunboat, and to split her foredeck. The clash threw back the steamer's smokestack. Some ten minutes after the first shock occurred the vessels were disengaged; the *Independencia* proceeded, was soon stopped, and dropped both her anchors some one hundred yards astern of the ill-fated *Daylight*, which has been filling rapidly with water and gradually sank. Neither in the latter part of the night nor on the next morning did the *Independencia* take pains to rescue the crew of the *Daylight*; they were not saved until about 7 : 30 a. m. on March 22, 1882, by a British schooner, the *Busiris*.

3. The great difficulty in this case, as in numerous collision cases, is one of conflicting and insufficient evidence. The only investigation of the facts that has been made was the one by the Mexican port authorities at Tampico who examined the masters and crews of both vessels (the Americans first) within the three weeks following the tragedy. The commander of the *Independencia* stated twice—once in his report of March 23, 1882, and once in the investigation on April 5, 1882—that the danger of the sudden rain storm moved him to seek a safer location. He stated that he

did so carefully, at first maintaining his starboard anchor and going slowly, but that after that he had to proceed under full steam; however, though the engines before and at the time of the collision were working at full speed, the vessel, since it was dragging one of its anchors, was not proceeding full speed. Mexico moreover contends that, if the American vessel had paid out more chain as soon as it was warned, the collision might have been prevented. The United States, on the contrary, contends that the gunboat knew that there was a schooner anchored only a mile off to the south; that under those conditions and with a strong "Norther" blowing the gunboat should not by leaving its perfectly safe position have disregarded the safety of other vessels; that when the steamer's smokestack fell there was a confusion or worse among the crew on board the *Independencia*. Besides, the United States assert—apparently basing its assertion on statements made by the mate and the sailor Oakland on March 25, 1881—that the *Daylight*, after the storm began and before the accident, had paid out all available chain, some thirty fathoms more than she had so far filed; but in the protest before the American consul on March 27, 1882, the captain and crew of the *Daylight* established that the crew "made everything ready to slip said Schooner's chain," but "had no occasion to slip Schooner's chain". The lack of conclusiveness in the evidence as presented on both sides before this Commission, which is the same evidence as was produced in the very next years following the occurrence (1883-1886), would seem to appear from the fact that the American Secretary of State on July 2, 1886, informed the American representative at Mexico City of the claimant's being invited "to produce whatever countervailing proof may be in his power," and that such further evidence never was obtained.

4. Among the Mexican evidence there is an inexplicable statement of the commander of the gunboat to the effect that, because of the extreme darkness, the light of the *Daylight* could not be seen until a short time before the collision; though there is evidence that the *Daylight* saw the gunboat from the beginning and that two other ships saw the lights of both vessels. Nor is it sufficiently explained why the *Independencia* after having been overwhelmed by the storm for half an hour could easily come to anchor, with both starboard and port anchors out, instantly after the collision. Among the American contentions, on the other hand, there is the unbelievable assumption that the Mexican commander had left without any reasonable ground a safe and effective anchorage in a dark, stormy, and dangerous night in waters with which he must have been quite familiar, and the dangers of which are well known to every Mexican seaman; in this connection it is worthy of note that one of the sailors of the *Daylight* (Abraham Oakland) testified on March 25, 1882, that after the storm began, but before the crew had noticed any movement of the gunboat, he had been "engaged in trimming the jib sails, so the schooner could put out to sea." The cook of the *Daylight* testified on March 25, 1882, that the mate (who replaced the captain, and who according to other evidence had been on deck when the tempest began) did not return on deck until the gunboat was within ten fathoms to the north of the schooner and the collision was imminent. The statement submitted by the United States that the *Independencia* if left to the current and wind could not possibly have collided with the *Daylight* would seem to indicate that the mere fact of the commander's leaving his original anchorage did not in itself constitute a dangerous act for this neighbouring ship.

5. The evidence as to fault on either side being greatly at variance, such as to leave the cause of the collision unascertainable, it is essential to determine whether some special rule as to burden of proof, or some presumption, can be invoked.

6. In the *Queen* case between Brazil and Norway, which was a case of a collision (1870) in Paraguayan waters between an anchored Norwegian sailing vessel and an aviso of the Brazilian navy under way at full speed, the arbitrator used as a basic rule the general principle that the burden of proof is incumbent upon the claimant government (Norway), and rendered an award in favor of Brazil (Lapradelle et Politis, *Recueil*, II, 708). In paragraphs 6 and 7 of its decision rendered March 31, 1926, in the case of William A. Parker (Docket No. 127), the Commission set out the grounds why this rule as to burden of proof is inapplicable to its proceedings. As to whether in case of collision between a ship at anchor and a ship under way the burden of proof by way of exception falls on the latter one, it may be stated that such a rule of evidence, where it exists, is usually considered and construed rather as a presumption of fault on the part of the ship under way than as a rule concerning evidence.

7. The United States contends that such a presumption in favor of ships at anchor, and another presumption in favor of sailing ships when colliding with steamers, are recognized by universal maritime law, and should be applied by this Commission which is bound to decide in accordance with the principles of international law, justice, and equity. Mexico, on the other hand, asserts that, as the collision occurred in Mexican waters, Mexican law is applicable, and that the Mexican law on collision in force in 1882—the *Ordenanzas de Bilbao* of 1737, confirmed in 1814—did not contain these presumptions. There would seem to be no doubt but that with reference to the present collision the law of Mexico is applicable. In the *Sidra* case the British-American arbitral tribunal held that “according to the well-settled rule of international law, the collision having occurred in the territorial waters of the United States, the law applicable to the liability is the law of the United States” (Nielsen’s *Report*, 457; see the *Canadienne* case, Nielsen’s *Report*, 430). In 1888, as its session of Lausanne, the *Institut de droit international* considering the problem of collisions both from the viewpoint of existing law and from that of a future uniform law, resolved in its drafts covering both viewpoints (under the guidance of such experts as Messrs. Lyon-Caen and Renault from Paris) that the law applicable is the law of the land where the collision took place a solution qualified by Mr. Fenault as required even by “ordre public”—and the Institute identified collisions within territorial waters with collisions in the interior of a country. If Mexican law in this matter were in open conflict with a universally recognized provision of international law the Commission should take such conflict into account; but even those international awards and authors who contend that in collision cases the Anglo-Saxon presumption in favor of the ship at anchor “is a universally admitted rule of maritime law” or is “*reconnu par tous les pays maritimes*” (Nielsen’s *Report*, 485; Lapradelle et Politis, II, 708) do not go so far as to establish that a disregard of this presumption constitutes a conflict with binding provisions of international maritime law. There certainly is a quite reasonable element in these presumptions for collisions under normal weather conditions; but under conditions so abnormal as this Tampico storm any generalization would seem objectionable. One of the first codes embodying the presumption in favor of ships at anchor, the maritime code promulgated by the Emperor Charles V

for the Low Countries in 1551, contains an express reservation relative to "a great tempest" and similar causes (Article 48 of said Code). In 1888 at Lausanne the presumptions were not included in either draft of the *Institut de droit international*; in 1898 at the Maritime Law Conference in Antwerp the question of the desirability of a specific provision for collision between a ship at anchor and a ship under way was unanimously answered in the negative by all of the affiliated national associations; and in the Brussels Convention of 1910 on collision law (Article 2, paragraph 2; and 6, paragraph 2) all presumptions, and especially that regarding ships at anchor, were abandoned.

8. It is to be considered, then, what the Mexican law in force in 1882 provided with reference to a collision of the present type. The existing federal Code of Commerce which contains a division (book the third) embodying maritime law was not in force at the time; it was not enacted until September 15, 1889. In 1882, the year of the occurrences discussed here, the Mexican Constitution of 1857 was already effective and it provided that all controversies relating to maritime law should be under the cognizance of the federal courts (Article 97, paragraph II). Said courts, in those days, applied as positive law the *Ordenanzas de Bilbao*, which had been the first mercantile law of the Mexican Republic in the period which elapsed between the date of the country's independence and May 16, 1854, the date of the promulgation of the first Mexican Code of Commerce, styled the *Lares Code*, after the Minister who sponsored its passage. The *Lares Code* was set aside by Article I of President Álvarez' decree of November 23, 1855, providing that the administration of justice should conform itself to the laws in force on December 31, 1852, and that the state courts with general jurisdiction should take cognizance of commercial law suits conformably to the ordinances and laws peculiar to each branch. At that time, in 1852, the law in force was the decree of November 15, 1841, which in Article 70 provided that, pending the enactment of a federal Code of Commerce, the law suits of this branch should be decided in accordance with the *Ordenanzas de Bilbao*, in so far as these ordinances had not been set aside. Therefore these ordinances had to be applied by the federal courts of Mexico, to which the Constitution of 1857, as stated heretofore, had transferred the jurisdiction in cases of maritime law. In the Bilbao ordinances the subject of collision is found under Chapter XX (*De las averías ordinarias, gruesas, y simples; y sus deferencias*; 36 articles), in Article 34, of which the general rule of responsibility for fault is reproduced without the introduction of any presumption. It can not be maintained that this silence on legal presumptions renders the Mexican law of the time incomplete and requires that it be supplemented by provisions drawn from the maritime law of a group of other countries.

9. In collision cases the first question to be answered is not which vessel is at fault, but whether either of the colliding vessels is at fault. Fault should be proven; absence of culpable fault must be surmised in cases where the cause of the collision can not be ascertained. There being no sufficient evidence before the Commission enabling it to hold that either commander or captain was guilty of culpable negligence or unskillful navigation, and there being no presumption, or specific rule for the burden of proof, in the Mexican law as it stood in 1882, culpable fault on the part of the *Independencia* can not be assumed.

10. There appears, however, in the record a circumstance which might raise serious doubts as to the respect felt for human lives on the part of

the *Independencia*. The commander of the gunboat knew that his ship had seriously damaged another vessel, and he might have suspected the danger arising out of the collision to the crew of the *Daylight*. Nevertheless there is no evidence as to any effort made by him either in the latter part of the night or even the next morning to render aid to the crew or the ship itself. It was left for a British schooner to save them, a long time after sunrise. Though this situation leaves a most unfavorable impression, the United States did not press it, and no opportunity was given the *Independencia* to explain her aloofness. Even if no good motive for this inhuman behaviour could be given, it would not furnish a legal ground for assuming culpable negligence with respect to the collision. At the Brussels Maritime Conference of 1905 it was expressly stated that, in cases of collision, failure on the part of one vessel to render assistance to the other vessel in distress does not in itself create a legal presumption of culpability for the collision (*Procès-verbaux du 17 octobre 1905*, pp. 7-10; Brussels Convention on collision law, 1910, Article 8, paragraph 3).

11. Mexico contends that there was laches on the part of the United States either in making the claimant present his claim in due form according to Mexican law, or in supplying further evidence. The first contention would seem untenable because of the fact that the reasons why the United States Government, rightly or wrongly, did not wish redress to be sought before Mexican administrative and judicial authorities were fully explained in the diplomatic correspondence of the years 1883-1886. Neither can laches be maintained with regard to the supplying of evidence, as the United States submitted all the evidence it could obtain. Once the diplomatic correspondence having come to a deadlock (1886), the United States, if unwilling to resort to force, could only wait.

12. For the reasons stated the claim should be disallowed.

*Nielsen, Commissioner:*

I concur in the Presiding Commissioner's conclusion that the case should be dismissed, although the record discloses evidence indicating that the Mexican war vessel may have been guilty of very faulty navigation.

There is no question as to the responsibility of a government under international law for damages caused by a public vessel, the improper management of which may be the cause of the injury to a merchant vessel belonging to another government.

In Bequet's *Repertoire du Droit Administratif*, the following principle is stated (23 p. 175):

"It is not only the army which by its acts can occasion accidents to individuals. The navy causes even more formidable ones and collisions between vessels of commerce and ships of war have sometimes extremely serious results. It is admitted without dispute that if there has been fault on the part of the officers of the fleet, faulty manoeuvring negligence, or imprudence on their part, the government is responsible."

International tribunals have frequently decided that compensation should be made for damages resulting from collisions between merchant vessels and public vessels. (See, for example, the case of the *Madeira*, Moore, *International Arbitrations*, vol. 4, p. 4395; the case of the *Confidence*, *ibid.*, vol. 3, p. 3063; the case of the *Sidra*, *American Agent's Report*, American and British Arbitration under the Agreement of August 18, 1910, p. 453; and the case of the *Lindisfarne*, *ibid.*, p. 483.)

Whether international practice justified the Mexican Government in taking the position when the United States presented a claim for the destruction of the *Daylight* that there should be a resort to local remedies is a question with which the Commission is not concerned. And the failure of the owners of the vessel to seek redress from Mexican administrative or judicial authorities is a matter which cannot be raised in defense to the claim at this time in view of the provisions of Article V of the Convention of September 8, 1923.

It is contended in behalf of Mexico that the only law applicable to the collision was the law of Mexico and not the law of the United States. The rule appears to have been laid down in two cases decided by the tribunal under the Special Agreement concluded between the United States and Great Britain August 18, 1910, that the law applicable to the determination of questions of fault with respect to collisions occurring in territorial waters is the *lex loci delicti commisi*. See the case of the *Canadienne*, *Agent's Report*, p. 427, and the case of the *Sidra*, *ibid.*, p. 453. This rule would appear to be sound as a general principle. But the recognition of the proper application of the rule in any given case would, I think, not necessitate the conclusion that an international tribunal would be impotent to determine liability based on the *general rule of international law* and the facts in a case in which it may appear that there is no applicable local admiralty law or is a law the effect of which may be to deny responsibility for a clearly wrongful act. In situations of that kind an international tribunal should, I think, determine the question of responsibility in the light of facts and general, applicable principles of law, as responsibility is determined, for example, in the case of wanton, negligent, or unnecessary destruction of property by some other agency for which the government is responsible.

It is maintained in the brief of the United States that maritime law is a part of the general law of nations, and it is argued that an examination of maritime codes reveals that at the time of the collision between the *Daylight* and the *Independencia* there was incorporated into the law of Mexico the principle of the often-stated rule which creates a presumption of fault against a ship in motion which comes into collision with a ship at anchor. In behalf of Mexico it is contended that no such rule was recognized in Mexican law in 1882. The statement has at times been made that admiralty law is international law. Admiralty law, although largely the product of principles and practices developed by maritime nations over a long period, can probably not be regarded as international law from the standpoint of the fundamental characteristics of the law of nations, namely, that it is a uniform law governing the conduct of nations which cannot be altered by a single nation. It can perhaps be said that certain principles of admiralty law have been so generally assented to that they are international law to which members of the family of nations should give effect. There may be some conventional international law. What is spoken of as general maritime law is the groundwork of all maritime codes, but nations generally do not consider themselves precluded from making modifications or additions. International law recognizes the right of a nation to subject foreign vessels within its jurisdiction to its authority, and to apply to them its maritime code. Aside from this particular point I think that clearly there are principles of law to which the Commission can give application in the instant case. And it should be noted that counsel for the United States apparently does not rely entirely on a rule with respect to presumption of fault, but argues

that evidence furnished by the Mexican Government reveals faulty navigation in several respects on the part of the war vessel.

In the opinion in the *Sidra case*, *supra*, signed by Monsieur Henri Fromageot, a distinguished authority, deeply versed in the law of nations, in the civil law, and in admiralty law, we have the following statement with regard to the requirements imposed on a moving vessel coming into collision with a vessel at anchor:

According to the well-settled Admiralty rule, recognized both in the United States and Great Britain, in case of a collision between two ships, one of them being moving and the other at anchor, the liability is for the vessel underway, unless she proves that the collision is due to the fault of the other vessel.

The rule so stated does not—at least not in terms—establish a presumption. But in taking account of the relative situations of two colliding vessels, it is probably in principle the same as the broad rule often stated by writers on admiralty law to the effect that there is a *prima facie* presumption against a moving vessel which collides with one at rest. The rule is obviously grounded on a sound principle. Whether the rule is so stated that it may be regarded as a rule of evidence or differently framed so that it may be considered, as I think it logically should, a substantive rule of admiralty law, it is probably formulated too broadly, unless it takes account of the situation of the vessel at rest. From an examination of decisions of courts of the United States in which effect has been given to the principle underlying the rule it would appear that the rule is best framed, substantially, in the language employed by Mr. Parsons, as follows:

“If a ship at anchor and one in motion come into collision, the presumption is that it is the fault of the ship in motion unless the anchored vessel was where she should not have been. The rule of law is the same when a vessel otherwise at rest is run into.”

See on this point the *Clara Clarita*, 23 Wall. 1, and the *Oregon*, 158 U.S. 186.

It does not appear from the record that the *Daylight* was improperly anchored, or that it failed to comply with any requirement of local law with respect to lights, or that any fault for the collision can be attributed to it.

Whether the rule as stated by Monsieur Fromageot or the general rule asserted by American courts is incorporated generally into maritime codes of nations at the present time, is not, it seems to me, a material point. The collision took place in 1882, and it is, of course, pertinent to have in mind the obvious principle that the effect of an act is to be determined by the law of the time when the act was committed. But the precise terms of any pertinent rule existing in that year appears to me not to be of controlling importance. The condition of the weather at the time of the collision in any given case can not affect the question of the proper application of the rule invoked by the United States or a similar rule, although, of course, it may be a very material point in determining whether a moving vessel was actually at fault. Evidence that unusual weather conditions rendered a ship unmanageable may be conclusive proof of lack of fault. Whatever may be the precise terms of any proper, applicable rule, it seems to me that it can scarcely fail to take account, in determining the question of fault, of the fact that one vessel is properly anchored and another is in motion, whenever collision results under such conditions.

The effective analysis of evidence in the record by counsel for the United States to my mind strongly suggests several reasons pointing to fault on



the part of the *Independencia*. It may be difficult in the light of the record to question the wisdom of the youthful commander of the war vessel—he was 23 years of age—in leaving the position where his ship was anchored. Undoubtedly the storm which he noted was equally violent at the place of anchorage of each of the vessels that came into collision. And if the merchant vessel by its anchor maintained its position with apparently but slight motion, it would seem strange that the war vessel should have been unable to keep its place of anchorage by the use both of its anchors and its engines, or should have been forced into the collision. It is strange, too, that the war vessel should be unable to check itself from coming into collision with the merchant vessel, when the former, after having been injured by the collision, and after its crew was apparently, as the evidence shows, to some extent demoralized, could drop anchor and come to a stop following the collision approximately one hundred yards distant from the merchant vessel. It seems strange also that it could promptly reverse its engines and pull away from the merchant vessel after the collision but could not reverse the engines in time to avoid an impending collision of which it had warning. Other facts mentioned in the brief of the United States tend strongly to indicate faulty handling of the war vessel.

Another point which is mentioned in the Presiding Commissioner's opinion, seems to me to be a pertinent one and one of which it is proper to take account, namely, the failure of the crew of the war vessel to observe what has been called "the first law of the sea"—to give assistance to seamen in distress and danger. By a statutory enactment of the United States the duty is imposed on the master of each vessel in case of collision to render all practicable assistance to the other, and if he fails to do so the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, negligence or default. (26 Stat. L. 425.) A similar provision is found in the British Merchant Shipping Act of 1894 (Sec. 420). Doubtless provisions of this nature are found in the laws of other countries.

It is solely in the absence of more conclusive evidence to rebut the testimony which the members of the crew of the *Independencia* all gave to the effect that the unusual condition of the weather was an unavoidable cause of the accident that I concur in the decision that the claim be dismissed.

I agree with the views of the Presiding Commissioner that the principle of laches can be given no application in the present case. A fundamental point in any proper application of that principle must be delay in the time or presentation of a case by a claimant government. A claim was presented by the United States as soon as a proper investigation had been made of the facts leading to the collision and was vigorously pressed thereafter for a considerable period of time.

*Fernández MacGregor, Commissioner:*

I concur with the statements of fact and law made by the Presiding Commissioner and with his conclusion that the claim must be disallowed.

#### *Decision*

The Commission decides that the claim of George W. Johnson, Arthur P. White, Executor, and Martha J. McFadden, Administratrix, must be disallowed.

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FRANCISCO MALLÉN (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(April 27, 1927, concurring opinion by American Commissioner, April 27, 1927, dissenting opinion (dissenting in part) by Mexican Commissioner, undated.  
Pages 254-280.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—EFFECT OF MISREPRESENTATIONS AND OF DESTRUCTION OF PART OF MATERIAL EVIDENCE BY CLAIMANT. Facts that claimant made misrepresentations, conflicting statements and destroyed part of material evidence *held* not in and of themselves to bar his claim.

DUTY TO PROTECT CONSULS. Government of consul's residence should exercise greater vigilance, in respect to his safety and security, than is extended common citizens.

LACK OF PROTECTION. Appointment as deputy sheriff of a police officer, made after such officer had attacked a Mexican consul and had threatened such consul with death, *held* to be a basis for award when such officer subsequent to such appointment violently attacked such consul for second time.

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Mexican consul was violently attacked and beaten by American police officer during course of arrest for carrying a pistol, which consul was lawfully entitled to carry. Such police officer apparently never paid the fine subsequently imposed upon him for such attack. Responsibility on part of respondent Government *held* established.

MEASURE OF DAMAGES, ATTACK UPON CONSUL.—PUNITIVE DAMAGES.—INJURIES DEVELOPING AFTER ATTACK. When injuries complained of were not apparent at time of attack or shortly thereafter but developed after lapse of considerable period, proof of causal connexion must be established. Punitive damages should not be awarded on ground claimant was a consul. Damages should take into consideration indignity suffered, lack of protection and denial of justice.

*Cross-references:* Am. J. Int. Law, Vol. 21, 1927, p. 803; Annual Digest, 1927-1928, pp. 213, 267, 374; British Yearbook, Vol. 9, 1928, p. 160.

*Comments:* Edwin M. Borchard, "Important Decisions of the Mixed Claims Commission, United States and Mexico," Am. J. Int. Law, Vol. 21, 1927, p. 516 at 521.

*Van Vollenhoven, Presiding Commissioner:*

1. This claim is put forward by the United Mexican States on behalf of Francisco Mallén, a Mexican national. The claim is based on two assaults made on Mallén at El Paso, Texas, U.S.A., where he had been consul of Mexico since 1895, by one Juan Franco, an American deputy constable of Mexican origin; the first assault occurring on August 25, 1907, the second on October 13, 1907. Mexico alleges that the United States is responsible for illegal acts of an American official including an unwarranted arrest, for lack of protection, and for denial of justice in both trials relating to the

assaults, and claims on behalf of the claimant damages for compensation and satisfaction in the amount of \$200,000 with interest.

2. According to the respondent Government, the present claim shows a peculiar and delicate feature in that the claimant has intentionally misinformed on several occasions his own Government, the American Government and this Commission; especially in that he has submitted as evidence a garbled transcript of the proceedings in the second trial (November 7-9, 1907), allowing the text of the cross-examinations and other parts of the transcript to be destroyed though he knew the County Court at El Paso was not a court of record; in that he related the facts of the first assault in an exaggerated manner to his Government; in that he made conflicting statements about the second assault; and in that he misrepresented the purport of Dr. Bush's visits to him after October 13, 1907. The question has been raised as to whether a claimant behaving as is alleged deserves to see his claim espoused by his Government or, once it has been so, to see it maintained by said Government; or even, whether such a circumstance might induce the Commission to reject it.

3. The fact that Mallén's telegram of August 25, 1907, directed to the Mexican Foreign Office on the very evening of the first assault, was clothed in exaggerated words and that part of its contents is not supported by the evidence to which Mallén himself referred, can not be denied. Nor can it be denied that Mallén by submitting only a part of the transcript which he ordered made of the proceedings before the El Paso court on November 7-9, 1907, had removed from this Commission the best and most complete evidence it might have had regarding the second assault. Mallén, being at the time a man of fifty-three years, who had been a consul for twelve years, who was familiar with handling private affairs and who must have been somewhat familiar with criminal court practice in the United States, should not have acted in so uncautious a manner; he should have explained or at least established the several discrepancies between some of his earlier and later sworn and unsworn statements. But the mere fact that those parts of the transcript, which have been submitted to the Mexican Agency and by it have been rendered available for the respondent agency and the Commission, contain references to the omitted cross examinations, would seem to indicate that Mallén could not have intended to destroy all traces of that part of the proceedings. As to the visits of the physician Bush, between Mallén's statements on the one hand and Bush's statement in court on November 7, 1907, on the other hand, there is contradiction in words, not in essence; a divergence does not occur until Bush's affidavits of December 22, 1910, and January 26, 1927. The conclusion from all of this should be to the effect that Mallén, strange though it may seem, has not sufficiently realized that in a claim of this type and in the statement corroborating it the utmost accuracy is required and that there is no place for exaggerated, incomplete, or conflicting contentions. In paragraphs 8 and 9 of its opinion in the *Faulkner* case (Docket No. 47), rendered November 2, 1926, the Commission, however indicated that exaggeration and even misrepresentation of facts on the part of claimants are not so uncommon as to destroy the value of their contentions.

4. The evidence as to the first assault on Consul Mallén by Deputy Constable Franco, though unsatisfactory as to its details, clearly indicates a malevolent and unlawful act of a private individual who happened to be an official; not the act of an official. On Sunday night August 25, 1907, in a street of El Paso, the deputy constable saw Consul Mallén, for whom

evidently he had a profound aversion; pronounced to bystanders in uncouth language his intention to "get" and to "kill" that fellow; walked up to Mallén some five minutes later, and either slapped him in the face or knocked his hat off, possibly after having said some words in Spanish. Another policeman or a private citizen, Powers, was either called by telephone or happened to notice the event, and took Franco away. From Ciudad Juárez, Mallén wired to Mexico City that he had been the victim of an attempt to shoot him with a pistol; but the evidence does not support that contention. Franco was prosecuted before the County Court at El Paso and fined the next day \$5 on account of disturbing the peace; the fine apparently had been paid. Mallén had intentionally abstained from submitting any complaint and from being present at the arraignment.

5. Direct responsibility of the United States for this first assault has not been alleged. Denial of justice is alleged, on the ground that the court treated an attempt to kill Mallén as a mere disturbance of the peace. Since the occurrence was submitted to the police court without any testimony on the part of Mallén himself, it is difficult to see how the court could have deemed it a dangerous attack of importance. Mallén at this time had no reason to suspect Franco of lying in wait for him in order to revenge the fact (of which Mallén was innocent) of the nonextradition by Mexico of a man who had been suspected of being the murderer of Franco's brother-in-law. Lack of protection *during* this occurrence cannot be maintained; the second policemen, or the private citizen, did all that was necessary, and the incident was closed. On the other hand, it would seem quite unsatisfactory that a deputy constable, after disturbing the peace he was appointed to protect, was—as far as the record shows—neither punished in any disciplinary way, nor warned that he would be discharged as soon as a thing of this type happened again. The circumstance that within two months Franco, using the very same uncouth words to show his aversion for Mallén, availed himself of another opportunity to "get" Mallén, this second time misusing his official capacity, shows how imprudently and improperly the authorities acted in maintaining such a man, without any preventive measure, in a position in which he might easily cause great harm to peaceful residents. Mallén not long after August 25, 1907, applied to the county attorney at El Paso in order to inquire whether he was authorized to carry a pistol. The authorities of Texas therefore should have realized the risks they incurred by maintaining Franco in office and by not protecting Mallén from violence at the hands of Franco, and they must bear the full responsibility for their action.

6. The question has been raised whether consuls are entitled to a "special protection" for their persons. The answer depends upon the meaning given these two words. If they should indicate that, apart from prerogatives extended to consuls either by treaty or by unwritten law, the Government of their temporary residence is bound to grant them other prerogatives not enjoyed by common residents (be it citizens or aliens), the answer is in the negative. But if "special protection" means that in executing the laws of the country, especially those concerning police and penal law, the Government should realize that foreign Governments are sensitive regarding the treatment accorded their representatives, and that therefore the Government of the consul's residence should exercise greater vigilance in respect to their security and safety, the answer as evidently shall be in the affirmative. Many penal codes contain special provisions regarding special felonies committed as against foreign diplomats; nobody will contend that

such provisions exhaust the care which the Government of their residence is bound to observe regarding their security and welfare. In this sense one might even say that in countries where the treatment accorded citizens by their own authorities is somewhat lax, a "special protection" should be extended to foreigners on the ground that their Governments will not be satisfied with the excuse that they have been treated as nationals would have been (see paragraph 8 of the Commission's opinion in the *Roberts* case, Docket No. 185, rendered November 2, 1926, and paragraphs 13 and 16 of its opinion in the *Hopkins* case, Docket No. 39, rendered March 31, 1926). In this second sense President Fillmore of the United States, in his annual message of December 2, 1851, rightly said: "Ministers and consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they faithfully discharge their respective duties and are guilty of no violation of our laws. \* \* \* Ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station." (VI Moore, *Digest* 813.) In this second sense it was rightly stated by the Committee of Jurists appointed by the League of Nations on the Corfu difficulties, in a report adopted on March 13, 1924: "The recognized public character of a foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf." (*American Journal of International Law* 18, 1924, p. 543.) In this second sense again it was rightly contended in 1925 by an American author that "if a consul is not a diplomatic agent, he is nevertheless entitled to a certain degree of protection because of his public character," similarly as commissioners employed for special international objects, such as the settlement of frontiers, supervision of the execution of a treaty, etc., "receive a special protection, even though it does not amount to diplomatic privilege." (Eagleton in *American Journal of International Law* 19, 1925, pp. 303, 308.)

7. The second assault, October 13, 1907, happened on a Sunday afternoon in a street car moving from Ciudad Juárez, Chihuahua, Mexico, across the river to the adjoining city of El Paso, Texas, U.S.A. Franco starting from a house at the Mexican side saw Mallén on the car, boarded the back platform, and told the conductor that as soon as they would be on the Texas side he would "get" this man. Once the car was in the United States, Franco walked up from behind Mallén who was seated in the front of the car, violently struck him with his fist on the right side of the head so that the left side was bumped against the door or the window (which rendered Mallén unconscious for a moment), went on striking him several more hard blows even while he was on the floor, drew his pistol, drove Mallén at the point of it to the rear of the car, made the car stop a little later, and then took Mallén, his face all covered with blood, to the El Paso county jail. It has been proven beyond doubt that during the following trial even the co-counsel for the prosecution had no knowledge of a blow on the right temple struck with Franco's revolver; he alleged only a heavy blow with the fist and a pointing at Mallén with the pistol; and a similar statement was made by Mallén himself the day following the occurrence to an El Paso paper. There is no evidence to support the allegation of a blow with a revolver, except Mallén's sworn statement dated October 13, 1907 (the night of the event), according to which Franco had struck him

"with his fists and by means and instrument to the affiant unknown." It is essential to state that the whole act was of a most savage, brutal and humiliating character. It is also essential to note that both Governments consider Franco's acts as the acts of an official on duty (though he came from the Mexican side), and that the evidence establishes his showing his badge to assert his official capacity. Franco could not have taken Mallén to jail if he had not been acting as a police officer. Though his act would seem to have been a private act of revenge which was disguised, once the first thirst of revenge had been satisfied, as an official act of arrest, the act as a whole can only be considered as the act of an official.

8. Franco contended that he arrested Mallén because of his illegally carrying a gun. This contention has no merit. Not only does the record sufficiently show that the law of Texas prohibiting the carrying of firearms was being executed so as to allow the officials of both Governments, who often had to pass the border, to carry them by way of mutual concession; but the county attorney at El Paso, not long after August 25, 1907, had explicitly told Mallén that he might do so without fearing any consequences—a fact, established not only by Mallén's statement, but also by co-counsel Beall's letter of November 13, 1907, to the American Embassy at Mexico City—and the authorities after the second trial did not give any attention to Mallén's alleged contravention of the Texas law. If Franco, being aware of the Mexican consul's unlawfully carrying a pistol, had merely wished to prevent such action, he would, instead of submitting Mallén to the humiliation of an arrest in a street car, have applied to his superiors requesting them to inform Mallén he was not authorized to carry arms, particularly since the district attorney (Estes) had advised him to apply to the county attorney or even to the grand jury. The arrest made by Franco in this manner and at a time when Mallén's pistol was not displayed was a mere pretext for taking private vengeance. Neither Government denies that, even supposing Franco's intention to have been to execute the Texas law, he went incredibly much farther than might have been necessary to perform any official duty.

9. There can be no doubt as to liability on the part of American authorities for this second assault on Mallén by an American official. The American Agency, in the conclusion of its reply brief, states: "The Agent of the United States does not contend that this Government is without responsibility in this matter. An 'official or other' acting in a broad sense for the United States was by an American jury, in the language of the treaty, found to have perpetrated an 'injustice' upon Mr. Mallén. This circumstance is properly resented by Mexico." A memorandum emanating from the American State Department, dated February 26, 1913, and filed among the evidence, concludes by stating that, if Mallén's allegations are not refuted, "it would be incumbent either upon the State of Texas or on the National Government to accord him reparation for his injuries". Franco was acting for the State of Texas as assistant of a *State* official, and whereas the State Department at Washington was active in respect to this claim it was the government of the State of Texas which was negligent and careless. However, as this Commission has had occasion to point out more than once, acts of authorities of Texas may, under the Convention of September 8, 1923, give rise to claims against the United States and claims may be predicated on such acts.

10. The second assault was tried before the County Court at El Paso on November 7-9, 1907, and Franco was fined \$100 for aggravated assault

and battery resulting in wounds which were not serious. The injuries sustained by Mallén were demonstrated before the court as not being at the time of a serious nature, though they might have been dangerous, and the court in its instruction to the jury included a statement that "the evidence of bodily injury, inflicted upon Francisco Mallén by the defendant Juan Franco, does not show the injury to be of that serious character to warrant a conviction of aggravated assault" on *that* ground. Under these circumstances a fine of \$100, being within the limits of the penal law, can not be said to represent a denial of justice merely because of its moderate amount.

11. Has that second fine plus the cost of the prosecution (\$51.75) been paid? Mexico denies it, and there is no evidence to the contrary, except Franco's own affidavit of December 22, 1910, that he paid \$95, which would mean a part only of the fine and costs. The county auditor at El Paso established on January 8, 1926, that Franco had given a bond for the sum of \$151.75, but that "no record appears of any payments ever having been made on said Convict Bond". It therefore should be assumed that the second fine has not been paid. The sentence moreover read that, if the sum was not fully paid, Franco should be committed to the county jail. It was for the United States to show that he has been committed to jail. Punishment without execution of the penalty constitutes a basis for assuming a denial of justice.

12. Lack of protection on the part of the Texas authorities lies in the fact that so dangerous an official as Franco, after having had his appointment as deputy constable cancelled on October 14, 1907, was reappointed shortly afterwards, at any rate before March 4, 1908, this time as deputy sheriff. This reappointment means lack of protection in so serious a form that it amounts to a challenge; it is exactly the reverse from that protection due to all peaceful residents, whether aliens or nationals. Instead of providing the Mexican consul with that security for his person which, according to the quotation from President Fillmore given in paragraph 6 of this opinion, is indispensable to permit a consul to perform his task, it would have exposed him to daily danger if he had stayed at El Paso.

13. There being established that the United States is liable (a) for illegal acts of the deputy constable Franco on October 13, 1907, (b) for denial of justice on the ground of nonexecution of the penalty imposed on November 9, 1907, and (c) for lack of protection, there remains to be established what material losses and damages resulted from Franco's second assault. The difficulty before the Commission lies in the problem, whether there is a link between, on the one hand, Mallén's ailments of 1908 and subsequent years up to the present time, together with their financial consequences, and, on the other hand, the events of October, 1907. It has been conclusively shown that in November, 1907, at the time of the second trial, both Mallén and co-counsel Beall only complained about a serious injury sustained by Mallén on the left side of his face as a result of contusion with the car, and that at that time the court did not esteem his injuries serious. It would seem from a receipt, produced among the evidence and relating to professional services by Dr. Anderson at El Paso "from October 13th to November 12, 1907. Surgery for wounded head and face \$35.00", that this first treatment ended before the middle of November, 1907. It is established, on the other hand, that on February 2, 1908, Mallén entered a hospital and on February 4, 1908, was operated upon in the right mastoid region by a Mexican physician at Mexico City for ailments which have since

disabled him. The only links between these two facts consist in (a) a certificate delivered on July 3, 1908, by Drs. Urrutia and Cañas, the physicians who operated upon Mallén and continued treating him from 1908 to 1912, relating that "the lesion originated in a wound over the temporal region, which, according to the physicians who attended the patient in El Paso, Texas, during the month of October of last year, was a contused wound with a purulent discharge from the ear and probable fracture of the bone, which was the direct and sole cause of the disorder referred to", and (b) a statement of March 9, 1927, by the same Dr. Urrutia and one of November 16, 1926, by Mallén, according to which the Chief Surgeon of the Mexican Army, General Caraza at Mexico City, treated Mallén for about a month, after he left El Paso and before he entered the sanitarium on February 2, 1908, for what Caraza, according to Urrutia, called a cerebral abscess of traumatic origin. It is true that there is no trace in the record of any new accident to Mallén between November 12, 1907, and February 2, 1908, which might have caused these subsequent troubles of traumatic origin, and that the physicians in Mexico City appear to have considered the connection between the injuries of October, 1907, and their operation on the right mastoid region a natural one. On the other hand, even when not applying to medical certificates the usual requirements of affidavits or legal statements, the present certificate, issued "on petition of the interested party", would seem too vague and incomprehensible to allow the Commission so far-reaching a conclusion as the claimant suggests. The certificate of July 3, 1908, mentions a medical treatment in October, 1907, not a later one; it does not even state who "the physicians" quoted are; Drs. Bush and Vilas seem to be out of the question, and there is no indication whatsoever either of any treatment by Dr. Anderson after November 12, 1907, or of any treatment by a fourth physician at El Paso. If Dr. Anderson had found after November 12, 1907, that the wounds of the left side had developed into a really dangerous ailment on the right side of the head, either the claimant or Dr. Urrutia would not have omitted to produce this surprising discovery of Dr. Anderson's in some way or other, and Dr. Anderson's careful and time-consuming examination of the patient leading to this discovery doubtless would have made its appearance in one of the numerous doctor's bills produced among the evidence. Nor is there any indication relating to General Caraza's views concerning the connection between the injuries of October 13, 1907, the abscess he treated, and the ear troubles and presumable bone fractures for which Mallén went to the hospital; the contention that Caraza treated Mallén for "an infection which resulted from the said wounds" appears in Mallén's affidavit only, not in the physician's statement. The claimant should have furnished some conclusive and pertinent medical testimony about the development of his illness between November 12, 1907, and February 2, 1908; or at least might have produced an expert statement by some high medical authority of the present day establishing the value of the two statements (a) and (b) referred to in the middle of this paragraph. The Commission under the Convention would seem not to be warranted in considering as sufficient proofs for a conclusion of this importance statements of so loose and inexplicable a character.

14. When accepting as the basis for an award, in so far as compensatory damages are concerned, the physical injuries inflicted upon Mallén on October 13, 1907, only those damages can be considered as losses or damages caused by Franco which are direct results of the occurrence. While recogniz-



ing that an amount should be added as satisfaction for indignity suffered, for lack of protection, and for denial of justice, as established heretofore, account should be taken of the fact that very high sums claimed or paid in order to uphold the consular dignity related either to circumstances in which the nation's honor was involved, or to consuls in backward countries where their position approaches that of the diplomat. The Permanent Court of Arbitration at The Hague in its award of May 22, 1909, in the case of the deserters at Casablanca twice mentioned "the prestige of the consular authority" or "the consular prestige", but especially with reference to conditions in Morocco as they were before France established its protectorate.

15. Taking all these considerations into account, it would seem that an award may properly be made in the amount of \$18,000 without interest.

*Nielsen, Commissioner:*

I agree with the conclusions of the Presiding Commissioner with respect to the legal responsibility of the United States in this claim, and I will merely indicate briefly my views touching certain aspects of the case.

A consular officer occupies a position of dignity and honor, and there are several recorded precedents revealing emphatic action taken by Governments to obtain redress for indignities or physical injuries inflicted upon consular officers in the countries of their residence. Diplomatic officers are accorded under international law certain privileges and immunities which do not extend to consular officers, and we find incorporated into domestic legislation provisions designed to carry out the obligations of international law with respect to matters of this kind. (See, for example, sections 4062 and 4064 of the Revised Statutes of the United States.) I think that international law undoubtedly secures to a consular officer the right to perform his functions without improper interference. And it would seem that, in a case in which his personal safety is threatened, authorities of the country of his residence may well be expected to take especial precaution to afford him protection. It is of course their duty to take proper steps for the protection of all aliens. But when indemnity is claimed before an international tribunal solely as personal compensation to a consular officer who has been injured, I do not believe that a sum so large that it must properly be regarded as punitive damages or as redress for indignity to a nation can properly be awarded on the ground that the injured person is such an official. Considerations that have prompted large demands of indemnity through diplomatic channels in connection with the adjustment of unfortunate incidents involving injuries to consular officers may clearly be of such a character that account may not be taken of them in connection with the determination of a claim such as that pending before the Commission. However, I do not intend to express the view that the fact that Mr. Mallén was a consul may not be taken into consideration in determining the amount of indemnity to which he is entitled for the injury inflicted on him.

Mr. Mallén might, of course, very properly bring to the attention of the Mexican Embassy the incident which occurred on August 25, 1907, and which is discussed in the Presiding Commissioner's opinion. But assuredly his status as a consular officer in no wise made it improper or inadvisable for him, in case he considered that a situation had arisen in which he was entitled to especial protection from local authorities in Texas, to bring that fact to the notice of those authorities. And if that situation was as serious as he has represented it to be, there would seem to be good

reason to suppose that direct communication with the authorities would have been useful in prompting them to take precautionary measures looking to his protection in the future which he states they failed to do.

I am of the opinion that no denial of justice can be predicated upon the proceedings in connection with the trial of Franco before the County Court at El Paso in November, 1907. When the law of Texas permitted the imposition of a fine in the amount fixed by the jury or a less amount, the members of the jury who tried Franco can not properly be charged with dishonorable conduct. Therefore, if the imposition of this fine was a penalty so inadequate that a violation of international law resulted therefrom, this wrong must be predicated on the character of the penal statute in which such a fine was authorized. I do not believe that the law was of such a nature as to do violence to ordinary standards of civilization.

But if the penalty imposed was not actually carried out, then a mockery was made of the trial—at least to some extent. Under the final order made by the court Franco could expiate his offense by the payment of \$100 and the costs of the prosecution, or by a term of imprisonment. I think it is certain that Franco was not compelled to serve a jail sentence, and though he may have paid part of the fine imposed upon him, he did not pay it all. The United States must, therefore, clearly be held liable for the acts of any official responsible for this remarkable state of affairs.

Franco was appointed a deputy sheriff after he committed the assault on the consul. It is not entirely clear when this appointment was made, but it was apparently within a few months after Franco's conviction. The appointment was doubtless made by the sheriff of the County of El Paso and in all probability without the knowledge of any of the higher officials of the State of Texas. Although this appointment did not contribute to the injuries which Mr. Mallén received on October 13, 1907, and although he had ceased to be consul at El Paso when it was made, it is clearly something of which the Commission may properly take cognizance in fixing the responsibility of the United States. It suggests a condonement of Franco's offense. (See on this point the opinion of the Umpire in the *Bovallins and Hedlund cases*, *Ralston's Report*, p. 952.) The United States appears to have admitted in its brief responsibility for the acts of Franco, and whatever might be said with regard to the liability of a nation for the acts of an official such as a deputy constable, I am of the opinion that there can be no question as to responsibility in this case, in view of the fact that either an inadequate penalty or no penalty at all was imposed on Franco.

The award of the Commission must be based on the character of the injuries inflicted upon the consul as a result of force and violence not necessary to effect his arrest.

I am unable to believe that the county attorney at El Paso in any way authorized Mr. Mallén to carry a pistol regardless of the law. In any event, there is a clear judicial pronouncement with respect to the illegality of Mr. Mallén's conduct in doing so. I consider untenable the argument of the Mexican Government to the effect that Mr. Mallén did not come within the operation of the law because he was traveling when carrying a pistol. Mr. Mallén according to his own testimony, took a street car from El Paso to Ciudad Juárez to visit a friend in the latter city, but changed his mind and did not leave the car but returned on it to El Paso. And on this point it may be noted that the theory advanced by counsel for Mexico is inconsistent with Mr. Mallén's explanation that he could properly carry a pistol

at any time in view of the construction put upon the law by the county attorney.

The judge at El Paso charged the jury that, if they believed that Franco knew the consul was carrying a pistol, then Franco had a right to arrest the consul, and it was Franco's duty to make the arrest. That charge was certainly not too favorable to the defendant, and, indeed, it seems to me that undoubtedly the judge might more accurately have stated the law to the effect that, if Franco had probable cause to suppose that the consul was carrying a pistol, the arrest could properly be made. I do not mean to suggest that other means might not have been employed in dealing with the offense for which the consul was arrested or that Franco was not merely seeking a pretext to arrest the consul, but it appears to be certain that the consul violated the law when he persisted in carrying a pistol. It seems to be equally certain that Franco knew that the consul had a pistol. That the consul violated the law of Texas was not a consideration which should have prevented the Mexican Government from putting before the Commission the claim which they have presented, but I am of the opinion that no charge of false arrest can be maintained. I am further of the opinion that there is no evidence of violent resistance to arrest on the part of the consul which could justify the treatment accorded him by Franco.

It is not necessary to be a medical expert to reach the conclusion that the best time to obtain the most satisfactory information with respect to the extent of the consul's injuries was immediately after those injuries were inflicted. Of course, there might be future developments. If there were, those are matters in relation to which the Commission should have competent proof, if it is to take account of them in formulating its decision.

The consul had full opportunity at Franco's trial to present evidence of his injuries through medical experts and by his own testimony. Special counsel was employed to assist the prosecution. Testimony was given at the trial to the effect that the injuries inflicted on the consul were not serious. In the light of all the testimony, including that given by Mr. Mallén, the trial judge directed the jury that the evidence of bodily injury inflicted on Mr. Mallén did not show the injury to be of such a serious character as to warrant a conviction for aggravated assault. In the absence of a clear showing of the impropriety of this finding and instruction, the Commission can not properly ignore it or regard it as improper.

The full record of the trial is not before the Commission. It is undoubtedly proper to assume that, if any testimony had been offered at the trial more favorable to the claim than that which Mr. Mallén laid before his government, he would have produced it. It is reasonable to suppose that the entire record would have been useful to the Commission.

With reference to the character of the injuries suffered by Mr. Mallén there remains to be considered the evidence by which it is attempted to link with the injuries inflicted upon the consul in 1907 the various ailments for which he alleges he has been treated over a long period of years. The Commission can not apply strict rules of evidence such as are prescribed by domestic law, but it can and must give application to well-recognized principles underlying rules of evidence and of course it must employ common-sense reasoning in considering the evidential value of the things which have been submitted to it as evidence. I think it can be briefly shown that to attempt, on the basis of certain statements in the record with regard to ailments suffered by the consul over a period of years, to ascribe such ailments to the action of Franco in 1907 would more nearly approach a

process of fatuous guesswork than an application of principles of law or any proper common-sense reasoning. It is not shown by evidence that Mr. Mallén was not suffering from such ailments prior to his difficulties with Franco. Ailments in the mastoid region which are frequently mentioned could, of course, have resulted from various causes.

In a certificate made on July 3, 1908, approximately nine months after the date on which Mallén received his injuries, Doctors Urrutia and Cañas made a statement in which they mention troubles in the mastoid region and assert that "the lesion originated in a wound over the temporal region, which, according to the physicians who attended the patient in El Paso, Texas, during the month of October of last year, was a contused wound with a purulent discharge from the ear and probable fracture of the bone, which was the direct and sole cause of the disorder referred to". The physicians mentioned as having attended Mr. Mallén are probably those who testified at the trial of Franco, and they said nothing about a purulent discharge from the ear or a probable fracture. If they said things at some other time upon which Doctors Urrutia and Cañas based their conclusion, it does not appear what was said. Clearly, no weight whatever can properly be given to a statement of this kind in formulating a conclusion with respect to the effect of the assault on Mr. Mallén.

It does not appear to be necessary to comment on a statement such as that given by Doctor Auerbach, who on December 28, 1908, more than a year after the date on which Mr. Mallén's injury was inflicted, declares, without personal knowledge of the injury, that he "can positively certify that Mr. Francisco Mallén's present condition is directly due to the original injury received over the temporal region on the right side".

In November, 1909, two years after the assault on Mr. Mallén, Doctor Andres Catalanotti, with no personal knowledge of the injury resulting from the assault, declared, without giving any information as to the basis of his conclusion, that deafness from which Mr. Mallén suffered in one ear was due "solely and exclusively to the injury aforementioned in the temporal region, of which he was the victim on the 13th of October, 1907." And he asserted that this injury produced a fracture of the mastoid process. Doctor Catalanotti does not explain how the injury, of which he knew nothing except what someone may have told him, could result in such a fracture. The doctor also furnishes other information about Mr. Mallén's afflictions, but no explanation is given how they might be considered to be related to the assault perpetrated upon Mr. Mallén.

On July 7, 1910, nearly three years after the assault, Doctors Sánchez and de la Vega made a statement containing some general information regarding Mr. Mallén's physical condition. There is nothing in this statement to indicate that the condition described had any relation whatever to the assault committed on Mr. Mallén. Without undertaking in any way to apply a technical rule of evidence with respect to the relevancy of testimony, the Commission must clearly regard a statement of this kind as entirely irrelevant to any issue in the instant case.

Under date of November 26, 1910, Doctor de la Vega made a brief statement with regard to an injury to Mr. Mallén's leg and an injury to his left wrist and declared that the injuries were caused by falls owing to Mr. Mallén's propensity to vertigo from which he had been suffering. Nothing is said concerning the assault on Mr. Mallén in 1907.

In 1910, about three years after the assault on Mallén, Doctor Urrutia issued a statement in Panama City describing the results of an examination

he made on Mr. Mallén. The doctor declares that he found a scar in the right temporal region which he says "indicates to have been the result of a serious injury". He does not undertake to say that this injury was inflicted by Franco in 1907. The doctor speaks of another scar in the mastoid region, which he says no doubt resulted "from some surgical intervention directed at reaching the mastoid cells". This is not relevant testimony with regard to the effects of the assault committed by Franco.

In 1912, about five years after the assault, Doctor Sánchez made a statement concerning his treatment of Mr. Mallén's right ear. In this statement it is said that the ailment "is a direct result from Mr. Mallén's delicate condition brought about by the bodily injuries testified to by Doctors W. H. Vilas, W. H. Anderson, and I. J. Bush in the County Court at El Paso, Texas, in November, 1907". This conclusion appears the more remarkable in the light of the fact that at least one of the doctors who testified in El Paso (Doctor Vilas) clearly expressed the view that Mallén's injuries were not serious or of such a nature that they would produce serious results.

In a statement made in 1912 Doctor Urrutia declares that he performed an operation in the right mastoid region on Mr. Mallén. Doctor Urrutia expresses the opinion that in the future Mr. Mallén may suffer from certain physical infirmities. There is nothing to show that such possible afflictions may in any way be linked with the assault committed on Mr. Mallén in 1907.

In the year 1923 Doctor Zelaya made some general statements about the physical ailments from which Mr. Mallén had suffered in the past and mentioned bodily injuries which rendered Mr. Mallén subject to a mastoid operation. This statement has no relevancy to the injury inflicted on Mallén in 1907.

On March 9, 1927, Doctor Urrutia made a brief statement, in which it is said that Doctor Rafael Caraza while Chief of the Medical Corps of the Army saw Mr. Mallén and attended him for one month and upon examining him as an ear and throat specialist indicated to him (Urrutia) the opinion that an ample trepanizing of the lateral cavity was indispensable. This statement contains no reference whatever to the injuries inflicted upon Mr. Mallén in 1907.

The physicians who furnish statements of this character had no personal information regarding the injuries inflicted on Mr. Mallén in 1907, and therefore evidently knew only what they were told by Mr. Mallén himself. It is natural, therefore, that these statements reveal on their face, as I am of the opinion they do, that they have no relevancy to the question of damages.

Statements made by physicians with regard to fees charged Mr. Mallén for medical treatment which do not show that the treatments were for the injuries which Mallén suffered at the hands of Franco in 1907, and statements of this character which are devoid of any trace of relevancy to issues in the instant case are not evidence of which account can properly be taken in fixing an indemnity. A considerable number of such statements accompany the Memorial.

In the view I take of the attempt to link with the assault committed by Franco in 1907 ailments for which Mr. Mallén has been treated over a long period of years and his nonemployment in an official capacity during a considerable portion of that period, it is unnecessary to discuss the application of legal principles to a claim for salary for \$80,000 from 1907 to 1926, a claim for a loss of \$20,000 from the failure to receive possible promo-

tions, and a claim for unproved losses in private affairs amounting to \$20,000 because of retirement from other activities.

Mention may be made of a few of the seemingly odd assertions advanced by Mr. Mallén upon which he predicates in part his claim for the large sum of money demanded as indemnity. He swears in an affidavit under date of November 16, 1926, that he can not produce certain evidence as proof of damages because he was told by the Mexican Foreign Office that it was the privilege of the Mexican Government to demand any sum that it desires as indemnity. I am of the opinion that he was badly mistaken as to the advice he received. He swears to the Memorial in which it is stated that he was struck by Franco with a pistol. It seems obvious from the record of the proceedings before the court at El Paso in 1907 that no blows were inflicted on Mr. Mallén with a pistol at the time of the assault in that year. He advances as an item of damage that he lost some jewelry because he failed to pay interest on a loan. It is attempted to fasten liability on the United States because foreign newspapers are said to have published libelous statements regarding Mr. Mallén.

In 1909 there was presented to the Government of the United States a claim which Mr. Mallén had submitted to his own Government for presentation through diplomatic channels. The amount of this claim was \$200,000. It is difficult to reconcile this estimate of damages with the amount now claimed in the Memorial which is also \$200,000, although this sum includes estimates for salaries totalling \$80,000 which Mr. Mallén states he might have earned up to 1926 ; also estimates with respect to possible promotions to the amount of \$20,000 ; also estimates of losses to the amount of \$50,000 because of retirement from all activities ; also doctor's bills in considerable numbers ranging from \$5 up to \$10,000.

The Agent for the United States argued that the unreliable character of testimony furnished by Mr. Mallén should be taken account of in connection with the assessment of damages. The argument is undoubtedly sound. Obviously account must be taken of unreliable testimony with regard to the extent and character of injuries suffered by the claimant. But the Agent advanced the further contention that evidence of such a character had been presented by Mallén to his Government that the claim should be dismissed because the claimant had attempted to mislead his own Government and the Government of the United States. In my opinion the claim can not be dismissed on that ground.

Neither the fact that Mr. Mallén violated the law of Texas nor the fact that he has furnished inaccurate or exaggerated statements can in any way affect the right of the Mexican Government to present against the United States a claim grounded on an assertion of responsibility under rules of international law, although obviously these matters are pertinent with respect to a determination of the merits of the claim, because account must properly be taken of them in reaching a conclusion regarding the nature and extent of the wrongs inflicted on Mr. Mallén. If he violated the law of Texas a charge of false arrest and imprisonment can not be maintained. And clearly the extent of his injuries and losses has been exaggerated by the testimony which he has furnished.

The *Weil* claim cited by the American Agent is not apposite to the pending case. The United States, after having received an award honorably paid by the Government of Mexico in that case could return the award, either because it was considered that the Government of the United States should not pay over an award to a claimant who had practiced fraud, or

because it considered that the award could not have been rendered unless fraud had been practiced.

In the so-called *Rio Grande* claim presented against the United States under the Special Agreement concluded between the Government of Great Britain and the Government of the United States August 18, 1910, a motion was filed by the United States to dismiss the claim, in which motion it was alleged *inter alia*:

"That important official dispatches and court decisions, which purport to be quoted in the Memorial, are set forth in a grossly inaccurate and garbled form; for example sentences and parts of sentences are taken from different parts of a document and combined without asterisks; extracts from different documents, written by various persons to various persons at various times during a period of years are thrown together and attributed to one person in one document; sentences and parts of sentences, taken from judicial decisions and their headnotes, are jumbled and combined without regard to their order, context, or meaning. In one case a newspaper article, used to attack the character and conduct of an officer of the United States, has been materially misquoted. In another alleged 'propositions of compromise' \* \* \* 'offered on behalf of the Government of the United States', are produced in quotation marks. The references in support of this quotation give no clue to its real origin, which appears to be another newspaper clipping which can not be identified either as to the paper or date of publication. The quotations and citations of the Memorial generally are so consistently and well-nigh universally inaccurate and misleading as to render the document improper for presentation to any judicial tribunal. (American Agent's Report, p. 335.)

The importance attached by the tribunal to the facts above stated is not entirely clear in view of the fact that the arbitral tribunal found other grounds on which to dismiss the claim.

In the same arbitration objection was made in behalf of the United States in another case against the presentation of certain documents placed before the tribunal about 13 years after the filing of the final pleading. Among the things filed were numerous unpublished papers and parts of such papers. None of the things so filed was authenticated in the manner prescribed by the rules of the arbitration, which required the filing of originals or certified copies. *Cayuga Indians* claim, *Ibid.*, p. 300. All of these things were, however, received by the tribunal. In the same case objection was made in behalf of the United States to a discussion of certain cases in which the records revealing the true character of such cases were not produced, and an unsuccessful attempt was made to lay such records before the tribunal. *Ibid.*, pp. 303-304.

Clearly the question of the validity under international law of contentions such as are advanced by Mexico with respect to want of protection for Mr. Mallén, failure of the authorities of Texas to punish the person who assaulted him, and the appointment to office of the person who committed the assault, can in no way be affected by the use of unreliable testimony by the claimant.

The Commission has not been misled by any inaccurate evidence. Mr. Mallén suffered a grave injury. This occurred in a community in which he had served for a long period of time as a consul. There is considerable evidence in the record indicating that as a cultured and capable official he served with credit to his country and to himself. The record reveals not only an absence of prompt and effective processes of law to bring about the punishment of a wrongdoer but also evidence of a condonement by officers of the law of the injury inflicted upon Mr. Mallén.

*Decision*

The Commission decides that the Government of the United States of America is obligated to pay to the Government of the United Mexican States on behalf of Francisco Mallén \$18,000 (eighteen thousand dollars), without interest.

*Dissenting opinion*

1. I concur with the opinion of the Presiding Commissioner, which finds after a careful analysis of this case that the United States is responsible on three grounds: (a) for the wrongful acts which Deputy Constable Franco committed against claimant, Mallén, on October 13, 1907; (b) for denial of justice resulting from the non-fulfilment of the sentence imposed on aforesaid Franco on November 9, 1907; and (c) for failure to give protection to Mallén.

2. However, I entertain serious doubts about the point of view stated by the Presiding Commissioner in paragraph 13 of his opinion in endeavoring to establish and determine the material losses and damages which were caused to Mallén by the second assault committed against him by Franco. In fact, it seems to me that, considering the evidence presented, a link can reasonably be established between the serious blows received by Mallén at the hands of Franco and the subsequent illness which the victim suffered in the ear since almost immediately after the assault.

3. Of course, it is proven that said assault was brutal and dangerous. The physicians who testified in the proceedings which were instituted against Franco, agreed that the blows which Mallén received were very severe and struck at a highly delicate part of the head. Dr. Vilas testified that, when he saw Mallén, "he had the appearance of having recently passed through a threshing machine or something of that kind", that he had "several bruises and contusions, one particularly bad on one side of the temple, in front and above the ear \* \* \*"; and referring to the latter, he stated that it was "quite a serious wound", adding "I consider that a little bit more there would have been very dangerous to life. It is in a very dangerous locality; that portion of the skull is very thin and that wound was in a very dangerous place". Dr. Anderson testified that Mallén had "a long cut on the side of his head—on his temple, \* \* \*" and when he was asked if, in his opinion, a blow on that part of the head could produce serious injury, he answered "yes" without hesitation. Dr. Bush testified that the cut over the right ear was "evidently the result of a blow", and when he was asked if a blow over the ear, in that part of the head, could result in serious bodily injury, he answered that "it might", adding that the wound "might become infected and produce blood poisoning or a blow there might have fractured the skull". It is true that the aforementioned physicians testified that they did not believe the wounds could be serious; but this was at the time of rendering their testimony; that is, on the day when the trial of Franco was held, and, at any rate, it appears from the statements of the physicians and from those of the eyewitnesses of the assault which Mallén suffered, that the blows struck by Franco were of a brutal character. It is highly regrettable that the authorities of Texas should not have waited for a sufficient time, as is done in other countries, when it is a question of determining the importance of injuries caused a person, but that they should have satisfied themselves with the statements,



in the nature of ordinary testimony rather than expert testimony, of the three aforesaid physicians, which were rendered during the proceedings instituted against Franco on November 7-9, 1907, that is to say, twenty-six days, at most, after the date when Mallén had received the blows. At any rate, it is evident, by the statements of said physicians, that the lesions were grave and in a part of the head where they could cause not only serious but fatal consequences. It seems that the physicians satisfied themselves with simply giving their opinion on the external aspects of the injuries, and that they never considered the possible internal consequences thereof.

4. It seems that Dr. Anderson continued to treat Mallén until November 12, 1907, on which date he issued him a receipt covering fees for professional services. It is not known whether these services of Dr. Anderson terminated on that date or whether they continued to be rendered. The only thing which appears in connection with the illness which claimant considers a consequence of the blows, is his entrance in the hospital of Dr. Urrutia on February 2, 1908, and his operation—February 4th of the same year—on the right mastoid region, as evidenced by a certificate of Doctors Urrutia and Cañas issued on July 3, 1908. This certificate is very important, and to weigh it, is it necessary to analyze the different facts it certifies. Of course it is reasonable, and in accord with the rules of evidence accepted among civilized countries, that such certificate must constitute full evidence as regards everything which the certifier had before his eyes and examined, and that it has no evidential weight with respect to the other circumstances to which he refers. In said document, Doctor Cañas and Urrutia certify the following facts: (a) that Mallén entered the sanatorium managed by Cañas, on February 2, 1908; (b) that he entered to cure himself from a suppuration of the right ear; (c) that it was necessary to operate on him immediately on account of the appearance of symptoms of meningitis which placed his life in serious danger; (d) that the operation was carried out on the 4th of the same month and that the operating surgeons found a purulent focus in the mastoid region and in the temporal channel which communicated with the skull, rendering necessary the trepanization and complete drainage of the channel; (e) that the focus was under treatment two months; (f) that on July 3, 1908 (the certificate says "at present"), the patient suffered from slight perturbations in the ear and pains which radiated from the skull, for which reason he was recommended to follow a very moderate and methodical life for some time and to abstain from all hard work; (g) that the lesion originated in a wound over the temporal region; and (h) that according to the physicians who attended the patient in El Paso, Texas, during the month of October of last year, the direct and sole cause of the disorder referred to was a contused wound with a purulent discharge from the ear and probable fracture of the bone. The aforesaid certificate contains nothing further, and if given slight consideration, it is readily seen that all the facts specified under headings a, b, c, d, e, f and g, are facts which the two surgeons, who operated on the claimant, had before their eyes and in their hands, for which reason they have to be given full faith and credit as regards such facts. On the other hand, the certification under letter "h" is only an explanation of the manner in which the lesion with a traumatic origin was caused on the temporal region; this explanation is given by them, attributing it to the physicians who attended the patient in El Paso, and they probably received it from the lips of the claimant himself, who transcribed, in part at least, the opinion of said physicians of El Paso. Perhaps nothing further is necessary to connect with a relation of cause

to effect, the lesions which Mallén received in October and the ills which had developed in him during the first months of 1908. In fact, the testimony of the physicians of El Paso shows that the blows, as already stated, were very severe and in a dangerous region. Doctors Urrutia and Cañas certify that Mallén entered their sanatorium to be operated at once for a suppuration of the ear, and they also certify (letter "g") that the lesion originated in a wound over the temporal region. It is not venturesome to infer that blows of the kind received by Mallén, could produce, within the period of less than three months, an abscess in the contused region, which might place the patient's life in danger due to its communication with the skull. Cañas and Urrutia had Mallén under observation at a time when it was surely easy to discover the scars of the blows and, taking into consideration their medico-legal experience, they had all reason to attribute the abscess to the blows which caused the exterior wound that was visible to them. During the oral arguments, there were read opinions of distinguished medico-legal experts who affirm that strong blows inflicted on the head can produce abscesses, either on the side struck or on the opposite side; and it must be remembered that Mallén received blows on both sides of the head; on one by Franco's fist and, on the other, by rebound against the walls of the street car.

5. But there is still more evidence. The same Dr. Urrutia, in a letter of March 9, 1927, states that he received Mallén from the hands of Dr. Rafael Caraza and that the latter indicated to him that, in his opinion, "an ample trepanization on the lateral cavity was indispensable, because, in his opinion, the patient, Mr. Mallén, had a cerebral abscess of traumatic origin and flebitis of the lateral cavity, which endangered his life"; and Urrutia adds that, in passing the surgical case, Dr. Caraza "did so in request of urgent professional services which, if not rendered, would cause, to use his own phrase, the death of the patient". Here again we find the indication, that the illness was of a traumatic origin, expressed by a physician (Caraza) who treated Mallén, according to this second statement of Urrutia, a month more or less before his entering the hospital, which fixes this time within the month of January. In this way the two certificates of Urrutia complement each other, and as there is no evidence, as the Presiding Commissioner reasonably avers, that Mallén would have received another blow between October and February, it is logical to suppose, it is insisted, that the blows struck by Franco were the ones that produced the abscess which Caraza found and Urrutia had in sight when he operated on him. There is nothing in the record, furthermore, which may prove that claimant suffered ear trouble before the events of October, 1907, and even supposing that such illness existed, there would remain the possibility that it might have been aggravated by the brutal contusions suffered by Mallén.

6. There remains to be explained why Urrutia did not refer at all to Dr. Caraza in his observations, in the first certificate. It may be conjectured that Urrutia did not believe necessary to make reference to what he states in his second certificate, because it was sufficient to certify his own discoveries logically attributable to the traumatic origin revealed by a recent scar on the temple (either of the temples): perhaps he only referred to the physicians of El Paso in order to establish merely the form of the traumatism, and he did not take care to check up what Mallén probably attributed to them. Anderson or the other physicians certainly did not say that there was otorrhoea, although they did indicate that a blow of the kind received by Mallén could cause fracture of the bone. Dr. Anderson, who continued

to treat Mallén after Franco's trial, said nothing with respect to the abscess found by Caraza and Urrutia, but his silence can be explained by the fact that this class of diseases do not develop rapidly and do not have marked external symptoms at the beginning. Anderson, and even Mallén, thought, perhaps, that the effect of the blows had disappeared, but shortly after, at most one month, Mallén began to suffer again and he consulted Dr. Caraza, who made the first discovery of the traumatic abscess.

7. The physicians who subsequently treated Mallén certify to the delicate condition of his health as a result of his illness in the temporal region, and they equally certify that as consequence of such illness, the sense of hearing in the right ear has been almost completely lost. The other details of those certificates can be placed in doubt, but they are not essential.

8. For the above reasons, I believe that the United States must indemnify Mallén, in addition to the grounds set forth by my colleagues, for the material damage suffered by him in the loss of hearing in the right ear.

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AMERICAN SHORT HORN BREEDERS' ASSOCIATION (U.S.A.)  
v. UNITED MEXICAN STATES.

(April 27, 1927, concurring opinions by American Commissioner and Mexican Commissioner, April 27, 1927, Pages 280-285.)

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CONTRACT CLAIMS.—AUTHORITY OF AGENT.—CLAIM IN RESTITUTION. Claimant shipped cattle to fair sponsored by Mexican Government or agency thereof under a guarantee against loss made by a purported agent of Mexico. Cattle were never redelivered to claimant or payment made therefor. *Held*, insufficient evidence furnished as to exact terms of guarantee, the making of such guarantee, and authority of agents purporting to act on behalf of Mexican Government.

*Cross-reference:* Am. J. Int. Law, Vol. 21, 1927, p. 802.

*Van Vollenhoven, Presiding Commissioner:*

1. This claim is asserted by the United States of America on behalf of the American Short Horn Breeders' Association, an American corporation, against the United Mexican States to recover the sums of \$1,220 and \$1,645, with interest thereon. The claim is predicated on two different counts.

2. In the first place, it is alleged that the Industrial Agent of the Mexican National Railroads, by name J. B. Rowland, induced the claimant in December, 1922, and subsequent months, to participate in a cattle exhibition at Mexico City in the Spring of 1923; that he guaranteed the association the price of the cattle left unsold or unpaid for at the close of the exhibition; and that, instead of fulfilling this guarantee, cattle of the value of \$1,220 were neither paid for nor redelivered. The Industrial Agent, it is alleged, is a Mexican official, or at any rate one "acting for" the Mexican Government; the exhibition, it is alleged, was a Government affair; Mexico, therefore, should be held responsible.

3. The record as submitted is incomplete and meager. It is worthy of note that the Memorial combines the facts of this first count of the present claim with the facts of its second count and of two other claims (Docket Nos. 2403 and 3217) which are essentially different and should be carefully separated.

4. About December 1, 1922, Rowland came to Chicago, Illinois, U.S.A., to take up with the claimant its willingness to ship cattle to the Mexico fair. Claimant establishes that it only knew him in his capacity of Industrial Agent of the Government-owned Mexican National Railroads. The exposition would be held from March 29 to April 5, 1923. The Government patronized and subsidized it in several ways. The claimant apparently was unwilling to participate unless he were given a guarantee; the only contract alleged by the claimant is to the effect that Rowland, on behalf of Mexico, undertook to give such guarantee. A telegram sent to the claimant on January 25, 1923, by one Treviño, quoting another telegram by Rowland himself states, "Stock guaranteed from exposition to date" —a sentence which would seem garbled. On February 11, 1923, Rowland's associate Abbott wrote: "Mr. Rowland is now in Mexico City, where he will take up with the Department of Agriculture, as well as the Director General of Railways, the matter of some form of guarantee that should satisfy all of the Associations"; on February 18, 1923, Rowland wired from Mexico City; "Arrived here today find letter asking guarantee am arranging agricultural department take any surplus stock Abbott sending detailed letter on orders everything very satisfactory"; and on February 21, 1923, there followed a telegram from Mexico City by the same Rowland reading: "Will guarantee carload" (follows description of carload desired). The link between the two last telegrams is such as to render acceptable an interpretation by the claimant to the effect that it was the Department of Agriculture at Mexico City which guaranteed that, in case not all of the cattle shipped were sold or paid for, this Department would take the surplus stock and pay its market value.

5. Acceptable though such an interpretation may have been, it is doubtful whether the Commission is warranted in fixing a liability on Mexico exclusively on an assumption of this kind. Neither Rowland nor his associate Abbott, a private man as far as the record shows, ever mentioned in their dealings the Government or the Mexican Railroads as the party concerned; goods were shipped to Rowland, checks accepted from Rowland, complaint of nonfulfillment of promises lodged with Rowland, as is shown by Rowland's letter of May 21, 1923. The claimant was right and was acting in a business manner by requesting a guarantee before taking the risks of shipping cattle to Mexico; but he did not ascertain who it was that gave the guarantee mentioned in the telegram of February 21, 1923, nor what was guaranteed. From Abbott's letter of February 11, 1923, stating that Rowland would "take up with the Department of Agriculture" the matter of "some form of guarantee" it should have been sufficiently clear that, without special authorization, Rowland could not give a guarantee binding on the Mexican Government. The record does not show that the claimant made any inquiry as to the author and the contents of the guarantee referred to in Rowland's telegram of February 21, 1923. It would seem, therefore, that the Commission can not, on the evidence presented, consider Mexico as having given through Rowland the guarantee the claimant desired; and if this causes the Association a disappointment, it suffers from its own lack of sufficient care.

6. The second count of the claim is based on the fact that in the fall of 1923 there was to be another cattle exhibition at Mexico City, and that once more Rowland came to Chicago (September, 1923) to invite the claimant to participate. The Association shipped cattle in the value of \$1,645 (costs and charges included), and did not receive any money nor were the cattle redelivered. The claimant had already experienced that the outcome of a cattle exhibition in Mexico might not measure up to Rowland's expectations; its participation in the fair of March-April, 1923, had ended in an unpaid check "a few months after the exposition". With respect to the second count of the present claim there is not even a suggestion of the existence of some guarantee or similar contract—the record merely states that "an order for (this) livestock \* \* \* was placed"—nor is there evidence that the Mexican Government actually received and retained for its benefit the claimant's animals.

7. On the grounds stated the claim should be disallowed.

*Nielsen, Commissioner:*

I am of the opinion that the claim must be disallowed. Unfortunately, the evidence in this case is of such an uncertain character that it is not possible to reach a positive conclusion with respect to the nature of the transaction entered into by J. B. Rowland and the claimant. The contentions with respect to the validity of the claim appear to rest on two propositions, namely, (1) Rowland acted as a representative of the Government of Mexico which is responsible for the nonfulfillment of the undertakings which he entered into with the claimant; and (2) Rowland entered into a contract with the claimant to sell cattle which the association exhibited, to remit the proceeds of sales to the association, and to pay the association for cattle not disposed of to private purchasers.

The precise relation of the Mexican Government to the exposition to which the cattle were sent and Rowland's status as a representative of that Government are controverted questions, which, in the view I take of the case, need not be considered in reaching a decision, because in my opinion there is not in the record evidence which could justify the Commission in reaching the conclusion that Rowland undertook to make sales of all cattle shipped, and to pay the claimant an agreed value of all cattle not sold to private purchasers.

To be sure there is evidence indicating that such an agreement may have been made, or that the claimant's representative may have thought that the interviews and correspondence with Rowland resulted in such an agreement. But in my opinion there is not evidence to justify the Commission in holding that such an agreement was actually consummated. There is evidence of an understanding that Rowland should undertake to obtain orders from Mexicans desiring to purchase stock placed upon exhibition, and that stock should only be sent when purchasers were found. In a communication addressed under date of February 11, 1923, to F. W. Harding, an official of the American Short Horn Breeders' Association, it was stated that Rowland would take up with the Department of Agriculture and with the Director General of the Railways the matter of "some form of guarantee that should satisfy" the associations interested in the exposition. In a telegram sent by Rowland to Harding under date of February 21, 1923, it is stated that the former will guarantee a certain number of cattle. But it is not possible on the strength of evidence of this character to reach the conclusion that the legal effect of the guarantee

mentioned, whatever may have been its precise character, was a contractual obligation in the nature of that upon which the claim apparently is grounded. Evidence with respect to the final disposition of the stock shipped for which the claimants were not paid might throw light on this point, and also on the broader question of the responsibility of the Mexican Government in connection with the transactions underlying the claim. But no such evidence is found in the record. I am of the opinion that the record is wanting in certainty and sufficiency of evidence upon which to predicate the consummation of a contract.

While my conclusions with respect to a proper decision in the case are based solely on this point, I may observe that it seems to be doubtful that there is evidence upon which a conclusion could properly be grounded to the effect that Rowland so represented himself to the claimants that they were justified in believing that he, as a representative of the Mexican Government, acting within the scope of his authority, undertook to bind the Government of Mexico to see to it that the claimants were paid for the cattle shipped to Mexico. The decision in the *Trumbull* case cited by the United States. Moore, *International Arbitrations*, vol. 4, p. 3569, was apparently grounded on the theory that the United States was liable to make compensation for services obtained by an American Minister in connection with an extradition case because he had made a promise in the name of his Government which, according to rules of responsibility of governments for acts performed by their agents in foreign countries, could not be repudiated.

Rowland evidently informed the claimant of certain privileges granted to exhibitors with respect to customs duties and railway rates. But the fact that he was in a position to do this is no clear indication of his representative character. I presume that remission of customs duties which was promised to the claimants is something that governments usually grant to foreign exhibitors in connection with expositions over which they have no direct control. In the instant case it may readily be perceived that the Mexican Government, being in charge of railway operations in Mexico, could see fit, in view of its desire to encourage and assist the exposition, to grant reductions in railway rates.

*Fernández MacGregor, Commissioner:*

I concur with the statements of fact and law made by the Presiding Commissioner and with his conclusion that the claim must be disallowed.

#### *Decision*

The Commission decides that the claim of American Short Horn Breeders' Association must be disallowed.

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WAUKESHA COUNTY HOLSTEIN-FRIESIAN BREEDERS'  
ASSOCIATION (U.S.A.) *v.* UNITED MEXICAN STATES.

(April 27, 1927, concurring opinions by American Commissioner and Mexican Commissioner, April 27, 1927. Pages 285-287.)

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CONTRACT CLAIMS.—AUTHORITY OF AGENT.—CLAIM IN RESTITUTION.  
Claim arose under similar circumstances to those of *American Short Horn Breeders' Association* claim *supra*. Disallowed for lack of evidence.

*Cross-reference:* Am. J. Int. Law, Vol. 21, 1929, p. 802.

(Text of decision omitted.)

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AMERICAN SHORT HORN BREEDERS' ASSOCIATION (U.S.A.)  
*v.* UNITED MEXICAN STATES.

(April 27, 1927, concurring opinions by American Commissioner and Mexican Commissioner, April 27, 1927. Pages 287-289.)

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CONTRACT CLAIMS.—AUTHORITY OF AGENT.—CLAIM IN RESTITUTION.  
Claim arose under similar circumstances to those of *American Short Horn Breeders' Association* claim *supra*. Disallowed for lack of evidence.

*Cross-reference:* Am. J. Int. Law, Vol. 21, 1927, p. 802.

(Text of decision omitted.)

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GEORGE ADAMS KENNEDY (U.S.A.) *v.* UNITED MEXICAN  
STATES.

(May 6, 1927, concurring opinion by American Commissioner, May 6, 1927. Pages 289-301.)

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DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—INADEQUATE PUNISHMENT. An American subject was fired upon by a Mexican, as a result of which he was hospitalized for several months and permanently crippled. The guilty person was sentenced by a Mexican judge to two months' imprisonment, in a sentence which was not pursuant to Mexican law. *Held*, denial of justice established in inadequacy of punishment imposed.

FAILURE TO PROTECT. Evidence *held* not to establish a failure to extend protection.

MEASURE OF DAMAGES. Damages measured in part pursuant to rule of *Janes claim supra*.

*Cross-references:* Am. J. Int. Law, Vol. 22, 1928, p. 174; British Year-book, Vol. 9, 1928, p. 158.

*Fernández MacGregor, Commissioner:*

1. This claim is presented by the United States of America in behalf of George Adams Kennedy, an American citizen, against the United Mexican States, demanding the amount of \$50,000.00, with proper allowance of interest thereon, on account of damages suffered by the claimant, who received a wound in the right leg at the hands of Manuel Robles, a Mexican, on November 5, 1919, in San Javier, Sonora, Mexico. The claim is based (1) on a denial of justice resulting from the failure of the Mexican authorities to take adequate measures for the apprehension and punishment of the persons who, together with Robles, assaulted him, and resulting from the fact that although said Robles was arrested and judged, the proceedings were irregular, with the consequent result that a punishment was imposed on him out of proportion to his crime; and (2) on failure of the aforesaid Mexican authorities to give protection.

2. Briefly summarized, the facts on which this claim is based are as follows: claimant, George Adams Kennedy, was employed as assistant manager and engineer of the W. C. Laughlin Company, which company operated the Animas Mine in San Javier, Sonora, Mexico. It seems that at the time of the events, trouble had arisen between the company and the Mexican employees due to certain exactions on the part of both sides, and that three of the employees, including Manuel Robles, were the chiefs and representatives of said employees; that the company discharged, first, one of the three aforesaid men (November 3, 1919), and that in the morning of the next day (November 4th) placards were found attached to the mine office door and at the shaft of the mine inciting the employees to go on strike; that said placards were sent to the Municipal President of the town of San Javier, to place the matter before him and ask for the necessary protection—which was done orally and confirmed through a letter; that on the same date (November 4th) the other two chiefs or representatives of the workmen were discharged from the company for the best interest of the service; and then, as alleged, made threats against the officials of the company; that later on it was learned, through a shift boss, that the three discharged men were in the plaza of the town of San Javier inciting their companions to strike, for which reason said shift boss was sent to see the Municipal President of the town to inform him of the situation and demand of him that the police be present at the mine at 6.30 o'clock on the following morning, although there is no positive evidence that the Municipal President actually received this second demand for special protection.

3. At 6.30 o'clock in the morning, on November 5th, when the employees came in, Robles and one of the other discharged men appeared and advised their companions not to go to work. Robles demanded from Kennedy and the timekeeper of the mine, a notice which had been posted and which required the employees to come thirty minutes earlier than the usual hour, and upon such demand being refused, he started to argue with Kennedy. The latter alleges that Robles thereupon threatened him with his gun; that he, Kennedy, grasped it and attempted to take it away. A moment



of confusion and struggle followed. Kennedy says that some of the workers, whose names he does not know, dealt him some blows which knocked him down causing him to loose his hold on the gun of Robles; that the latter stepped back; that Kennedy caught a piece of pipe and threw it at Robles, who was able to dodge it, and, then, said Robles fired upon and wounded Kennedy in the right thigh. Robles and the eye-witnesses agree that the former did not fire until Kennedy threw the pipe at him, but they leave in doubt as to whether Robles had previously drawn his gun. Kennedy was subsequently taken up and his wound treated. The local magistrate immediately took notice of the matter and arrested Robles, placing the latter at the disposal of the local judge of San Javier, who proceeded to initiate the prosecution, appointing at once experts to examine the victim of the attack and taking the statements of all the persons who took part in the events or were witnesses thereof. The first proceedings having been concluded, the cause was remitted to the Judge of First Instance of Hermosillo to continue the prosecution. Kennedy left the next day (November 6th) for Nogales, Arizona, U.S.A., where he arrived, after a painful trip, in the night of the same day and was taken to St. Joseph's Hospital. He was operated upon on November 11th and remained in the hospital for four months, after which he went to Denver, Colorado, United States of America, where he arrived on April 1, 1920. On April 3rd, he underwent another operation in the right leg, which left it in a bad condition, for which reason he had to undergo other operations, also unsuccessful, that have left him permanently crippled. In the meantime, the prosecution of Robles before the Judge of First Instance of Hermosillo was continued, said Judge having rendered, on March 2, 1920, a decision sentencing Robles to two months' imprisonment, but he immediately released him, as he had already been kept in jail five months. The sentence became final, because neither of the parties appealed from it.

4. In view of the foregoing facts, it is alleged, chiefly, that the procedure followed by the Mexican Judge and his findings resulted in a denial of justice: (a) because the persons who took part in the attack provoked against Kennedy, were not punished: and (b) because a punishment was imposed on Robles notoriously out of proportion to the criminal act he committed. There is not sufficient evidence in the record to show that Kennedy may have been assaulted by other persons, outside of Robles; for, although it is true that Kennedy alleges that a young man who was standing near Robles at the time of the scuffle, struck him on the head with the lamp, and that some others did the same thing, also seizing his hands to break his grip on the gun; on the other hand, Robles, as well as seven eyewitnesses ignore such allegations. In the confusion that followed the act of the fight between Kennedy and Robles, nobody probably realized exactly what was happening, and Kennedy himself affirms that he thought at first that the men who intervened "were trying to intervene so that Robles would not shoot him". In view of these circumstances and the evidence which he had before him, the judge in the case could not, surely, consider guilty any other person than Robles, who had confessed his crime. It can not, then, be said that there may be a denial of justice on this ground.

5. The second ground on which a denial of justice is based, is, that the sentence of two months' imprisonment imposed on Robles is out of proportion to the seriousness of his crime. This assertion seems justified. In fact, I think that the international duty which a state has duly to punish those who, within its territory, commit a crime against aliens, implies the obliga-

tion to impose on the criminal a penalty proportionate to his crime. To punish by imposing a penalty that does not correspond to the nature of the crime is half punishment or no punishment at all. In order to reach the conclusion that the shooting was a very malicious act, it is sufficient to note that it was Robles who provoked the quarrel; that Kennedy was unarmed at the moment when he was fired upon; that the Mexican Prosecuting Attorney and judge discard the theory of self-defense; that the nature of the wound inflicted was serious. The Commission has repeatedly expressed the repugnance it feels for the frequent and reckless use of firearms, and in the instant case one can do no less than think that it is a question of a serious aggression. The mere description of Kennedy's wounds shows their seriousness; the first medical report that was given, immediately after the events (November 5th), says that the principal wound "is in the front part of the right thigh and near the groin \* \* \* that the bullet penetrated, crossing the muscles and breaking the femur bone in the third superior section, and remained imbedded in the exterior part below the right hip, from where the bullet was extracted, which was found about to come out". Said report adds that "that wound, although serious, does not, *for the moment*, endanger the life of the wounded person, but it can later place it in danger if complications result". A sentence of two months' imprisonment for such a wound is a disproportionate penalty, and it can almost be said that it is an inducement for the commission of crimes of that kind. A municipal law which would oblige the judge to impose penalties of this nature could be considered, perhaps, as outside of the standards used by civilized countries. But no such charge can be made against Mexican law. As a matter of fact, the Penal Code of Sonora, Mexico, on the question of injuries, adjusts the penalty to their importance and their results, and for that purpose requires that no case involving personal injuries may be decided before the expiration of sixty days from the date on which the crime is committed, in order that the judge may know the probable result of such injuries, before imposing the sentence (Article 434). Furthermore, it provides that upon the expiration of the sixty days, two medical experts shall state the certain, or at least the probable, result of the injuries, and that having in mind such statement, final decision may be pronounced (Article 435). In the present case, the judge, for some inexplicable reason, did not comply with the requisites of his domestic law. It has been alleged that the record contains the medical certificate which described the wounds and to which reference is made above; that later, on December 27, 1919, the same physician who rendered the first certificate, together with a practical expert, certified that the wound received by Kennedy was not of the kind which necessarily endangers life and that it would take six weeks to two months to heal, without its resulting in the permanent incapacitation of the injured member, and that said expert opinion is sufficient, according to a provision of the Code of Criminal Procedure of Sonora (Article 111); that the diligence of the Mexican authorities in this respect, is shown by the fact that, in addition, the Prosecuting Attorney filed a motion on January 13, 1920, asking for a report on the condition of the patient from the physicians who were attending him at the St. Joseph's Hospital, in Nogales, Arizona, which motion was allowed by the judge, who, on his part, appointed two other physicians, Mexicans, who were to examine Kennedy, in pursuance of which letters rogatory were issued to the Judge of First Instance of Nogales, Mexico; it being further alleged that Mexican authorities are not responsible because of the failure to render

such report, and that the judge could not wait indefinitely, in view of the fact that the Mexican Constitution prescribes a maximum period within which the delinquent must be tried. We can not take into account such allegations, because the first medical certificate referred only to the wound at the time it was received; because the second certificate could in no manner help the judge to know the condition of the wounded man at the time of the trial, inasmuch as the physician and the practical expert, who issued such certificate and who were in San Javier, admit that they did not have before them the wounded man, as he was already in United States territory; and because the judge could have made urgent representations to the end that the physicians of the two towns of Nogales, who had later been appointed, would issue their certificate in time, as it must be taken into consideration that such certificate was requested on January 13, 1920, and sentence was not pronounced until March 2 of said year. It is true that the fact that the wounded man was absent made the completion of the proceedings more difficult; it is true that Kennedy's attorneys failed to take the necessary steps in order that the report would be rendered; however, the judge, on finding himself obliged to render judgment bound by the aforesaid provision of the Mexican Constitution, could have based himself, in imposing the sentence, on the nature itself of the wound, at least as described by the first medical certificate, which has all the aspects of being conscientiously made. The result of all was, that the judge ignored the seriousness of the injury suffered by Kennedy and that, exclusively basing his decision on the milder and conjectural certificate of December 27th, he imposed a penalty which was not the proper one for the crime of Robles, and even intentionally imposed the minimum of the inadequate penalty, basing his decision on the extenuating circumstance of confession on the part of Robles, when he had latitude to impose, at least, a longer term of imprisonment between two months and one year. In view of all the foregoing, it seems that there was negligence in a serious degree, and that such negligence constitutes a denial of justice.

6. Much stress has been laid upon the fact that the Mexican judge states in his sentence that the facts relating to the circumstances of the offence committed by Robles are supported by a document addressed by 54 laborers of the mine to one Leopoldo Ulloa, which document is contained in the record of the proceedings. That fact, it is deemed, can prove that the judge allowed himself to be unduly influenced. It is evident that such document could not be taken into consideration by the judge, because it lacked the requisites of evidence legally rendered, and that, therefore, the judge should not have even mentioned it in his sentence. But inasmuch as the judge did not avail himself of it, except to corroborate the circumstances of the offense that were already proven by statements of witnesses rendered according to law, the aforesaid fact does not reveal a serious transgression.

7. With regard to the allegation of failure to give protection, the following may be said: it seems that, notwithstanding the serious disturbances which occurred in that region—one of them being the insurrection of the Yaqui Indians—American lives and property in the mining district of Las Animas had been given adequate protection by the Mexican authorities; there is evidence that escorts had been furnished for the transportation of the company's minerals. On the other hand, there is no evidence that there may have been failure to maintain the usual order which it is the duty of every state to maintain within its territory. The question lies in knowing whether the special demand for protection made by the American employees

of the mine, due to the labor problems which had arisen between the management and the workmen, was such as to require the Mexican authorities to take extraordinary measures. The first alleged demand for protection was that made orally and later confirmed by letter to the Municipal President of San Javier on November 4th; it referred to threats of a strike and other vague threats made by the discharged workmen, the letter sent to the Municipal President mentions "difficulties between the company and its workmen in the mine", the interference by a worker called Rendón, who had repeatedly made threats against his chiefs, which threats are not specified, and it ended saying: "this company respectfully brings this matter to your attention requesting you to take the matter in hand and prevent the said Mr. Rendón from continuing in the interference of the operation and business of this mine". It seems that the Municipal President promised to attend to the matter. Taking into account the circumstances set forth by the company, I do not see that it might be a question of imminent danger which would require urgent measures either that very day or at the beginning of the next day. The second more definite demand for protection was made, according to Kennedy and an American companion of his, after Robles and another fellow worker were discharged, on November 4th, after 9.30 at night, through one Dominguez. The Municipal President was asked to send a *police officer* at six-thirty the following day, November 5th, to "arrest" the "agitators" and, if necessary, "to prevent their interfering with the shift going to work". There is not sufficient evidence that this second demand reached the Municipal President; Mexico might perhaps have cleared up this doubtful point. However, considering the evidence in the record, it seems to me that it is not possible to establish any responsibility on the part of Mexico for failure to give protection.

8. In view of the foregoing, I believe that this claim can be properly grounded only on a denial of justice resulting from the failure to have imposed on Kennedy's aggressor a punishment commensurate with his offense; but, taking into account that the irregularity imputed on the procedure of the Mexican judge was to a certain extent due to the lack of diligence on the part of claimant's attorneys and physicians, taking into account, further, that it is a question of indirect responsibility, and the principles mentioned in paragraph 25 of the opinion rendered in the *Janes* case, Docket No. 168, I believe that the sum of \$6,000.00 (six thousand dollars) is an adequate award.

*Van Vollenhoven, Presiding Commissioner:*

I concur in Commissioner Fernández MacGregor's opinion.

*Nielsen, Commissioner:*

On November 5, 1919, George Adams Kennedy, an American citizen, was shot at San Javier, Sonora, Mexico, by a Mexican citizen, Manuel Robles, seriously wounded, and evidently permanently crippled. The United States contends that the Mexican authorities at San Javier had been warned that Robles and others were dangerous agitators who were inciting the workmen in a mine at that place to interfere with the operations of the mine, and that the authorities failed to afford protection against the activities of these agitators. It is further contended that no proper steps were taken to prosecute persons who assaulted Kennedy, and in particular that there was a miscarriage of justice in connection with the trial of Robles.

Numerous citations were made in the brief of the United States from the works of writers on international law with regard to the duty of a state to take appropriate action to prevent injuries to aliens. The general rule on this subject is, of course, well established. But cases involving complaints of lack of protection often present difficulties, in that evidence is vague and scanty on the important point whether authorities have been put on notice with respect to apprehended illegal acts.

An indemnity in the sum of \$40,000 was paid by the United States to the Government of Greece on account of destruction of property belonging to Greek subjects and personal injury inflicted on them in the City of South Omaha in the year 1909. Public, No. 207, 65th Congress. An interesting point in connection with this case was the question whether a mass meeting held by citizens of the city shortly before the riot began was a warning to the local authorities of a possible riot. The meeting was prompted by a feeling of hostility which existed among the people of the city against the Greeks, who were said to be guilty of offensive conduct and unlawful acts. One of them on the day previous to the meeting had killed a policeman. The Government of the United States did not admit legal liability in the case, but did, however, pay an indemnity as an act of grace without reference to the question of liability. *House Reports*, vol. 1, 64th Cong., 2nd Sess., 1916-1917.

In the *Home Missionary Society* case, under the Special Agreement of August 18, 1910, between the United States and Great Britain, claim was made by the United States on account of losses sustained during an insurrection in the British Protectorate of Sierra Leone in Africa in 1898. It was argued in behalf of the United States that representatives of the British Government in the Protectorate had notice that the natives regarded a so-called "hut tax" imposed on them as unjust, and that forcible resistance, dangerous to the lives and property of foreigners, would be made to the collection of the tax. *American Agent's Report*, p. 421. The tribunal held that the imposition of the tax was a legitimate exercise of sovereignty, and, further, that, although it might be true that some difficulty might have been foreseen, there was nothing to suggest that it would be more serious than is usual and inevitable in a semibarbarous protectorate and certainly nothing to lead to widespread revolt.

The difficulties with respect to evidence inherent in cases of this nature exist in the present case. The Mexican *Presidente Municipal* at San Javier was informed during the course of an interview which he had with Kennedy that certain employees in the mine were instigating discord between workmen and the so-called shift bosses. Placards inciting the men to strike were brought to the notice of the *Presidente*, and he was requested to prevent the agitators from interfering with the operation of the mine. A communication dated November 4, 1919, was delivered to the *Presidente*, calling attention to the activities of Victoriano Rendón, a discharged employee, stating that Rendón was inciting the employees of the mine to insubordination and disturbances and was threatening his chief, and requesting that steps be taken to prevent Rendón from continuing in the interference with the operation and business of the mine. In the Memorial is printed a sworn statement made by Kennedy to the effect that he sent an employee of the mine, Trinidad Dominguez, to the *Presidente* with instructions to inform the latter that Robles and two other discharged employees had been in the so-called Plaza inciting the men to strike and threatening violence to any who might go to work on the following day, and that a demand

was made of the *Presidente* to send a police officer to the mine at 6.30 o'clock in the morning on the following day to arrest the agitators if necessary and to prevent interference with the miners in going to their work. There is no testimony that Dominguez delivered the message other than the sworn statement of Kennedy that he had the assurance of Dominguez that the latter delivered the message immediately on leaving the office of the mine. It would seem, however, that if it were not delivered, testimony to that effect might have been furnished by the Mexican Government. The mine which employed several hundred men was an important industrial plant and presumably one from which the local community derived much benefit. Undoubtedly there was abundant reason why the local authorities should be solicitous to afford protection to persons and property at the mine in case they had warning of threatened violence to life or property.

The record leaves some doubt as to the specific nature of the warning given to the Mexican authorities. The *Presidente* at San Javier was evidently informed that the operators of the mine had had difficulties with some workmen. It is not entirely clear to me that the duty to give protection was suitably performed, but in the light of the general principles which the Commission has announced in the past with respect to the necessity for grounding pecuniary awards on convincing evidence of improper governmental administration, I am not prepared to say that the charge of lack of protection can be maintained.

In considering the contentions advanced by the United States with regard to the impropriety of the proceedings instituted against the person who shot Kennedy, the Commission of course must have in mind the general principles asserted in behalf of Mexico with regard to the respect that is due to a nation's judiciary and the reserve with which an international tribunal must approach the examination of proceedings of domestic tribunals against which a complaint is made. As said by counsel for Mexico, such a tribunal of course does not act as an appellate court, but it is not precluded from making a most searching examination of judicial proceedings, and it is the duty of a tribunal to make such an examination to determine whether the proceedings in a given case have resulted in a denial of justice as that term is understood in international law. The principles which must guide the Commission in a case of this character were stated to some extent in the separate opinions written in the *Neer* case, Docket No. 136. There are numerous cases in which international tribunals have been called upon to examine the propriety of proceedings of domestic tribunals. See for examples, decisions in prize cases and other cases, cited in Dr. Borchard's *Diplomatic Protection of Citizens Abroad*, p. 342. See also the case of *Cotesworth and Powell*, Moore, *International Arbitrations*, vol. 2, p. 2050; the *Rio Grande* case under the Special Agreement of August 18, 1910, between the United States and Great Britain, *American Agent's Report*, p. 332; the *Brown* case, *ibid.*, p. 162; and the *Webster* case which was concerned with the action of quasi-judicial tribunals, *ibid.*, p. 537.

I agree with the conclusions stated in Commissioner MacGregor's opinion to the effect that the imposition of a sentence of two months' imprisonment on Robles was clearly an inadequate penalty for the grave crime which he committed. If Mexican law had required this penalty, the wrong resulting from the inadequate sentence should be predicated on the character of the law itself. But I think it is clear that the law authorized and required the infliction of a more serious penalty for the offense committed, and that therefore the Mexican Judge at Hermosillo who sentenced Robles did not

properly apply Mexican law. Such conduct on his part is assuredly some evidence bearing on the question of a denial of justice, but there is further evidence of the impropriety of the proceedings in connection with the trial of Robles. A medical certificate, which was obtained by order of a Judge at San Javier, and which evidently under Mexican law was evidence with regard to the injuries of Kennedy, reads in part as follows:

"In the front part of the right thigh and close to the groin there is located the principal wound caused by firearms, the bullet having passed into and through the high, breaking the femur bone in the upper third section, passing through the outer part of the hip bone on the left, from which place the bullet was extracted at the point where it had almost passed out of the body. The scalp showed a superficial wound an inch long, and there was a scratch on the right cheek near the eye. In addition on both hands and almost in the same place there were found scratches between the thumb and the index finger. The wound of the muscle, although serious, does not put in peril for the moment, the life of the wounded man, but it may later endanger it if complications result."

The certificate clearly shows the serious nature of the injuries inflicted on Kennedy. From the decision of the Judge at Hermosillo it appears that the Judge, in imposing a sentence of but two months' imprisonment, relied upon a second certificate signed by the physician who executed the first certificate and one other person, evidently not a physician. This certificate was executed nearly two months after the date of the first certificate, without any reexamination of Kennedy. The second certificate declares that the injury "is of a character that does not necessarily endanger life and will require from six weeks to two months to heal, without for that reason resulting in a permanent disability of the wounded member". The failure to obtain a further certificate for which steps apparently were taken can presumably be excused, at least to some extent, by the fact that Kennedy at the time when these steps were taken was no longer within Mexican jurisdiction.

Another feature of the proceedings before the Judge at Hermosillo which to my mind reveals their impropriety is the appearance in the record of a communication signed by 54 workmen in the mine at San Javier which was addressed to one Leopoldo Ulloa. In this communication the workmen requested Ulloa to endeavor to obtain the release of Robles and recited a series of complaints against the mining company with regard to the improper treatment said to have been accorded to the workmen in the mine. The extent to which the Judge was influenced by this communication is a point concerning which perhaps no positive conclusions may be drawn, but the communication is clearly made a part of the record of the proceedings and is cited by the Judge. It would seem that more appropriate action with respect to a matter of this kind would have been to take effective steps to discipline the person who ventured to put it before the Judge evidently for the purpose of influencing his action in a case in connection with which the consideration of such a communication was, to say the least, highly improper.

Several other matters were mentioned by counsel for the United States in analysing the proceedings before the Judge at Hermosillo with a view to showing their impropriety. Whatever might be said of their controlling importance, if any, I think that enough has been said to justify the conclusion which the three Commissioners have reached to the effect that the instant case reveals a denial of justice within the meaning of international law.

*Decision*

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America on behalf of George Adams Kennedy the sum of \$6,000.00 (six thousand dollars) without interest.

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HENRY RUSSELL *et al.* (U.S.A.) *v.* UNITED MEXICAN STATES.

(*May 9, 1927. Page 302.*)

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PROCEDURE, MOTION TO AMEND. Motions to amend answers *granted* in absence of opposition of adverse Agent.

(*Text of decision omitted.*)

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THE PEERLESS MOTOR CAR COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.

(*May 13, 1927, concurring opinions by Presiding Commissioner and Mexican Commissioner, May 13, 1927. Pages 303-305.*)

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CONTRACT CLAIMS.—RESPONSIBILITY FOR ACTS OF DE FACTO GOVERNMENT.

—CLAIM IN RESTITUTION. Claim for unpaid purchase price of two automobile ambulances sold and delivered to Mexican Government under contract made during Huerta regime *allowed*.

*Cross-references:* Am. J. Int. Law. Vol. 22, 1928, p. 180; Annual Digest, 1927-1928, p. 246.

*Nielsen, Commissioner :*

1. Claim is made in this case by the United States of America in behalf of the Peerless Motor Car Company, an American Corporation, to obtain payment of 23,000 Mexican pesos, which it is alleged is due as the purchase price of two automobile ambulances, under a contract entered into July 25, 1913, between the Mexican Government and the claimant. Interest on this sum is claimed from October 15, 1913.

2. The contract, a copy of which accompanies the Memorial (Annex 2), recites that it is executed in fulfillment of an order "of the Department of War and Navy, between the Chief of the Military Sanitary Section, Colonel Agustín Nieto y Mena, M. D., and Mr. Joseph M. Wheeler, merchant of this city [Mexico City] and representative of 'The Peerless Motor Car Company'". By the third paragraph of the contract it is stipulated that payment for the ambulances shall be made "as soon as the said ambulances are duly received". Under date of October 15, 1913, a receipt for the ambulances bearing the signature of A. Nieto y Mena was delivered to Joseph



M. Wheeler, the claimant's representative in Mexico City. In this receipt it is recited that the ambulances received are complete and satisfactory, and that payment will be made to Wheeler immediately (Annex 6 to the Memorial.)

3. In the arguments advanced before the Commission both Governments rely upon the decision rendered by the Commission in the *Hopkins* case, Docket No. 39. In behalf of the Government of Mexico it is not disputed that the automobiles were manufactured and delivered conformably to the terms of the contract, and that the purchase price has not been paid. But it is contended that there is no international responsibility on the Mexican Government for, as stated in the Answer, "the nonpayment of certain war material admitted by the claimant corporation to have been ordered by, and sold and delivered to an illegitimate administration", that is, the administration of General Victoriano Huerta. It is further alleged in the Answer that "even assuming that the legitimate government of the United Mexican States had subsequently to the sale and delivery of the war material aforesaid to the local de facto administration become possessed of the said war material, no liability could be predicated upon the said respondent government neither in international law, nor equity, nor justice, since the said possession was due to the recognized right that all legitimate governments possess to capture the war material of the enemy".

4. In the view I take of this case it is unnecessary to consider the point as to the responsibility of Mexico grounded on the contention of the United States that it may be assumed from the record that Mexican authorities in power following the administration of General Huerta made use of the cars delivered by the Company. Nor is it necessary to consider the Mexican Government's contention as to the character of the ambulances as war material. The United States contends, among other things, that the purchase of these motor ambulances was an unpersonal act, and that therefore, under the principles laid down in the *Hopkins* case, Docket No. 39, the Government of Mexico is liable for the purchase price of the ambulances. I am of the opinion that the contention is sound, and that an award should therefore be rendered in favor of the United States in the sum of 23,000 pesos with interest from October 15, 1913, the date on which the receipt for the ambulances was delivered to the claimant's representative at Mexico City.

*Van Vollenhoven, Presiding Commissioner :*

I concur in Commissioner Nielsen's conclusion with respect to the liability of Mexico. The purchase of ambulances, however, in my opinion is not a part of the ordinary routine of government business. It comes within the doubtful zone mentioned in paragraphs 5 and 6 of the opinion in the *Hopkins* case. As such, it is much more akin to a transaction of government routine (the one extreme) than to any kind of voluntary undertaking "having for its object the support of an individual or group of individuals seeking to maintain themselves in office" (the other extreme), and therefore should, under the principles laid down in the said opinion, be assimilated to the first group, to wit, the routine acts.

*Fernández MacGregor, Commissioner :*

I concur in the opinions expressed by Commissioners Van Vollenhoven and Nielsen.

*Decision*

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America in behalf of the Peerless Motor Car Company the sum of \$11,465.50 (eleven thousand four hundred and sixty-five dollars and fifty cents) together with interest on that sum at the rate of six per centum per annum from October 15, 1913, to the date on which the last award is rendered by the Commission. The said amount of \$11,465.50 is the equivalent of 23,000.00 pesos for which claim is made. The Commission renders the award in the currency of the United States conformably to its practice in other cases of making all awards in a single currency, having in mind the purpose of avoiding future uncertainties with respect to rates of exchange which it appears the two Governments also had in mind in framing the first paragraph of Article IX of the Convention of September 8, 1923, with respect to the payment of the balance therein mentioned "in gold coin or its equivalent".

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TOBERMAN, MACKAY & COMPANY (U.S.A.) *v.* UNITED  
MEXICAN STATES.

(May 20, 1927, *concurring opinion by American Commissioner, May 20, 1927.*  
*Pages 306-311.*)

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STANDARD OF CARE OF PROPERTY HELD IN CUSTODY. Respondent Government *held* not subject to obligation to take special care, of a standard commensurate with that of a private concern, of goods coming into the custody of its customs service and left with it beyond required period for withdrawal of goods.

*Cross-references:* Am. J. Int. Law, Vol. 22, 1928, p. 182; Annual Digest, 1927-1928, p. 228; British Yearbook, Vol. 9, 1929, p. 157.

*Fernández MacGregor, Commissioner:*

1. This claim is presented by the United States of America in behalf of Toberman, Mackey & Company, an American corporation, demanding from the United Mexican States the sum of \$1,845.57, with interest, the value of 376 bales of hay, property of claimants, which was damaged in the Mexican Custom House of Progreso, Yucatán, Mexico, between the beginning of June, 1919, and July 23, 1920. It is alleged that the hay in question became completely deteriorated by exposure to the weather, on account of the negligence or lack of care of the authorities of the Mexican Custom House.

2. The evidence presented in this case shows that Toberman, Mackey & Company, an American firm dealing in grains, seeds, fodder and other products, having previously received an order from the firm of Crespo and Suárez, of Progreso, shipped in New Orleans, Louisiana, U.S.A., on a Norwegian vessel, June 3, 1919, 376 bales of compressed hay, under a bill of lading issued by the Gulf Navigation Company, Inc. The shipment was consigned to shippers order, Crespo and Suárez to be notified upon

its arrival, who, although they apparently had dissolved partnership on January 31, 1919, continued to do business jointly or separately. The shipment of hay was delivered by the steamer to the Custom House at Progreso sometime during the early part of June, and it was placed in an open space on the wharf, covered only with a canvas. Crespo and Suárez did not accept the hay, due, apparently, to some questions as to the manner of making payment for it, the result of which was, that they neither took steps to withdraw the hay from the Custom House nor to pay the import duties. The Gulf Navigation Company, Inc., on August 7, 1919, received from one Mariano de las Cuevas, who seems to have been the shipping company's agent, notice that Crespo and Suárez had not withdrawn the hay, in spite of his having urged them to do so, and that the hay had deteriorated somewhat on account of rains which had fallen. The Gulf Navigation Company, Inc., on December 12, 1919, notified claimants that Crespo and Suárez had definitely refused to accept the shipment of hay; that the latter was already in a rather bad state, after a long period of storage in the Custom House; and that the shipment was to be auctioned in conformity with customs regulations. Finally, the Custom House, in compliance with said regulations, and as the hay was then useless, burned it on July 23, 1920.

3. The claimant Government alleges that the Custom House of Progreso was negligent on account of not having taken due care of the fodder in question, as shown by the fact that it left said fodder in the open, exposed to the elements, for more than one year; that such negligence of Mexican officials, which was the cause of the complete loss of the goods, makes the Mexican Government responsible according to general principles of law, as well as under special provisions of the General Customs Regulations of the United Mexican States (Articles 120, 153, and others). The Mexican Government, on its part, alleges in defense, that the loss of the hay was due to the negligence of the consignees, of the shipping company or of the claimants, who did not comply with said Customs Regulations, citing also the provisions thereof to support their contention.

4. This case involves, therefore, an alleged act of a Mexican authority, which act, in the terms of the Convention of September 8, 1923, has resulted in injustice to American citizens. Said act is the omission of a Custom House to take due care of merchandise deposited therein. I do not believe that there is any clear principle of international law which obliges a government to take special care, as if it were a private storage concern, of merchandise which comes in through its Custom Houses, for the mere purpose of exercising the sovereign right of collecting import and export duties. It is conceivable that, under certain circumstances, the State may assume certain obligations in the exercise of sovereign acts of this nature; but, if such obligation is not established very clearly, it cannot, in my opinion, be imposed on the State. The question lies in determining whether the law of such State (in this case, Mexican law) imposes on custom houses the obligation of guarding, at all times and without limit like a good *pater familias*, all goods and merchandise which pass through its ports of entry. Mexican law in this respect is sufficiently clear, according to my opinion. In fact, the General Customs Regulations of Mexico require that application be filed for the dispatch of imported goods, within eight days following the date of unloading, and that the merchandise be withdrawn, at the latest, thirty days after unloading has been finished (Article 152). The party obliged to comply with these obligations, is the consignee (Article

109). When the parties concerned do not file their applications within said periods, the merchandise may remain in the storehouses or yards of the Custom House, incurring a custody charge (*derecho de guarda*), the custody being limited to preventing the loss of the merchandise by theft or otherwise (Articles 153 and 698), but the law further provides, that complaints filed against the Custom House attributing to it delay in the timely withdrawal of the merchandise within the periods provided by the Regulations, will not be taken into consideration (Article 152). The same law presumes that the merchandise may be placed, in the absence of a special petition, on the yards or in the storehouses, without determining in which cases one or the other must be done. From the foregoing citations it is inferred that, although the merchandise may remain in the custom house after the expiration of the term allowed for its withdrawal, said custom houses refuse to accept any responsibility for its deterioration once that term has expired. It remains doubtful whether such responsibility is assumed for the month in question, although it may be presumed that it could be legally so. But in the present case, claimants have not proven that the complete deterioration and loss of the hay may have commenced during the first month that such hay was on the yards of the Custom House. On the other hand, although it is true that the consignees were the claimants, they stipulated that Crespo and Suárez should be notified, who, it appears, were the purchasers of the merchandise. Either of these parties should have paid the duties, applied for the dispatch of the shipment, and withdrawn the hay. Crespo and Suárez should have been given timely notice of the arrival of the hay, by the claimants themselves, as may be implied from the letter of February 27, 1920, signed by one W. M. James, and they doubtless received later on notice from said Mariano de las Cuevas. However, they did not file their application within the eight days, nor did they withdraw the merchandise within thirty days after unloading; neither did they specifically refuse, before the Custom House, acceptance of the shipment (Article 113). The shippers, Toberman, Mackey & Company, also should have been given timely notice by said Crespo and Suárez that the latter were having difficulties in obtaining the merchandise, and, at least, they were so notified on December 12, 1919, by the Gulf Navigation Company, Inc., in a letter which causes the presumption that they had already been given notice of this fact previously. Both parties incurred the delay on account of this failure to comply with the clear provisions of Mexican law, and it was their negligence that unduly threw on the Mexican Custom House authorities the care of the merchandise, which care they had in no way contracted for. There can not be, therefore, imputed to the Custom House a responsibility which it did not have, nor assumed clearly, and which, on the other hand, was thrown on it by the negligence of the consignees and claimants in this case, who, it appears, had a clear knowledge of the circumstances in which the merchandise was shortly after its arrival at Progreso, and, surely, two months after such arrival. Under such circumstances, taking into account that in this case no discrimination or other unjust act on the part of Mexican customs authorities have been proven, and that the negligence of the owners and consignees of the bales of hay in question appears evident, I believe that this claim should be disallowed.

*Van Vollenhoven, Presiding Commissioner:*

I concur in Commissioner Fernández MacGregor's opinion.

*Nielsen, Commissioner:*

I concur in Commissioner Fernández MacGregor's opinion that the claim should be disallowed. I attach less importance to the provisions of Mexican legislation with respect to the interpretation of which conflicting contentions are advanced by counsel for each Government than to the uncertainty of the record in relation to facts concerning which it is important that the Commission should have definite information. The claim of the United States is predicated upon a complaint of negligence on the part of Mexican customs authorities in dealing with an importation of baled hay into Mexico.

International law of course recognizes the plenary sovereign right of a nation in all matters relating to imports and exports. The Mexican Government is free to establish at a port of entry elaborate facilities for storing imports or no facilities at all, and an importer can ship his goods to such a port or refrain from doing so just as he chooses.

Irrespective of what may be the precise formalities prescribed by Mexican law with regard to the treatment of imports, it seems to me that provisions of that law are probably substantially the same as those that doubtless exist generally in other countries. After a specified period storage charges are collected on imports, and after a further period goods may be sold or destroyed if not claimed. Presumably it is contemplated by Mexican law that some kind of care shall be taken of goods for a part if not all of such periods, and that commodities shall not be entirely unprotected, even though they are left without attention for long periods by importers, as was the claimant's shipment. However, I am of the opinion that, in considering the contention that Mexico is responsible for negligence on the part of the customs authorities we cannot properly fail to take some account of the conditions under which the hay was shipped to Progreso and left there until it was destroyed.

I am not prepared to say that under the terms of the Convention of September 8, 1923, liability might not be fastened upon a government for the acts of its customs authorities in a case revealing negligence with respect to protection of imported commodities, particularly in a case that might reveal a purpose of making discrimination against an importer whose goods were damaged or destroyed. It would be necessary in such a case that there should be convincing evidence of negligence on the part of those officials. The contention of the United States apparently is that negligence can properly be inferred from the fact that proper adequate care was not taken of the hay. It seems to me that there may have been negligence. However, while the Memorial contains an allegation of negligence, there is neither allegation nor evidence as to the nature of the facilities at Progreso for storage nor as to the particular reason why the hay was not cared for other than by the use of a canvas. Having in mind a proper limitation on inferences that may be drawn from evidence, I do not believe that on the record before the Commission an award could properly be rendered holding Mexico liable under international law for the destruction of the hay.

#### *Decision*

The Commission decides that the claim of Toberman, Mackey & Company must be disallowed.

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GEORGE W. COOK (U.S.A.) *v.* UNITED MEXICAN STATES.

(*June 1, 1927, concurring opinion by Presiding Commissioner, June 1, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 311-318.*)

NULLIFICATION OF POSTAGE STAMPS.—FAILURE OF AUTHORITIES TO COMPLY WITH APPLICABLE LAW. Claim for value of postage stamps which were retired by Mexican authorities without the notice required by law allowed.

*Cross-reference:* Am. J. Int. Law, Vol. 22, 1928, p. 185.

*Nielsen, Commissioner:*

1. Claim is made in this case by the United States of America in behalf of George W. Cook to recover the sum of \$153.52, stated to be the equivalent of 307.04 pesos, the value of two quantities of postage stamps, which were purchased by the claimant from Mexican postal authorities and which subsequent to the purchase were declared void. The stamps were submitted to the Commission for examination. Interest is claimed from November 15, 1914, on the sum of \$131.95 and from September 15, 1915, on the sum of \$21.57. The facts on which the claim is based as they appear from the record may be briefly stated as follows:

2. Under date of October 7, 1914, a circular communication was issued at Mexico City by the Mexican Postmaster General prohibiting the use after November 15, 1914, of a certain issue of stamps of which the claimant possessed a considerable quantity. It appears that Articles 194 and 195 of the Postal Code of Mexico make provision for the retirement of stamps upon a three months' notice, and that holders of stamps may, within the prescribed period of three months, effect an exchange of stamps which they possess for a new issue. It is provided that those who have not effected an exchange within this period shall lose not only the right to exchange the old stamps for new ones but also the value of the retired stamps which they may possess.

3. In communications dated January 14, 1915, and June 5, 1915, the claimant requested the Mexican authorities to effect an exchange or payment of stamps which he held of the value of 262.94 pesos, but no reply was made to his letters. In communicating with Mexican authorities, the claimant mentioned stamps to the value of 262.94 pesos; from the Memorial it appears that he held invalidated stamps to the value of 263.89 pesos at the time he wrote these letters. It is clear that no notice of three months was given by the postal authorities with regard to the retirement of the stamps in question. Furthermore, there is no proof that notice was given by postmasters as required by law of the retirement of the nullified stamps, within even a period of thirty-nine days, that is, from October 7, to November 15, 1914, the latter date being that on which the invalidation of the stamps took effect. While the point is immaterial in view of the fact that the legal notification prescribed by the Postal Code was not given, it may be noted that, had there been any public notice given of the retirement of the stamps on a shorter notice, evidence of such public notice could apparently easily have been produced. Notifications issued by postmasters to the public are, of course, something very different from instructions

sent to the postmasters through the mail by the Postmaster General. Obviously the claimant was deprived improperly of the value of the stamps nullified by the order of October 7, 1914. In transmitting mail the claimant would, of course, not make use of stamps which had been declared void or stamps concerning the validity of which there might be some question.

4. The claimant's rights with respect to another quantity of stamps to the value of 43.15 pesos is equally clear, or perhaps it might better be said, still more clear. These stamps bore the printed inscriptions "Gobierno Constitucionalista" and the letters "GCM". Under date of July 6, 1915, an order was issued that these postage stamps should be invalid from September 16, 1915, and that no new issue should be placed in circulation. It will be seen from this order that there was no compliance with the Mexican Code either with respect to a three months' notice of the nullification of stamps or with respect to the substitution of stamps in place of those nullified. Obviously, therefore, the claimant was deprived of his property.

5. The Mexican Agency has put in evidence a communication under date of September 8, 1926, addressed by the Mexican Postmaster General to the Department of Foreign Relations in which reference is made to a letter of February 9, 1926, addressed to W. Hansberg, an employee of Mr. Cook's firm. Nothing is said with regard to the contents of this communication, except that Mr. Hansberg "was not advised that the stamps to which he referred, were valid up to the year 1925, inasmuch as this office, on July 31, 1921, through its official organ, Bulletin of the Postal Service, advised all post offices of the Republic to notify the public that, beginning with September 1st of that year, postage stamps of the "Centenary Issue" would again be effective". Even if Mr. Hansberg had been informed in 1926, as it is stated he was not, that the stamps would again be effective up to the year 1925, such information would, of course, have been of no value to Mr. Cook in 1926. It is not perceived how the notification to the post offices to which reference is made in the above quoted extract could have any bearing on any issue in the instant case. In any event no copy of the notification to the post offices is produced, so that the Commission is not in a position to make any determination with respect to its legal effect. And no evidence is furnished that the post offices made any notification to the public to the effect that the so-called "Centenary Issue" would again be effective. If such evidence existed it evidently could easily have been produced, so that its contents and its bearing, if any, on the present case could be determined. It is nowhere even stated that a notification was given to the public. It is merely stated in the communication of September 8, 1926, that the post offices were advised to notify the public. Some of the stamps held by the claimant for which he seeks compensation evidently belonged to this "Centenary Issue".

6. In the Mexican Brief, it is stated that Mr. Cook must have seen more than once that stamps like his own were being used on the letters confided to the Mexican postal services; that he must have received correspondence addressed to him bearing those stamps; and that it did not occur to him to use them or transfer them. In my opinion it is highly improbable that even if some of these stamps were used on letters addressed to Mr. Cook—a thing concerning which, of course, we know nothing—they should ever have attracted the eyes of a business man of large affairs. Assuredly a business man to whose establishment comes a large quantity of mail which is generally opened by clerks does not make a personal examination of every stamp that comes to his place of business. Moreover, it is highly

improbable that stamps belonging to the limited issues which were nullified by the postal authorities ever came to Mr. Cook's office. And it is possible, and perhaps it may be said very probable, that none was ever used by anybody in Mexico. Whatever action may have been taken to give the public notice of a revalidation of the nullified stamps—and the record is too uncertain to reach any conclusion on that point—nothing was done until six years after the stamps had been nullified. Even though the observations made in the Mexican Brief concerning stamps that may have been seen by Cook had any bearing on the issues in the instant case, which I believe they have not, the Commission can not ground a decision on inferences of that kind, even if there were some foundation for them which I think there is not.

7. There are certain very simple facts and principles of law which I think are clearly decisive in this case. It would seem that there can be no more elementary principle of law than that the propriety of an act must be judged by the law existing at the time of the commission of the act. It is indisputable that Mr. Cook paid for the stamps that were nullified. Indeed as a matter of accommodation he took a large quantity of stamps in payment of money orders. It is also indisputable that he could not use nullified stamps, nor obtain other stamps in substitution conformably to law, nor obtain the value of the stamps nullified. It is obvious that he is entitled to pecuniary compensation to the amount he paid for the stamps which amount the Mexican authorities received.

8. I am of the opinion that an award should be rendered in this case in favor of the claimant in the amount of \$153.06 with interest at the rate of six per centum per annum, on the sum of \$131.55 from November 15, 1914, and on the sum of \$21.51 from September 15, 1915, such interest being computed on both sums from each of the two specified dates to the date on which the last award is rendered by the Commission.

*Van Vollenhoven, Presiding Commissioner:*

I concur in paragraphs 1 to 4, inclusive, of Commissioner Nielsen's opinion. I fully concur in paragraph 3 of Commissioner Fernández MacGregor's dissenting opinion. Since, however, in the present case Mexico has neither submitted the text of the revalidation circular of July 31, 1921, nor established how far said circular covered the stamps canceled in 1914 and 1915, nor established until what date (either January 1, 1925, or September 1, 1925) this revalidation had effect—such date being essential for the sake of knowing whether Cook could have legally used or sold his stamps at the time he presented his claim to the American Agency—and since Mexico was in honor bound to make full disclosure of these facts (paragraph 7 of the opinion in the *William A. Parker* case, Docket No. 127, rendered March 31, 1926, and Ralston, *Report of French-Venezuelan Mixed Claims Commission of 1902*, p. 25), I concur in paragraph 8 of Commissioner Nielsen's opinion.

#### *Decision*

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America in behalf of George W. Cook the sum of \$153.06 (one hundred and fifty-three dollars and six cents) with interest at the rate of six per centum per annum, on the sum of \$131.55 from November 15, 1914, and on the sum of \$21.51



from September 15, 1915, such interest being computed on both sums from each of the two specified dates to the date on which the last award is rendered by the Commission. Conformably to the practice of the Commission of making awards in a single currency, the award is expressed in the currency of the United States, the Mexican peso being converted at its par value of \$0.4985.

*Dissenting opinion*

1. I concur with the statement of facts contained in paragraphs 1 and 2 of Commissioner Nielsen's opinion. It appears clearly that the Mexican authorities violated their own law by not giving the three months' notice provided by articles 194 and 195 of the Postal Code; and although I believe that it is most probable that the circular of October 7, 1915, should have been published in the usual manner, posting it on the bulletin boards of the post offices for the information of the public, I agree that there is no evidence of its having been done.

2. All the postage stamps involved in this case, with the exception of a few in the amount of 1.12 pesos, are of the so-called "Centenary Issue." Some in the amount of 43.15 pesos, bear a renewal stamp which says; "Gobierno Constitucionalista", and the letters "GCM", and the balance, in the sum of 262.77 pesos, are not restamped. According to a letter from the Postmaster General to the Secretary of Foreign Relations, dated September 8, 1926, the postage stamps of the "Centenary Issue" were again in force from September 1, 1921, until the year 1925; such order, according to said letter, was published in the "Indicador del Servicio Postal", official organ of the Post Office Department of Mexico. Although I agree that the Government of Mexico could have produced the text of the order I have just referred to and failed to do so, I believe, nevertheless, that the letter of September 8, 1926, proves clearly that such order was made known to the public, inasmuch as it was published July 31, 1921, in the organ which the Post Office uses officially to give information about everything concerning the postal service. Claimant was, then, in my opinion, legally notified that the stamps which were in his possession as null, had been revalidated, and, therefore, could be used again or sold. If he failed to make use of them, it was due to his not wishing to do so or to negligence.

3. I believe that it is an established principle that claims must be considered as they are when presented before an international tribunal, even though it be true, further, that the propriety or impropriety of the act out of which they arise must be judged according to the law existing at the time of the commission of the act. In order that an international claim of the nature of those over which this Commission has jurisdiction, may arise properly, it is necessary (1) that there may be a transgression, on the part of a State, of some principle of international law, and (2) that there may be at the time of filing the claim evident damage to a citizen of the claimant State, directly caused by such transgression. In the present case the Mexican Government undoubtedly committed a transgression in declaring null the claimant's stamps, in violation of Articles 194 and 195 of the Postal Code; but it subsequently repaired the damage caused the claimant by restoring to the stamps he had all their value, during the long period included between September 1, 1921, and the year 1925. There was reparation of the damage caused, although such reparation may not have been complete, as Mexico limited herself to restoring the value of

certain stamps without restoring the value of all or the interest on the money which they represented. I believe it to be a sound and helpful practice recognized by authors and international decisions for the Government of the injured person to give the offending Government the opportunity to render justice to the offended party through its own regular and voluntary ways, thus avoiding occasion for international discussion and friction.

4. In view of the foregoing, I am of the opinion that the Mexican Government repaired in part the damage inflicted on the claimant, when it restored the value of certain of his stamps, and that this claim is now proper only for what has not been restored and for the unpaid interest, at the rate of six per cent per annum. The Mexican Government owes the interest on the sum of 262.77 pesos, from November 15, 1914, to September 1, 1921, and on the sum of 43.15 pesos, from September 15, 1915, to September 1, 1921; plus the sum of 1.12 pesos, value of the stamps which did not belong to the "Centenary Issue", which value was never returned, plus the corresponding interest thereon, from November 15, 1914, to the date on which the last award is rendered by the Commission.

G. Fernández MACGREGOR,  
*Commissioner.*

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GEORGE W. COOK (U.S.A.) *v.* UNITED MEXICAN STATES.

(*June 3, 1927, concurring opinions by Presiding Commissioner and Mexican Commissioner, June 3, 1927. Pages 318-324.*)

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APPLICATION OF DOMESTIC STATUTE OF LIMITATIONS. A domestic statute of limitations is not binding on an international tribunal, particularly when claimant demanded payment of respondent Government within prescribed period.

CONTRACT CLAIMS.—NON-PAYMENT OF MONEY ORDERS.—EFFECT OF DEPRECIATION OF CURRENCY.—COMPUTATION OF AWARD.—RATES OF EXCHANGE.—EFFECT OF DOMESTIC LAW GOVERNING PAYMENTS. Claim for non-payment of money orders issued during Huerta regime *allowed*. A domestic law governing payments of obligations contracted in paper currency *held not applicable*. Award granted on basis of value of Mexican currency as of time of original transaction, when claimant had delivered value for money orders in question.

*Cross-references:* Am. J. Int. Law, Vol. 22, 1928, p. 189; Annual Digest, 1927-1928, pp. 205, 264.

*Comments:* Joseph Conrad Fehr, "International Law as applied by U.S.-Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312 at 313.

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*Nielsen, Commissioner:*

1. Claim is made in this case by the United States of America in behalf of George W. Cook to recover the sum of \$4,526.58, United States currency, stated to be the equivalent of 9,053.16 Mexican pesos, the aggregate amount

of numerous postal money orders, which are owned by the claimant, and which it is alleged were not paid upon presentation to Mexican postal authorities. The orders were issued in the years 1913 and 1914. A proper allowance of interest is claimed on the said sum of \$4,526.58.

2. The Answer of the Mexican Government contains an allegation to the effect that the money orders in question were issued by an illegitimate authority (the administration of General Huerta) which could not bind the United Mexican States. However, no contentions on this point were pressed in view of the decision rendered by the Commission in the *Hopkins* case, Docket No. 39, on March 31, 1926.

3. In the Brief filed by the Mexican Government in the case of the *Parsons Trading Company*, Docket No. 2651, of which use was made in the argument in the instant case, it is alleged that the right to collect a postal money order is subject to a statute of limitations of two years after the date of issue, and that a recovery on the orders in question is now barred by that statute. Finally, it is argued that, if a pecuniary award should be rendered by the Commission the amounts stated in the money orders should be calculated on the basis of the so-called Mexican Law of Payments of April 13, 1918. It is explained that this law had for its object the partial lifting of a general moratorium created by earlier legislation, and that the law established certain specified equivalents in gold currency of obligations contracted in paper currency. It is asserted that money orders are contractual obligations, and that the law of April 13, 1918, as a part of the *lex loci contractus*, is applicable to the payment of such orders.

4. It has sometimes been said that statutes of limitation are not a bar to international reclamations. General statements of this kind have perhaps at times led to some confusion of domestic law with a well-recognized principle of international practice. There is, of course, no rule of international law putting a limitation of time on diplomatic action or upon the presentation of an international claim to an international tribunal. Domestic statutes of limitation take away at the end of prescribed periods the remedy which a litigant has to enforce rights before domestic courts. It is satisfactorily established by evidence that the claimant in the instant case presented his money orders and requested payment within the period during which payment could be made under Mexican law, and that payment was refused by Mexican postal authorities. The United States is not now debarred by any Mexican statute of limitations from recovering money wrongfully withheld from the claimant. The Mexican Government could not by withholding payment for a period prescribed by a domestic statute of limitation relieve itself from an obligation under international law to make restitution of the value of the orders. From a conclusion to this effect it does not follow that international tribunals must always disregard all statutes of limitation prescribing reasonable periods within which remedies may be enforced before domestic tribunals. And it may be further observed that in view of the stipulations of Article V of the Convention of September 8, 1923, no question can arise in this case with respect to the exhaustion of local remedies.

5. The issue determinative of responsibility in this case is a simple one, and when its real character is perceived it is clear that the arguments advanced before the Commission covered a wide range of subjects not relevant to a proper disposition of the case. It is not necessary to take account of the considerations explained by Mexico with respect to economic conditions

in Mexico which prompted the enactment of the law of April 13, 1918. Nor is it necessary to determine whether Mexican money orders must be regarded as contracts, governed in all respects by the *lex loci contractus*, including the law of April 13, 1918, or whether it may more properly be considered that money orders are not commercial transactions, as was said by an American judge with respect to American money orders, but rather the means employed in exercising a governmental power for the public benefit. *Bolognesi et al. v. United States*, 189 Fed. Rep. 335. In a sense it may doubtless be said that a money order of the usual type evidences on the one hand some obligation of the Government that issues it to pay the value of the order, and on the other hand the right of the holder to receive payment. Furthermore, it is not necessary to give application in the present case to the principles asserted by the Commission in the *Hopkins* case, to which counsel for the United States called attention as to the standing of domestic statutes which by their operation on rights of aliens may contravene international law.

6. Obviously, rights and obligations in relation to money orders, the creatures of Mexican law, are governed by that law. But the Commission is not called upon to consider whether, if the Mexican Government had forced the claimant to accept payment according to the table of payments prescribed by the Mexican law of April 13, 1918, such action would have resulted in a violation of international law. The Mexican authorities have refused to make any payment. The questions before the Commission are, first, whether the failure of the Mexican Government to pay to the claimant the value of the money orders upon presentation renders the Government of Mexico liable under the terms of submission in the Convention of September 8, 1923, requiring the Commission to determine claims in accordance with principles of international law, and, second, if such liability exists what sum shall be awarded for wrongful withholding of the purchase prices or the orders. That responsibility in a case of this character exists was stated by the Commission in the decision rendered in the *Hopkins* case on March 31, 1926.

7. When questions are raised before an international tribunal, as they have been in the present case, with respect to the application of the proper law in the determination of rights grounded on contractual obligations, it is necessary to have clearly in mind the particular law applicable to the different aspects of the case. The nature of such contractual rights or rights with respect to tangible property, real or personal, which a claimant asserts have been invaded in a given case is determined by the local law that governs the legal effects of the contract or other form of instrument creating such rights. But the responsibility of a respondent Government is determined solely by international law. When it is alleged before an international tribunal that some property rights under a contract have been impaired or destroyed, the tribunal does not sit as a domestic court entertaining a common law action of assumpsit or debt, or some corresponding form of action in the civil law. And in a case involving damages to or confiscation of tangible property, real or personal, inflicted by agencies for which a government is responsible, or by private individuals under conditions rendering a government liable for wrongs inflicted, an international tribunal is not concerned with an action in tort, the merits of which must be determined according to domestic law. The ultimate issue upon which the question of responsibility must be determined in either of these kinds of cases is whether or not there is proof of conduct which is wrongful under

international law and which therefore entails responsibility upon a respondent government.

8. By the failure of the Mexican authorities to pay the money orders in question in conformity with the existing Mexican law when payment was due, the claimant, Cook, was wrongfully deprived at that time of property in the amount of 9,053.16 pesos. Payment of the orders should have been made when they were presented. The claimant is entitled to recover the loss which he sustained on account of the nonpayment at that time. An award should therefore be rendered by the Commission in favor of the claimant for the amount of the orders, namely, 9,053.16 pesos with interest. The total sum represents the legal measure of the loss suffered by the claimant when payment of the orders was refused. Since it is desirable to render the award in the currency of the United States conformably to the practice which the Commission has followed in the past, having in mind the desirability of avoiding uncertainties with respect to rates of exchange, and further having in mind the provisions of the first paragraph of Article IX of the Convention of September 8, 1923, account must be taken of the proper rate of exchange.

9. Domestic courts have frequently had occasion, especially in recent years, to deal with the translation into the currency of their own country monetary judgments in satisfaction of obligations fixed in the terms of the currency of some other country. In the absence of evidence with regard to the value of a foreign coin it has been held that the par value should be taken. *Birge-Forbes Company v. Heye*. 251 U. S. 317. The courts are required to convert currency in these cases in view of the fact that they can render judgments only in coin of the government by which they were created. However, the principles which these courts have considered in arriving at their decisions may have some pertinency to a case such as that before the Commission, since the translation of currency either by an international tribunal or by a domestic court must be based on some principle that is sound from the standpoint of the interests of the parties to the litigation. Some courts have held that in the case of a breach of contractual obligations the rates of exchange should be determined as of the date of the breach. Others have held that the rate should be fixed as of the date of judgment. In a recent case the Supreme Court of the United States held that the debt of a German bank to an American citizen arising from the refusal to pay a deposit on demand should be determined as of the value of the mark at the time the suit was brought. *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U. S. 517. In a Brief filed by counsel in the case of *Hicks v. Guinness et al.*, 269 U. S. 71, are cited numerous decisions of each kind. I am of the opinion that in the instant case the par value of the Mexican peso, namely \$0.4985, may properly be taken in determining the amount to be awarded in the currency of the United States. There are several considerations which I think justify this conclusion. Mexico withheld payment of the money orders, and the claimant should be reimbursed in the full value of the orders. That payments were not made is satisfactorily shown by evidence, but the date upon which payment of each order was refused is uncertain, and it is natural that the claimant should not be able to furnish precise information in each case. There is not, in my opinion, before the Commission the proper kind of evidence on which the Commission could properly determine the rate of exchange on each of those dates or an average rate of exchange during the period within which the orders were dishonored,

even if such computations might be deemed to be proper. And what is probably more to the point, Mexico has not contended that the prevailing exchange rates at the time the orders were dishonored should be applied, but has insisted that an award should be rendered in terms of the law of payments of April 13, 1918.

10. Having in mind the uncertainty in the record as to the specific dates on which payment of each of the several money orders was refused, I am of the opinion that interest may properly be allowed on the sum of \$4,513.00 from the date of the last order, namely, September 21, 1914.

*Van Vollenhoven, Presiding Commissioner:*

I concur in paragraphs 1 to 4, inclusive, 8 and 10 of Commissioner Nielsen's opinion. Amounts which fell due to claimants in Mexico in the years 1913 to 1915 when a depreciated paper currency was in circulation throughout the country should be awarded by this Commission in strict compliance with the monetary enactments of Mexico effective in those years, unless in any specific case there might be conclusively proven that by so doing the Commission would cause the claimants an unjust enrichment. In the present case not only such evidence fails, but it would seem from the record that Cook, in having the full value of his money orders reimbursed to him, would only receive the value of what he sold, delivered, and was compensated for by way of these money orders. I therefore am of the opinion that an award should be rendered in the sum of \$4,513.00, with interest thereon.

*Fernández MacGregor, Commissioner:*

I concur in the opinion of the Presiding Commissioner.

#### *Decision*

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America in behalf of George W. Cook the sum of \$4,513.00 (four thousand five hundred and thirteen dollars) with interest at the rate of six per centum per annum from September 21, 1914, to the date on which the last award is rendered by the Commission.

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### PARSONS TRADING COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.

*(June 3, 1927. Pages 324-325.)*

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CONTRACT CLAIMS.—NON-PAYMENT OF MONEY ORDERS.—EFFECT OF DEPRECIATION OF CURRENCY.—COMPUTATION OF AWARD.—RATES OF EXCHANGE.—EFFECT OF DOMESTIC LAW GOVERNING PAYMENTS. Decision in *George W. Cook* claim *supra* followed.

*Cross-reference:* Am. J. Int. Law, Vol. 22, 1928, p. 194.

*(Text of decision omitted.)*

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JOHN A. McPHERSON (U.S.A.) *v.* UNITED MEXICAN STATES.

(June 3, 1927. Pages 325-329.)

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OWNERSHIP OF CLAIM. Where evidence throws doubt upon claimant's ownership of claim, which doubt claimant was apparently in a position to dispel and failed to do so, claim *disallowed*.

*Cross-references:* Am. J. Int. Law, Vol. 22, 1928, p. 194; Annual Digest, 1927-1928, p. 253.

(Text of decision omitted.)

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GEORGE W. HOPKINS (U.S.A.) *v.* UNITED MEXICAN STATES.

(June 3, 1927. Pages 329-331.)

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NON-PAYMENT OF MONEY ORDERS. Claim for non-payment of money orders *allowed*, pursuant to rulings in *George W. Cook* claim and *John A. McPherson* claim.

OWNERSHIP OF CLAIM. Any doubt as to his ownership of the claim should be dispelled by claimant.

*Cross-reference:* Am. J. Int. Law, Vol. 22, 1928, p. 194.

*Nielsen, Commissioner:*

1. Claim is made in this case by the United States of America in behalf of George W. Hopkins to recover the sum of 1,013.40 Mexican pesos or its equivalent, the aggregate amount of six postal money orders which are alleged to be the property of the claimant, and which were not paid upon presentation to Mexican postal authorities. The orders were issued in the year 1914. A proper allowance of interest is claimed on the said sum of 1,013.40 pesos. A motion to dismiss this claim was filed by Mexico on December 16, 1925, and was overruled by the Commission on March 31, 1926. The case is before the Commission for final decision.

2. One of the money orders, in amount 23.40 pesos, is payable to Hopkins Studio. Two others, each in the amount of 200 pesos, were issued in the name of George W. Hopkins, and were indorsed to the *Banco Germánico de la América del Sur* of Mexico City. It is clear from the record that the indorsements were made for purposes of collection. I think that, conformably to the principles underlying the decision of the Commission in the case of *George W. Cook*, Docket No. 663,<sup>1</sup> and the decision in the case of *John A. McPherson*, Docket No. 126, an award should be rendered in favor of the claimant for the value of these three orders, namely, 423.40 pesos, or \$211.06, currency of the United States, with interest at the rate of six per centum per annum from June 6, 1914, the date of the last order, to the date on which the last award is rendered by the Commission.

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<sup>1</sup> See page 209.

3. The other three orders were made payable to the *Banco Germánico de la América del Sur*, and were indorsed to The Davidson Co., S. A. In view of the uncertainty in the record with respect to the circumstances surrounding the purchase of these orders, I am of the opinion that no award should be made in favor of the claimant for the value which they represent. They are mentioned in a long list of orders contained in a letter sent by the *Banco Germánico de la América del Sur* to Davidson in which the latter is notified that the orders listed could not be collected. The necessity for certainty in the evidence in a case of this character was discussed in connection with the decision of the Commission in the case of *John A. McPherson*, Docket No. 126.<sup>1</sup> It would seem that it should have been possible for the claimant to produce evidence of his relations with Davidson and with the *Banco Germánico de la América del Sur* such as copies of communications establishing the relationship of agency, copies of instructions by the principal to the parties acting for him, and certified copies of entries in the books of any or all of the parties to the transactions in question which might have served to clarify the important point which is presented to the Commission.

*Van Vollenhoven, Presiding Commissioner :*

I concur in Commissioner Nielsen's opinion.

*Fernández MacGregor, Commissioner :*

I concur in Commissioner Nielsen's opinion.

#### *Decision*

The Commission decides (1) that the claim must be disallowed with respect to the three money orders issued in the name of the *Banco Germánico de la América del Sur* of Mexico City, totaling the amount of 590 pesos; and (2) that with respect to the three other money orders the Government of the United Mexican States shall pay to the Government of the United States of America on behalf of George W. Hopkins the total amount of the orders, namely, \$211.06 (two hundred and eleven dollars and six cents) with interest at the rate of six per centum per annum from June 6, 1914, to the date on which the last award is rendered by the Commission.

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#### H. G. VENABLE (U.S.A.) *v.* UNITED MEXICAN STATES.

*(July 8, 1927, concurring opinion of American Commissioner computing damages in a different amount, July 8, 1927, concurring opinion of Mexican Commissioner, July 8, 1927. Pages 331-392.)*

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INTERFERENCE WITH CONTRACTUAL RELATIONS.—WRONGFUL DETENTION OF PROPERTY.—RESPONSIBILITY FOR ACTS OF RAILWAY SUPERINTENDENT.—PROXIMATE CAUSE. The National Railways of Mexico, under government control, granted the use of its tracks to four locomotives owned by Illinois Central Railroad Company and leased to two American companies, of one of which claimant was president. Superintendent of said National Railways of Mexico by wire ordered that such locomotives

<sup>1</sup> See page 218.



be not permitted to leave Mexico, thereby preventing their return to owner in accordance with provisions of lease. Such locomotives thereafter remained in Mexico and became substantially valueless, despite efforts of claimant to procure their return. *Held*, respondent Government was responsible for such losses and damages as were an immediate and direct result of superintendent's order.

**DETENTION OF PROPERTY NOT A PART OF BANKRUPTCY ESTATE.**—INTERNATIONAL STANDARD. Facts *held* not sufficient to establish a failure to meet international standards when locomotive engines not belonging to debtor were attached for debts.

**RESPONSIBILITY FOR CARE OF PROPERTY IN CUSTODY OF BANKRUPTCY COURT OR OFFICIALS.**—OBLIGATION TO RELEASE PROPERTY NOT PART OF BANKRUPTCY ESTATE. When it was apparent to bankruptcy court and officials that property in their custody was rapidly deteriorating through theft, complete inaction on the part of the court will entrain the responsibility of respondent Government.

**MEASURE OF DAMAGES, INDIRECT RESPONSIBILITY.** Where Mexican court and railway officials stood passively by while railway locomotives leased by claimant's company were being dismantled by thieves, resulting in their destruction, respondent Government will not be held accountable for full value of each engine thus destroyed, since engines were not in its personal custody, but only for a lesser sum, since respondent Government was only indirectly responsible.

**RAILWAY COLLISION.**—RESPONSIBILITY FOR LOSSES SUFFERED DURING OPERATION OF TRAINS BY NATIONAL RAILWAYS OF MEXICO. Evidence *held* insufficient to establish fault on part of crews of National Railways of Mexico in connexion with a wreck of a railway locomotive in a collision.

**CLAIM FOR EXPENSES.** Claim for attorneys' fees and travel expenses, incurred after deterioration of locomotives, in custody of bankruptcy court, was discovered, *allowed*.

*Cross-references:* Am. J. Int. Law, Vol. 22, 1928, p. 432; Annual Digest, 1927-1928, pp. 229, 279.

*Comments:* Joseph Conrad Fehr, "International Law as Applied by the U.S.-Mexico Claims Commission," A.B.A. Jour., Vol. 14, 1928, p. 312 at 315.

*Van Vollenhoven, Presiding Commissioner:*

1. This claim is asserted by the United States of America on behalf of H. G. Venable, an American national. On April 18, 1921, a company of which Venable was president had, together with a company of which one E. S. Burrowes was president, entered into a contract with the Illinois Central Railroad Company at Chicago, Illinois, U.S.A., for the rental of some locomotives to them for use in Mexico, and a few days before, on April 13, 1921, Burrowes in his personal capacity had entered into another contract with the Mexican National Railways allowing him to use the Mexican tracks with these locomotives. About April 20, 1921, four locomotives were delivered, and in May they entered Mexico. On July 22, 1921, however, the Central Company under the contract requested the return of these four engines; in case of failure to do so either Burrowes' company

or Venable's company—the choice between them to be made by the Central Company in its discretion—would be subject to a high penalty. When, for this reason, Venable tried to have the engines leave Mexico, a Mexican railway superintendent by name of C. C. Rochin intervened, at Burrowes' request, by a telegram of September 3, 1921, which forbade his railway personnel to allow these engines and ten other ones to leave Mexican territory and from September 3 to 7, inclusive, 1921, the four locomotives were several times attached by the Court at Monterrey, Nuevo León, Mexico, for liquidated debts of Burrowes' company. On September 17, 1921, Burrowes' company, at Venable's request, was declared a bankrupt, the attachments then being consolidated for the benefit of the bankruptcy proceedings. Repeated demands made by Venable failed to effect the release of the engines; on the contrary, they were retained in the railway yard at Monterrey, where, after a few months, three of them appeared to have been deprived of so many essential parts as to have become practically useless. Even before these occurrences, on August 21, 1921, one of the four engines had been wrecked in a railway collision for which, it is alleged, Mexico is liable. Since finally Venable had to indemnify in the sum of \$154,340.10 the National Surety Company, which had secured the Central Company against its losses; and since he had incurred other expenses in connection with the facts which constitute the basis of this claim, the United States alleges that Mexico is liable to him in the amount of \$184,334.84, with interest thereon, on account of direct responsibility for Rochin's injustice, direct or indirect responsibility for the Court's action, direct responsibility for three engines having been destroyed in the railway yards, and direct responsibility for one engine having been destroyed in a collision.

2. As to the nationality of the claim, which is challenged, reference may be made to the principles asserted in paragraph 3 of the Commission's opinion in the case of William A. Parker (Docket No. 127), rendered March 31, 1926. On the record as presented, the Commission should hold that the claimant was by birth, and has since remained, an American national.

3. In order successfully to analyze the facts in this case, it is indispensable to establish first the contents of three contracts. The first one, a railway traffic contract of April 13, 1921, between, on the one part, the National Railways of Mexico (under government control) and, on the other part, Burrowes, was the contract under which the railway company was to use its tracks for the transportation of merchandise of Burrowes and to this end to use the locomotives imported or otherwise controlled by Burrowes. By the second contract, that of April 18, 1921, the Illinois Central Railroad Company agreed to lease, for use in the handling of freight traffic on certain lines of the National Railways of Mexico, six locomotives, to a combination of two companies, (*a*) the Burrowes Rapid Transit Company (Burrowes, president) and (*b*) the Merchants Transfer and Storage Company (Venable, president). In fact, as stated before, only four engines were delivered. The third contract is that of the same date of April 18, 1921, between the Illinois Central Railroad Company on the one part and, on the other part, Burrowes' company, Venable's company, and the National Surety Company, in which the three companies severally obligated themselves to a penalty of \$150,000.00 in case of nonfulfillment or improper fulfillment of the return of the engines under the contract.

4. About April 20, 1921, four locomotives were delivered by the Central Company to Burrowes' company and Venable's company at New Orleans, Louisiana, U.S.A.; and from the middle of May, 1921, to July 22, 1921, they apparently operated in Mexico without any occurrence or accident.

*Burrowes and Venable*

5. Before examining the details of this complicated case it may be prudent to make a preliminary remark. The record before the Commission doubtless reveals a series of acts on the part of Burrowes which attempted to injure Venable's business interests; acts in which Burrowes saw fit to involve Mexican authorities, either with or without fault on their part. The record, however, does not disclose Burrowes' motives and views. Apparently between May, 1921, and August, 1921, a serious friction had developed between the two men. Was Burrowes the first of them to attempt measures against the other? There is something quite enigmatic in the position taken by the Illinois Central Railroad Company. On July 22, 1921, it forwarded to Burrowes' company a *telegram* demanding the return of the four locomotives *within fifteen days*, i.e., on or before August 7; but in the fall of 1921, when it was advised that it could receive these engines from Monterrey if only it applied to the Court, it declared that it had no interest in doing so; and even as late as the first part of November, 1921, it did not show anxiety to have them. It would, therefore, seem to be not altogether improbable that the Central Company had not in July, 1921, requested the engines on its own initiative and from its own desire, but on the instigation of some one else. The locomotives were indispensable for the private freight transportation business Burrowes was conducting in Mexico; in a telegram of August 29, 1921, Burrowes contended: "Rapid Transit blown up action Venable and Waldrop" (Waldrop was the vice president both of Burrowes' company and of Venable's company); and it is clear from the record that late in August Venable was trying to have the engines returned to the United States without consulting Burrowes or informing him. In the same way Burrowes' instigating executory processes and attachments *in Mexico* against his own corporation may have been a counter act against Venable's request of a receivership before the *Texas* court. This means that it is not for this Commission—and that, on the record as it stands, it could not even do so with knowledge of facts—to consider whether Venable is justified to complain of Burrowes' attitude, or whether Burrowes might have been justified to complain of Venable. The Commission should eliminate all considerations of moral approbation or disapprobation of what either American citizen planned and did, and merely inquire whether Burrowes, in the course of execution of his scheme, induced Mexican authorities or others acting for Mexico to perform on their part acts resulting in injustice toward an American citizen, or even whether these authorities did so spontaneously.

*Rochín's telegram*

6. The first question before the Commission is that concerning Rochín's telegram of September 3, 1921; whether he was obliged or entitled to send it. It was argued by Mexico before the Commission, on the one hand, that Rochín in forwarding this telegram had in view the safeguarding of interests and rights of the National Railways of Mexico; that he did so under the

provisions of the railway traffic contract of April 13, 1921; and that in doing so he executed a *right*, not a duty. On the other hand, however, it was alleged by Mexico that Rochín merely acted under instructions from the owner of the locomotives or the man whom he might consider to be so (Burrowes), that he only meant to safeguard interests and rights of this private American citizen, and that it was his *duty* to do so, since a refusal on his part to act would have amounted to an interference in Burrowes' private affairs quite as much as his action did. There has not been alleged that Rochín acted under the emergency provision of Article XXI of the railway traffic contract, nor that he acted in connection with temporary exportation permits granted Burrowes' company by Mexico.

7. It would seem untenable to maintain that Rochín in sending his telegram acted under Article VI and VII of the contract providing that no Burrowes cars should be removed or rebilled until such unpaid freight charges as were due to the National Railways of Mexico should have been liquidated. If this had been the motive for his action, the evidence doubtless would have shown (*a*) that he had personal knowledge of the existence of unpaid charges in a sum of some importance, (*b*) that the order purported to prevent the "removing or re-billing" of the cars, (*c*) that the order would be canceled after payment of said charges, and (*d*) that, when the Burrowes Rapid Transit Company was declared a bankrupt, he (Rochín) joined the other creditors and presented his claim. For none of these contingencies is there proof or even probability. As to non-payment of due charges, there is nothing in the record except one Toussaint's statement of September 2, 1921, to Rochín's assistant Carpio that Burrowes' company was on the verge of bankruptcy, that he advised him to protect the interests of the National Railways with respect to unpaid freights, and that he did not know the amount due. A statement made by Venable to the District Court at Laredo, Texas, U.S.A., on September 1, 1921, that Burrowes had collected freights in advance on property being transported by Burrowes' company "and not paid same to cooperating railway lines, as he should have done", can not possibly have been known to Rochín on September 3, 1921, and neither contains the necessary elements for any governmental action. In the second place: Rochín's order did *not* prevent "removing or re-billing" of the cars, but exclusively their leaving Mexican territory. In the third place: the telegram did *not* establish that it would lose its effect once the charges would be paid, but it merely referred to an ulterior authorization by Ocaranza Llano, who was director general of the National Railways of Mexico and Rochín's chief in the railway management. In the last place: no claim in the bankruptcy proceedings against Burrowes' company was filed by the National Railways until some time between 1922 and March, 1926, and then for an amount of 12,957.63 Mexican pesos, for the payment of which sum it would not have been necessary to retain fourteen locomotives. From all of this there can only be one conclusion, to wit, that Rochín's telegram did not purport to protect any claim of the National Railways as against Burrowes' company.

8. There remains the other possibility: that Rochín acted under instructions from the man who apparently controlled the locomotives and whom he may have considered to be the owner, and that he even was obliged to obey these instructions. The evidence before the Commission would seem to render this second explanation improbable. If Rochín had acted

with this purpose, it would have been but natural for him to wire "do not permit the engines to cross the border unless Mr. Burrowes authorizes it", but he did so only on or about September 23, 1921, even then not saying "Burrowes" but "the owner". Instead of that, he ordered on September 3. not to release them "unless Mr. Ocaranza authorizes it". If Rochín had wired on behalf of the owner, there might have been expected some explanation by Burrowes regarding the reason why he could not act himself, and what was the name of the Mexican railway official who disobeyed his legitimate orders, and on what ground he disobeyed. Instead of that, Toussaint's letter of September 2, 1921, only establishes that the Mexico office of Burrowes's company had been the victim of some undisclosed frauds on the part of their managers at the boundary. If Rochín had wired on behalf of the owner, there might have been expected the production of some evidence which locomotives were either owned by Burrowes or under his control; instead of that, there is nothing except a unilateral statement in Toussaint's letter of September 2, 1921, designating the four locomotives rented from the Central Company and ten other engines. If Rochín had wired under instructions of the owner, he could only have ordered a measure the owner was entitled to order; and there can be no doubt but that a prohibition to let movable property leave the country except by authorization of a high Government official (Ocaranza Llano) was a remedy which could not have been applied by Burrowes himself. Rochín certainly was under no duty to comply with Burrowes' demand. There is no provision whatsoever in the contract either obliging the National Railways to act for the interests of Burrowes' company (apart from allowing them to use their tracks), or authorizing the National Railways to apply in behalf of Burrowes any remedy which Burrowes could not apply himself. Rochín being an official in an important and responsible position should have understood, supposing even that he was entirely unaware of Burrowes' intentions, that it might be dangerous for him to act as he did without having acquired sufficient information as to the reasons for Burrowes' request, at first sight inexplicable; the more so as he was advised that Burrowes was on the verge of being declared a bankrupt (as a matter of fact not bankruptcy, but receivership had been ordered on September 1. 1921), and as he should have realized the uncertainty as to Burrowes' rights to dispose of his effects at the time he applied to Rochín. If Burrowes some day had cabled to Rochín "see to it that fourteen locomotives in which my company is interested immediately leave Mexico", is it thinkable that Rochín would have used his official power to obey this command, or would he not have left this affair entirely to the activity and responsibility of Burrowes himself?

9. It is true that Rochín under the contract was not obliged to consider other American contract rights than those of Burrowes' private freight transportation business. But acting outside of the contract, he should take care not to violate other contract rights vested in any national or foreigner. If, acting without right or authorization, he damaged any such contract right—in the present case: Venable's—his being unaware of its existence would not exclude or diminish Mexico's liability for what this official of the National Railways (under government control) illegally did. Direct responsibility for acts of executive officials does not depend upon the existence on their part of aggravating circumstances such as an outrage, wilful neglect of duty, etc.

10. What was the damage caused by Rochín's telegram? Linked up with subsequent occurrences, his telegram may have been the cause of all the mishap of the claimant relative to the three engines which on September 3, 1921, were in good condition, and of part of the mishap with the fourth engine which had been wrecked in August; though it is uncertain where the three engines were on September 3, and whether they might not at the time of the attachment by the Court have been on Mexican territory even without Rochín's telegram. It is clear, however, that only those damages can be considered as losses or damages caused by Rochín which are immediate and direct results of his telegram; see the award in the *Lacaze* case between Argentine and France under the decree of December 17, 1860 (*De Lapradelle et Politis*, II, 298), and paragraphs 13 and 14 of the first opinion in the *Francisco Mallén* case (Docket No. 2935). Every day of delay in returning the four engines to the Illinois Central Railroad Company might have caused the claimant's company a loss of \$140.00 and, apart from that, obstacles against his returning them after August 7, 1921, might have resulted in imposing on the said company an obligation to pay the \$150,000.00 due under the contract in case of nonfulfillment or improper fulfillment of the duty to return the engines in good condition and in time. An element of uncertainty, however, proceeds from the fact that the Illinois Central Railroad Company never claimed any amount of \$140.00 per day for the period elapsed after August 7, 1921; and that it was not until November 15, 1921, after all of the important events subsequent to Rochín's telegram had occurred, that the Central Company really claimed the contractual penalty for the four engines. It is difficult, therefore, to make the money value of the damage caused by Rochín's act the object of a precise calculation.

*The bankruptcy proceedings*

11. The second problem before the Commission is that concerning the attitude of the State Court at Monterrey, Nuevo León, in its bankruptcy proceedings against Burrowes' company.

12. On July 22, 1921, the Central Company had requested the return of the four engines, a request which if complied with (as was Burrowes' duty) apparently would have destroyed an important part of Burrowes' transportation business. On August 1, 1921, Burrowes' company had taken over the similar business of the Brennan, Leonard and Whittington Transportation Company, including the use of ten more engines. On September 1, 1921, Venable, before the 49th Judicial District Court of Texas at Laredo, Texas, had requested the appointment of a receiver for Burrowes' company, and this request had been granted the same day. On September 1 and 2, 1921, one R. L. Bateman, a creditor of Burrowes' company, requested the said Court at Monterrey to attach the property of Burrowes' company for a liquidated and unpaid debt. Bateman's request appears to have suited Burrowes' plans; instead of opposing it, he recognized at his earliest opportunity—on September 3, 1921, late in the afternoon—that indeed he had discontinued paying his debts. The relation between the requests made at Laredo and at Monterrey has been touched upon in paragraph 5. On September 15, 1921, Venable demanded the Court at Monterrey to adjudicate the bankruptcy of Burrowes' company; the Court granted this request on September 17, 1921, appointing a lawyer, Leal Isla by name,

provisional *síndico* (trustee) and one Morales Gómez *interventor* (controller or supervisor). Leal was the Monterrey lawyer of the National Railways of Mexico.

13. The legal difficulties had begun when on September 3 to 7, inclusive, 1921, goods belonging to the debtor company had been attached by the clerk of the Court. Under Mexican law creditors are entitled to point out which effects they desire to see attached, and the debtor has the right to present objections. In the present case Burrowes as president of the debtor company designated for attachment "the entire business represented by him" (*toda la negociación por él representada*); whereupon Bateman and, after him, some other creditors demanded that, apart from a few goods of minor importance, out of the fourteen locomotives controlled by Burrowes' company—see paragraph 7—either the four engines leased by the Central Company or the three undamaged ones should be attached. The clerk of the Court did not inquire whether they were part of "the entire business" of the debtor company, but merely established that Burrowes had three days to object to said execution. Burrowes never objected, but, on the contrary, requested that "the properties designated by the parties and which are enumerated in the foregoing writ of attachment" be declared "to be formally attached". So the Court did on September 3, 1921, and following days. On September 17, 1921, these several attachments were consolidated into one attachment for bankruptcy.

14. In attaching the four engines for the debts of a company which did not own them the clerk of the Court may have made the slight oversight indicated in paragraph 13; but the mistake is entirely due to an unreliable statement of Burrowes. No fault can be imputed to the Court, and certainly not a defective administration of justice amounting to an outrage, bad faith, wilful neglect of duty, or apparently insufficient governmental action (see paragraph 4 of the Commission's opinion in the *Neer* case, Docket No. 136, rendered October 15, 1926).

15. The present claimant, Venable, then began his determined efforts to get these four engines free from the attachment. In order to be represented among the creditors and to be entitled to request bankruptcy proceedings, he bought, on the advice of his Mexican lawyer, the claim of one of the company's creditors, the firm of A. Zambrano e Hijos. It has been argued by Mexico that, acting on the advice of his Mexican lawyer, he failed to take the steps required by Mexican law in the forms required by Mexican law, and took other steps which according to the laws of procedure and bankruptcy never could make him attain his end. It is most unsatisfactory to state that he was the victim of either lack of knowledge or of application on the part of his lawyer; but Mexico can not be held liable on that ground. He moreover was the victim of the fact that the Illinois Central Railroad Company, which successfully could have required the release of the engines in the Monterrey Court, was unwilling to act (see paragraph 5).

16. Of these court proceedings four parts would seem open to criticism. When Venable instituted a suit against the *síndico*, the Court, instead of clinging to the periods of the law, accepted an answer filed by this *síndico* fifteen days late. In the second place: the Judge in the court room had private conversations on the case with Venable, his lawyer, and the *síndico*, in which he indulged in making a kind of informal ruling as to the party authorized to claim release of the engines (the Central Company only),

but in which he never told the claimant that he did not live up to the forms of Mexican law and that there lay his trouble. It would seem more appropriate for a Judge not to allow such interviews; but once he does, he should not be silent on a vital point which he might have indicated without committing himself. In the third place: a request of the Court itself addressed to the Mexican Land Registration Office on October 28, 1921, was allowed to remain unanswered, though a reply was indispensable for the continuation of the suit filed by Venable against the *sindico*. In the fourth place: the Court did nothing to bring the bankruptcy proceedings to an end, allowed them to remain at a standstill, did not direct the *sindico* to account for his acts nor for the custody of the goods trusted to his care. The first of these four objectionable acts can not be said to amount to so serious a deviation as to constitute a mal-administration of justice as mentioned at the end of paragraph 14. Nor can the second and third acts. The fourth act will be considered under paragraph 23. As to the details of the court proceedings, I refer to paragraphs 4 to 13, inclusive, of Commissioner Fernández MacGregor's opinion, in which I concur.

17. Supposing the choice of Leal as *sindico* was not a happy one, the Court can certainly not, on the record, be blamed because of the mere fact that a lawyer of the most important railway corporation was chosen as trustee in the bankruptcy proceedings against a company doing business relative to railways. Leal's proposal of October 4, 1921, temporarily to lease the engines to one of two applicants both alien to the National Railways can not be represented as meaning a prejudiced act intending to promote, not the interests of the estate, but of his railway corporation.

18. Since for those parts of Mexican law which are involved in the present case much depends upon the knowledge and trustworthiness of lawyers, satisfactory results of the administration of justice are not to be expected if, indeed, as it would appear from the record, even in important centres of Mexican life lawyers of good standing are not or were not up to the usual standards. Statutes following the type of French law, as it was adopted in Napoleon's day, can not work well unless the lawyers in the country where such statutes are in force correspond to what lawyers were and are in France and similar countries; and if a nation can not feel sure of that, it should in its legislation grant a larger power to its Judges, even in civil suits, as has been done in the legislations of parts of Asia, where the same difficulty existed.

19. The conclusion should be that the court proceedings at Monterrey, though presenting an unattractive picture of how legal provisions were allowed to be misused in support of bad intentions, do not show a defective administration of justice such as might give ground for their being stigmatized by an international tribunal.

#### *The destruction of the three engines*

20. On September 3, 1921, the four locomotives, three of which had continued to be in good operating condition, were attached for debts of Burrowes' company; on September 17, the attachments were consolidated and the engines were given in custody to a *sindico* or bankruptcy trustee. From September 3, 1921, until further provision to the contrary, the owners and other private persons interested in the engines lost their power over them. It is established by the record that the engines at all times were left



in an unprotected position, exposed to the weather; that up to October, 1921, they had been well preserved; but that before June, 1922, and particularly before June, 1925, so many parts of prime importance had been removed or injured that the engines had been reduced to a practically worthless condition. The question before the Commission is whether under international law these circumstances present a case for which a government must be held liable.

21. There could have been no hesitation to answer in the affirmative if the goods had been taken into custody by Mexican officials or other persons "acting for" Mexico. Then a direct responsibility of the government would have been involved. In paragraph 4 of its opinion in the *Nick Cibich* case (Docket No. 14)<sup>1</sup> the Commission held that Mexican police officers having taken a man's money into custody must account for it and would, apart from further complications, render Mexico liable if they did not. In paragraph 3 of its opinion in the *Quintanilla* case (Docket No. 582)<sup>2</sup> the Commission held that, once a government has taken into its custody war prisoners, hostages, interned soldiers, or ordinary delinquents, it is obliged to account for them. The opinion in the *Toberman, Mackey & Company* case (Docket No. 17) has no bearing on the present problem, since a real custody of imported goods in the hands of customhouse officials was held not to have existed in that case. In the *Lord Nelson* case before the British-American arbitral tribunal the United States was held responsible for the embezzlement of funds in custody of the clerk of a federal court (Nielsen, *Report*, 433-434).

22. The present situation, however, is different. When a court places a bankrupt estate in the custody of some kind of trustee (in Mexico; a *sindico* and an *interventor*), it does the same thing for an estate that it does for specific goods of a debtor when allowing a plaintiff to attach them in order to preserve for his benefit property on which eventually to execute a future award rendered in his favor. Such goods are not taken into custody by the courts themselves; a private citizen is appointed trustee, acting for the benefit of the plaintiff, or the plaintiff himself is appointed for this purpose. Likewise, in many countries a bankruptcy trustee, such as the Mexican *sindico*, can not be considered as an official, or as one "acting for" the government; he acts "as representative of the creditors" (Ralston, *Venezuelan Arbitrations of 1903*, 172). The *Institut de droit international*, in the rules on bankruptcy law it adopted in 1902 in its session of Brussels, styled persons like this Mexican *sindico* "the representatives of the estate" (*les représentants de la masse*; Articles 4 and 5). The draft convention on bankruptcy law inserted in the final protocol of The Hague conference on private international law of October-November, 1925, attended by delegations from twenty-two states (including Great Britain), established in its Article 4 that the syndic can take all conservatory measures or administrative measures and execute all actions "as representative of the bankrupt or of the estate" (*comme représentant du failli ou de la masse*). It is true that the British delegation left this conference before its close, but not because of any difference of views as to the position of the trustee; and, moreover, in the present case the position of the bankruptcy trustee should be considered in the light of Mexican, not of Anglo-Saxon, law. In countries with bankruptcy legisla-

<sup>1</sup> See page 57.

<sup>2</sup> See page 101.

tions such as the Mexican code contains, direct responsibility for what happens to the bankrupt estate lies not with the government. In the present case it rested either with Familiar, a railway superintendent at Monterrey, under whose care the engines had been placed at the time of their attachments and under whose care they had been left on October 4, 1921, by the *sindico* Leal; or the responsibility rested with this *sindico*, appointed by the Court on September 17, 1921, or with the combination of *sindico* and *interventor*. Laws like that of Mexico intentionally refrain from laying the heavy burden of these responsibilities on personnel of the courts. I concur with respect to the problem of the position of the Mexican *sindico* in paragraph 16 of Commissioner Fernández MacGregor's opinion.

23. Though the direct responsibility for what befalls such attached goods does not rest with the courts and the government they represent, because these are not the custodians, a heavy burden of indirect responsibility lies upon them. The Government obligates owners and other persons interested in certain goods to leave the care of these goods entirely to others; it temporarily excludes these owners or other persons interested from interference with their goods; it constrains them to allow custodians to handle them as these custodians think legal and fit. Here, conformably to what was held in the *Quintanilla* case, a Government can not exculpate itself by merely stating that it placed the goods in someone's custody and ignores what happened to them. The Court at Monterrey had "to provide for the preservation of the bankrupt estate", and the appointment of a provisional *sindico* and of an *interventor* had this special purpose (Article 1416, Mexican Code of Commerce of 1889). Through the *interventor* the Court could execute its control on the acts of the *sindico*. Through the prosecuting attorney the Court had to be vigilant against crimes. It had to see to it that the bankruptcy proceedings went on regularly and were brought to a close within a reasonable space of time. The Court at Monterrey seems not to have realized any of these duties. At a time when everybody could see and know that the three engines were rapidly deteriorating because of theft in a most wanton form, the less excusable since it could not have been accomplished unless by using railroad machinery specially adapted for such purposes as the dismantling of locomotives, no investigations were made by any prosecuting attorney, no prosecutions were started, no account was required from the custodian appointed by the *sindico*, nor from the *sindico* himself, and nothing was done to have the bankruptcy proceedings wound up. Even if, here was not wilful neglect of duty, there doubtless was an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether this insufficiency proceeded from the law or from deficient execution of the law is immaterial. The Court at Monterrey can not plead innocence; having constrained private individuals to leave their property in the hands of others, having allowed unknown men to spoil and destroy this property, and not having taken any action whatsoever to punish the culprits, to obtain indemnification, to have the custodians removed and replaced, or to bring the bankruptcy to an end, it rendered Mexico indirectly liable for what occurred. Nor can the Court exculpate itself by alleging that no American citizen has applied to it in order to have these wanton acts investigated and to have the necessary action both against the perpetrators of crimes and the unreliable custodians started; to do such things is an essential part of proper governmental action and can not be made dependent upon private initiative.

24. The three engines according to the contract of April 18, 1921. between the Central Company, Burrowes' company, and Venable's company were valued at \$37,500.00 each. In October, 1921, an American expert calculated their value somewhat higher, to wit, at \$40,000.00 each. A proposal of the *síndico* to have the engines rented out (paragraph 17) was opposed by Venable and was never allowed by the Court; being kept unused in the railway yards, even when well protected, their value must have somewhat decreased, the custodians not being obligated to spend money in order to keep them in a first-class condition. It would seem proper, therefore, to consider the loss sustained because of the destruction of the three engines as amounting to the original valuation of \$37,500.00 each, or a total of \$112,500.00. In case of direct responsibility for engines under its own custody, Mexico should have had to indemnify in this sum, unless the occurrences could be ascribed to an irresistible calamity. Here indirect responsibility only can be fastened upon Mexico. The engines, however, were destroyed not by an act of God, but by criminal acts of men. The results of the acts were not secret or hidden; they were under the eyes of all the railway officials at Monterrey, who at the time were government officials. The crimes must have been committed not by private means, but by using railway machinery, which at the time was government machinery. It is not for the Commission to investigate who had the benefit of these removals; but there is high probability that the valuable parts of the engines were added to other engines proceeding from the same plants, as where the ninety-one locomotive engines sold by the Central Company to Mexico on April 23, 1921, and gradually delivered at New Orleans from shortly thereafter to June 28, 1921 (record of Docket No. 432). Considering all these points, the amount due because of this indirect government responsibility may be fixed at \$100,000.00 without fear of being unjust or unequitable.

25. The respondent Government has not denied that, under the Convention of September 8, 1923, acts of courts of Nuevo León may give rise to claims against the Government of Mexico. The Commission has repeatedly held that claims may be predicated on acts of state authorities.

#### *The wrecking of the fourth engine*

26. On August 21, 1921, one of the four engines had been wrecked in a collision on the railway track between Saltillo, Coahuila, and Monterrey, Nuevo León. Both colliding trains were operated by crews of the National Railways of Mexico (under government control); it is, therefore, irrelevant which crew was at fault. But were the National Railways liable for the accident? Article XXIII of the railway traffic contract of April 13, 1921, establishes that "the Railways will not be responsible for the damage suffered by locomotives, the cars or their contents by reason of accidents, fire—or for any other cause of superior force, the Second Party Contractor waiving for this effect the Articles Nos. 1440, 1442, and 2512 of the Civil Code of the Federal District". It is difficult to consider as convincing evidence of fault a mere statement proceeding from one of the mechanics that the other train was running without, or contrary to, orders. I therefore concur on this point, in paragraphs 19 to 21, inclusive, of Commissioner Fernández MacGregor's opinion.

27. The impossibility to return this engine in good condition to the owner (the Central Company) made the lessees liable, under their contracts of April 18, 1921, to an indemnification of \$37,500.00, which was actually paid. An expert estimate made on September 15, 1921, on behalf of the National Railways of Mexico stated that to put the engine in good condition would need repairs in the approximate cost of 21,000.00 Mexican pesos. It therefore would seem proper to consider the value of the engine after the collision as having amounted to \$37,500.00 minus the approximate equivalent of 21,000.00 pesos (viz, \$10,500.00), resulting in \$27,000.00. There is no evidence that, while in the Monterrey yard, this wrecked engine had some of its parts removed. Instead of ordering, under Article IX of the Convention of September 8, 1923, that this fourth engine be restored to Venable, it would seem in keeping with the interests of both parties to award on its account an amount in money representing its value (\$27,000.00) increased with a sum representing interests from the uncertain date on which, if the bankruptcy proceedings had been terminated in due time (see paragraph 23), the status of this engine would have been decided.

*Venable's present rights in the four engines*

28. Since there is no controversy between the two Governments that rights in the engines are vested exclusively in Venable at the present time and that they were so at the time he filed his claim, it is only necessary to indicate how he acquired them. The ownership of the engines was from the beginning in the Illinois Central Railroad Company. On August 15, 1922, it passed to Venable because of their transfer to him by the National Surety Company, which had paid \$154,340.10 to the Central Company under the bond proceeding from the third contract mentioned in paragraph 3 above. Venable, however, did not pay in 1922 to the National Surety Company more than \$50,780.65. was sentenced on March 6, 1923, to pay to this corporation an additional sum of \$111,743.83, and satisfied this judgment on December 7, 1926. Potential rights of three insurance companies in the engines were surrendered to Venable in contracts of July 7, 10, and 11, 1922, between them and the claimant.

*Other items claimed*

29. Venable, moreover, claims an amount of \$1,250.00, representing the sum paid by him for the claim of one of the creditors of Burrowes' company (A. Zambrano e Hijos), bought in order to enable him to request bankruptcy proceedings. Mexico can in no manner be held liable for this expense.

30. Venable claims fees of attorneys whose services he engaged either in Mexico or in the United States, in the total sum of \$20,294.74. In as far as these expenses are merely consequences of the attachments directed against Burrowes' company, they can not be linked with any illegal act of Mexico; but he should be compensated for them in as far as they relate to action taken after the deterioration of the three engines in the Monterrey railway yard had been discovered. The amounts claimed for such action of attorneys correspond with items 11 and 12 of Venable's list concluding

the Memorial, and with part of the amount under 10, in the sums of \$648.52, \$797.79, and \$2,000.00 (four monthly payments), in total, \$3,446.31.

31. Venable claims expenses for several trips, made by himself and others, in the amount of \$8,450.00. The trips made since the deterioration of the three engines was discovered caused the expenses under items 6 and 7, in the sums of \$2,200.00 and \$2,200.00, in total, \$4,400.00. The trips made in September-October, 1921, by Mims, in June, 1922, by Greenstreet, and in June, 1925, by Greenstreet and Mims, in order to establish the deterioration of the four engines, have also a bearing on facts for which Mexico should be held liable; but no indemnification is claimed on these counts.

#### *Interest*

32. The amount of \$100,000.00 for which Mexico is responsible on account of the destruction of the three engines (paragraph 24) is a lump sum for injustice inflicted and should bear no interest. Nor should any of the other amounts, apart from what has been suggested at the end of paragraph 27.

#### *Conclusion*

33. In conclusion, taking account of what has been said in the foregoing paragraphs, it would seem proper to award the claimant the sum of \$140,000.00, without interest.

#### *Nielsen, Commissioner:*

Claim is made in this case by the United States of America in behalf of H. G. Venable, in the sum of \$184,334.84. The claim is predicated, as stated on page 1 of the American brief, "on the wrongful detention and destruction of four (4) railway locomotives by the employees, agents, representatives, and officials of the 'National Railways of Mexico and Connecting Lines under Government Control', in conjunction with the Civil Court of First Instance at Monterrey, Mexico, and the Receiver and Superintendent in Bankruptcy of the Burrowes Rapid Transit Company [an American corporation, doing business in Mexico], who were serving under appointment by that Court".

The record in the case is a long one, embracing numerous copies of contractual arrangements and judicial proceedings. However, the most salient matters underlying the claim preferred by the United States can be somewhat briefly summarized from the allegations contained in the Memorial and the brief.

In 1921 E. S. Burrowes, an American citizen, entered into a contract with F. Perez, General Director of the National Railways of Mexico, under which the former obtained certain rights to use the tracks of the Railways in connection with the business of the Burrowes Rapid Transit Company, an American corporation, engaged in the transportation of freight. In carrying on this enterprise Burrowes obtained the cooperation and assistance of the claimant, Venable, who was the owner of the property of a Mexican corporation called the Merchants Transfer and Storage Company. This Company and the Burrowes Rapid Transit Company jointly leased

four locomotives from the Illinois Central Railroad Company, an American corporation. The lessees agreed to pay the Illinois Central Railroad Company \$35.00 in American currency per engine for each day while the lease was in force, and further agreed that in case the engines or any one of them should not be returned conformably to the terms of the lease, or if all or any of them should be injured so as to become unserviceable, the sum of \$37,500.00 should be paid to the lessor for each engine. The lease was subject to termination on fifteen days' notice on the part of the lessor. The two lessees, in conjunction with the National Surety Company, another American corporation, executed a bond to guarantee the proper performance of the terms of the lease, and by another undertaking the lessees pledged themselves to the National Surety Company to indemnify that company for any loss it might sustain in consequence of having executed the bond by which all the three companies pledged themselves to the Illinois Central Railroad Company.

On or about July 22, 1921, the Illinois Central Railroad Company gave notice of the termination of the lease. Difficulties evidently arose between Burrowes and Venable during the course of their business relationship. On or about August 25, 1921, Venable, having been informed of the notice of termination of the lease, took steps to return the locomotives. He was in New York City during the months of July, August, and September, 1921. Pursuant to his directions, A. G. Wittington, General Traffic Manager of the Burrowes Rapid Transit Company, sent a telegram on August 25, 1921, to P. E. Martinez, who was in charge of the office of that company at Monterrey. In this message the latter was directed to return the engines to Brownsville as quickly as possible. Martinez received the telegram and took steps to carry out the instructions therein contained, but was prevented from making delivery of the engines at Brownsville because of an order given by C. C. Rochín, Superintendent of Transportation of the National Railways of Mexico. On August 29, 1921, C. M. Hammeken, who was in charge of the Burrowes Company's offices in Mexico City, received at that place the following telegram from Burrowes:

"Rapid Transit blown up action Venable and Waldrop stop Quick have proper authorities prohibit engines leaving Republic until all freights which have been collected are paid protecting my name and yours stop Protect yourself by attaching anything on sight stop Don't draw Zambrano no funds available at all. My license still good and if freights are taken care of we can still make some money for you and I. I can get some power myself advise Ancira Hotel personal."

Hammeken explains in an affidavit accompanying the Memorial that on receipt of this telegram he went to Monterrey to confer with Burrowes, who urged Hammeken to persuade the Railway authorities to issue orders which would prevent the locomotives from leaving Mexico, so as to give time and opportunity to embargo them for debts of the Burrowes Rapid Transit Company; that to aid him (Hammeken) to have such orders issued he was given a letter addressed to an official of the Mexican National Railways; that this letter was presented to Rochín with whom Hammeken states he "had good relations"; and that thereupon Rochín sent his telegram directing the stopping of the locomotives.

Under date of September 3, 1921, Rochín sent to P. S. Alvares, Superintendent of the Northern Division of the National Railways of Mexico at Monterrey, the following telegram:

"11.05 A. M. As per instructions from General Superintendent you will not permit the following engines to cross border: Burrowes 2280, 2281, 2282, 2283, M.K.T. 502, 506, 598, 411, 413, ING 205, 229, 221 SA & AP 170 and 247 unless Mr. Ocaranza authorizes it. Please acknowledge receipt if understood."

The locomotives having been detained by the order of Rochín, the Judge of the First Court of Civil Letters at Monterrey, on September 3, issued an order of embargo on all four locomotives in connection with a proceeding instituted by R. L. Bateman, an employee of the Burrowes Rapid Transit Company, to recover a debt in the amount of 1,950 pesos alleged to be due to him from the Company.

It is alleged by counsel for the United States that Burrowes fraudulently took advantage of Hammeken's close relationship with Rochín to undertake to persuade the Mexican National Railways that the stopping of the engines would be a protection to the interests of the railways. And with reference to Rochín's order it is contended that his act in stopping the engines was illegal, extrajudicial, and improper; that Rochín clearly had notice with respect to the right of control over the locomotives and with respect to fraudulent purposes of Burrowes to prevent his co-lessee from returning the locomotives in accordance with the terms of the lease under which they had been obtained from the Illinois Central Railroad Company; and that Rochín's action resulted in a breach of the lease contract, entailing great financial loss on Venable for the consequences of which the Mexican Government is responsible in damages.

Counsel for Mexico in argument expressed the opinion that Burrowes used the court for the purpose of ruining Venable. It is undoubtedly clear from the evidence that the attachment of the locomotives was instigated by Burrowes. But counsel for Mexico differs from counsel for the United States with regard to the propriety of the action of the court in directing the seizure of the property. The latter contends that to direct execution on approximately \$200,000 worth of property for a debt of 1,950 pesos was manifestly improper; that it is clearly the purpose of provisions of the Mexican Commercial Code that property shall be seized only in sufficient quantity to satisfy a debt; and that the Code carefully guards against unnecessary seizure.

Following the seizure of the locomotives by order of the court, it appears that it was made known to the judge by Lic. Salome Botello, Mexican counsel for Venable, in a manner which is described in the Memorial and accompanying Annexes as "unofficial", that the locomotives were not the property of the Burrowes Rapid Transit Company, and that their return had been demanded by the Illinois Central Railroad Company pursuant to the terms of the lease of the locomotives. It further appears that the liability of the claimant as a joint lessee was explained to the judge, but that the judge refused to release the embargo and to permit the reexportation of the locomotives to the United States, and entered several additional orders of embargo.

Botello thereupon advised Venable that, as an expedient to meet the attitude taken by the judge that the locomotives could be released only on the demand of the Illinois Central Railroad Company, application could be made to the judge for a declaration of bankruptcy against the Burrowes Rapid Transit Company. For this purpose Venable, on the advice of counsel, purchased a draft, which had been drawn by the Burrowes Rapid Transit

Company at Monterrey on that company at Laredo, Texas, and discounted by a bank at Monterrey and had not been taken up and paid at Laredo. Application was made to the judge of the First Court of Civil Letters at Monterrey for a declaration of bankruptcy, and this application was granted by the court.

Carlos Leal Isla was appointed provisional *sindico* and Antonio Morales Gómez interventor, and the former apparently left the property in the direct charge of Francisco G. Familiar. No bond was required from any of these men to protect persons interested in the property seized.

The idea underlying the legal strategy advised by Botello in obtaining a declaration of bankruptcy against the Burrowes Company evidently was that it would be the duty of the judge under Mexican law promptly to release seized property which did not belong to the estate of the bankrupt; and furthermore, that a proper conservation of the estate of the bankrupt would make such release imperative, in view of the fact that, under the lease from the Illinois Central Railroad Company to which the Burrowes company was a joint party with the Venable Company, the Burrowes company was jointly liable with the Venable company for the entire value of all the locomotives, if delivery was not made conformably to the notice of the termination of the lease.

Venable called a meeting of creditors with the idea of effecting an arrangement for the release of the locomotives. He pointed out to the creditors that the further retention of the locomotives could be of no advantage to them, since they were not assets of the bankrupt; that, on the other hand, such retention was contrary to the interests of the Burrowes Company which was legally bound to return the locomotives. All efforts made by Venable to induce the creditors to act were fruitless. From a petition filed by Venable with the court at Monterrey it appears that the indifference of the creditors was explained as due to a feeling on their part that they could lose nothing by what might happen to an estate such as that actually possessed by Burrowes. In that petition it is further alleged that the creditors, knowing the liability of Venable towards the Illinois Central Railroad Company, hoped that he would settle their claims against the Burrowes Company in order to bring about the release of the locomotives. Venable in his petition stated that rather than submit to tactics of that kind he appealed to the court for the release of the locomotives as property which was no part of the estate of the bankrupt Burrowes company.

On September 22, 1921, the Merchants Transfer and Storage Company filed suit against the *sindico*, the court's appointee, to obtain the release of the locomotives. This suit was instituted by a pleading fully describing the ownership of the locomotives, the conditions under which they had been leased to the Venable company and the Burrowes company, the obligation of the lessees to return the locomotives to the owners, and the losses which would be sustained if delivery to the owners was not made. Copies of documents showing all these things which have been heretofore described were made part of this pleading. The court entered an order to give the *sindico* five days in which to make a reply. The *sindico* answered by filing a pleading of a technical character praying that Venable should be obliged to furnish a bond or surety, proof of the character in which he claimed the return of the property, proof of his legal representation of the Merchants Transfer and Storage Company, and an exact statement of what he prayed for. The pleading contained a long explanation of the legal basis of the so-called



dilatory exceptions interposed by the *sindico*. Counsel for Venable in turn made answer to these exceptions. These dilatory pleas were criticized by counsel for the United States as attempts to bring about delay and to harass Venable. In this connection it is pointed out that, although under the rules governing procedure before the court the *sindico* had five days from September 22nd in which to make reply, he did not file such reply until October 9th. The court thereupon allowed a period of ten days for receiving evidence. The *sindico* answered that there was no evidence to produce, and he requested the court to ask the register of the Land Office whether Venable or the Merchants Transfer and Storage Company possessed any real estate. On October 28th the court entered an order directing that inquiry be made of the Land Office regarding real estate. The record does not disclose that a report respecting that inquiry has been received up to the present time.

In September, 1921, Venable applied to a court in Texas for a receiver to take charge of the assets of the Burrowes Rapid Transit Company, which also did business in Texas with its principal office and place of business in Laredo and working offices in other places in the state. The petition filed by Venable recited the difficulties between himself and Burrowes with regard to the return of the locomotives obtained under the lease from the Illinois Central Railroad Company and contained allegations with respect to debts owing by the defendant company to the Merchants Transfer and Storage Company, liabilities which Burrowes had created against Venable and acts of the former in a reckless disregard of the interests of the latter. A copy of the lease was presented to the court. The court granted Venable's petition and appointed W. C. Greenstreet receiver. Subsequently the court issued an order reciting that the engines embargoed at Monterrey were the property of the Illinois Central Railroad Company.

Greenstreet, following his appointment as receiver, made application to the court reciting that since his appointment he had diligently endeavored to collect and preserve the records of the Burrowes Rapid Transit Company, and to obtain possession of the locomotives, but had been unable to do so because, as he believed, they were being held first, by an order of one of the officials of the National Railway Lines of Mexico, and second, by embargo proceedings in the court at Monterrey. The receiver prayed that he be authorized by the judge to make proper representations to the court and authorities in Monterrey or elsewhere in Mexico for the purpose of having the locomotives delivered conformably to the terms of the lease under which the use of the locomotives had been obtained from the Illinois Central Railroad Company. Such authority was granted by the court to the receiver. The receiver thereupon proceeded to Monterrey with Venable and Mexican and American counsel and attended a hearing at that place before the judge of the First Civil Court and the *sindico*, Isla, and presented to the court orders of the Texas court establishing that the engines were owned by the Illinois Central Railroad Company. Information was also given to the court respecting the authority conferred by the Texas court on Greenstreet to request the Monterrey court to release the locomotives, the demand of the Illinois Central Railroad Company for the delivery of the locomotives, and the relations between the Merchants Transfer and Storage Company and the Burrowes Company.

In an affidavit which is found in the record, Greenstreet stated that he heard the judge of the First Civil Court at Monterrey state that he was convinced that the locomotives belonged to the Illinois Central Railroad

Company and were not liable for the debts of the Burrowes Company; that he recognized that the detention of the locomotives in Monterrey was a great injustice to Venable and the Merchants Transfer and Storage Company, which would result in serious loss; but that he could not enter an order for the release of the locomotives, but indicated he would do so on a request from Isla. In the same affidavit it is stated that Isla declared that he also was convinced of these same facts with regard to the ownership of the locomotives, and the responsibility on the part of Venable for their return; that should the judge of the First Civil Court at Monterrey direct the release of the engines, he, Isla, would carry out the order; but that he would not ask for it.

On December 26, 1921, Botello filed another petition calling attention to the status of the locomotives and to the expiration on December 31st of that year of a permit for the reexportation of the locomotives without the payment of duties, so that this information might be brought to the attention of the *sindico* and the supervisor, with a view to the release of the locomotives. It does not appear that any action was taken with respect to this petition.

The locomotives having been received by Isla, who was appointed *sindico*, and who was a legal representative of the Mexican National Railways at Monterrey, they were in turn by him placed in the hands of Francisco G. Familiar, a superintendent of the Mexican National Railways. It is shown by evidence in the record that the locomotives, while so held, were dismantled. The record contains an affidavit made by Greenstreet giving details of his examination of the engines, and incorporating statements of approximately 15 pages of itemized articles that had been stolen. The record contains other sworn testimony of a similar nature. Greenstreet in his affidavit states that during the occasions of his inspection of the locomotives he heard conversations among the employees of the National Railways of Mexico, and was told by them that the parts of the locomotives which were missing had been removed by them and other employees of the National Railways of Mexico and used by the Railways. It is represented by counsel for the United States that such was obviously the fact; that the parts removed were of such a character that they could only have been taken by persons in control of apparatus for handling locomotives such as mechanism that could lift a locomotive; that obviously the parts removed were taken to be used in repairing other similar locomotives owned by the Mexican National Railways, and that, the Railways being under Government control, the Mexican Government profited greatly by the dismantling of the locomotives. It is not denied in behalf of Mexico that the locomotives were dismantled, but it is stated that there is no evidence proving that the Railways were responsible for the damages inflicted. It seems to be impossible to escape the conclusion that the parts removed were used in repairing other locomotives. Moreover, it would of course have been a very simple matter to obtain evidence on this point from persons connected with these serious matters, and assuredly that would have been a logical and very important thing to do. The locomotives were in such a condition that American insurance companies which had insured them against theft, destruction, and detention adjusted their risks without any contest with respect to liability.

The contentions advanced by the United States appear to involve three fundamental points: (1) The propriety of Rochín's order in stopping the

movement of the locomotives, (2) the propriety of the judicial proceedings before the court at Monterrey, (3) the theft and destruction of the locomotives. Wrongful action on the part of Mexican authorities resulted, it is alleged, in an interference with contractual rights of the claimant and consequent great financial loss.

I am of the opinion that the action of Rochín must be regarded as illegal and improper, irrespective of what may be the information or motive that prompted it. Mistaken action can not properly be asserted as a legal defense against liability predicated upon what Rochín did. See the case of the *Costa Rica Packet*, Martens, N.R.G., 2d Ser. XXIII (1898), pp. 48, 715, and 808; case of the *Union Bridge Company* under the Special Agreement of August 18, 1910, between the United States and Great Britain, *American Agent's Report*, p. 376; cases of the *Jessie*, *Thomas F. Bayard*, and *Pescawha*, *ibid.*, p. 479. Rochín's action was an interference with the rights of Venable and the rights of the Illinois Central Railroad Company. In matters pertaining to the contract made by Burrowes with the Mexican National Railways, officials of the latter would naturally deal with Burrowes or his agents. However, when Rochín was requested to prevent the engines from leaving Mexico, it does not seem to be conceivable that he should not have appreciated that he was dealing with a most unusual situation which required caution and full information as to the facts in relation thereto. That he had such information is to my mind made clear by the evidence. Testimony of Rochín on this point was not produced by Mexico. C. M. Hammeken, in an affidavit, swears that he explained to Rochín that it was desired to have the engines held on the latter's order, so that they might be attached by the court. There appears to be no provision in the Burrowes-Perez contract under which Rochín had either the right or the duty to stop the locomotives. It is not shown by any record in the case that the court at Monterrey gave effect to any rights asserted by the Railways under the contract. And, in any event, the seizure of the locomotives by administrative officials does not appear to be a proper assertion of such rights. It may be observed, although the point is not a material one, that it would seem that Rochín must have known that Burrowes was merely a lessee. It would be a most unusual state of affairs if Burrowes or his company had been a private owner and manufacturer of locomotives in Mexico. It would likewise seem that Rochín was informed concerning the rights of both Venable and the Illinois Central Railroad Company.

From the hands of the administrative officials of the Railways under Mexican control the locomotives passed under the control of Mexican judicial authorities. Whatever may be said of the standing of the attachment proceedings in international law, they seem clearly to have been of an unusual character. Bateman brought proceedings to collect approximately \$900.00 from the Burrowes company, who admitted the debt. Burrowes designated for attachment "the entire business represented by him". The court thereupon authorized the seizure of approximately \$200,000 worth of property, not belonging to that company, to secure a debt of \$900.00. Article 1395 of the Mexican Commercial Code which designates the kinds of property and the order in which such property may be taken to satisfy debts seems clearly to contemplate that property shall be seized only in sufficient quantity to satisfy the debt claimed. No examination appears to have been made with regard to the ownership of the property seized. No reasons such as prior liens or attachments were given for the seizure of this large amount of property. No bonds were given to

indemnify anyone for losses that might be sustained as a result of the attachment.

The bankruptcy proceedings which followed the attachment proceedings are to my mind likewise of a most unusual character. It happens occasionally that possession is taken of property which is not part of the assets of a bankrupt. This occurs when among property in the custody of a bankrupt are found things which may not have passed to the actual legal ownership of a bankrupt, or things concerning which the legal title may not be clear. It seems to be obvious that, from the time that the bankruptcy was declared, the judge at Monterrey and those acting under his direction and all creditors were aware of the fact that the locomotives did not belong to Burrowes or to his company. They were not part of the assets of the bankrupt. They were property which, conformably to the provisions of Articles 998 and 999 of the Mexican Commercial Code should be returned to the owner. These Articles provide in part that certain described property, including property which a bankrupt may have leased, shall be considered as belonging to others and shall be placed at the disposition of their legitimate owners.

The judge, in granting the petition for a declaration of bankruptcy, refers to a letter which he states creates a very strong presumption that the railroad equipment of the Burrowes Rapid Transit Company is not the property of the company and gives this as a reason for his decree of bankruptcy. It may probably be inferred from this that under Mexican law a business concern could not be forced into bankruptcy because of the nonpayment of a relatively small amount of debts when a creditor had a great many times more property than was necessary to satisfy such debts, and that in a case of that kind a creditor would be remitted to a suit, a monetary judgment in which could be satisfied out of a small proportion of the assets of the debtor. All the records of the Burrowes Rapid Transit Company were taken into custody when bankruptcy was declared, and they of course revealed clearly that the Burrowes Company was not the owner of the locomotives, and also that Venable was a joint lessee; and that the Illinois Central Railroad Company was the owner. The representations made to the judge by Botello and by Greenstreet, the receiver appointed by the court in Texas also made known to the judge and to the *sindico* the status of these engines.

That the locomotives were not part of the assets of the bankrupt, and therefore could not properly and legally be treated as such, was evidently clear to all persons who had any connection with the bankruptcy proceedings. It appears that the sole reason assigned for the failure to release the locomotives was that they would be released only to the owner directly, and not to a lessee having rights of possession. Counsel for Mexico declared in argument that this attitude on the part of the court and of the *sindico* was consistent with Mexican law, and that if the owner should not apply the property would be auctioned and sold. It seems to me to be inconceivable that it is a correct interpretation of the law of Mexico that in connection with drastic proceedings such as bankruptcy proceedings are, in which an individual or a business concern is wiped out and the owner's property is applied to the satisfaction of the claims of creditors, the law provides that property belonging to third parties—property the title to which is clear—may be seized, held, and sold at auction to satisfy the debts of a creditor to whom such seized property does not belong, simply because the party asking for the release of the property is one having a possessory right, or, as in the instant case, the owner of property represented by a lease.

Article 1416 of the Commercial Code of Mexico provides that "the judge who has cognizance of the bankruptcy shall provide for the conservation of the property of the estate and appoint for the purpose a provisional syndic and an interventor".

Article 998 of the Code contains the following provision with regard to the release of property which may have been seized and which does not belong to a bankrupt:

"The merchandise, effects, and every other species of property which exist in the estate of the bankrupt whose ownership has not been transferred to the bankrupt by a legal and irrevocable title shall be considered belonging to others, and shall be placed at the disposition of their legitimate owners, their rights being acknowledged by a meeting of creditors or by a final judgment, the estate retaining the rights in said properties which belonged to the bankrupt, in whose place such estate shall always be substituted, provided it fulfill the obligations annexed to the said rights."

Under Article 999 of that Code property which the bankrupt may have leased is included "within the principle" of the foregoing Article.

It is contended in behalf of the United States that the locomotives, being clearly property of the Illinois Central Railroad Company, the possessory right of which was in lessees at the time of the seizure, should have been released by an order of the court made on its own initiative, when the court was undoubtedly aware of the fact that the property did not belong to the bankrupt, or in any event, should have been promptly released when suit to recover it was instituted against the *sindico*, or following the hearing attended by Greenstreet. Counsel for Mexico contends on the other hand that under the law the property may be released only to the owner directly and that, failing an application from the owner the property must be sold to satisfy claims against the bankrupt. When the Mexican Code of Civil Procedure provides that property not belonging to a bankrupt shall be released to the owners, it seems to me that it is a common-sense interpretation that property under a lease shall be released to the owner of the lease, or in other words, to the owner of the property represented by that lease.

The Civil Code of the Mexican Federal District and Territories contains several chapters devoted to leases, which are defined as contracts by which one cedes to another the use or enjoyment of a thing for a certain time and in virtue of a certain price. When property under lease is seized under governmental authority the owner of a lease is, of course, deprived of the use of his property. This simple point is aptly illustrated by the case of the *Modern Transport Company, Ltd., v. Buneric Steamship Company*, Law Reports, King's Bench Division, vol. 1, 1916, p. 726, in which it was held in a case concerned with the requisition of a ship by the British Admiralty that the interest which was affected by the requisition was that of the *charterer* and not that of the owner. From the standpoint of international practice it is interesting to note the following definition of owner in the British Prize Court Rules and Orders:

"'Owner' shall include any person to whom by operation of law the property in a ship seized or taken as prize shall, in whole or part, have passed, and shall also include any person intervening in a cause on behalf of an owner, or intervening and claiming or alleging an interest in such ship." *Tiverton's Prize Law*, "Rules and Orders", p. 1.

A rule which would deprive a lessee from any standing in court to recover the use of his property and which would recognize only an owner not in possession would appear to be an arbitrary rule, the effect of which would be to destroy the contractual relations between the lessee and lessor, since property would be taken from him who has the right of possession and delivered to one who for a valuable consideration had sold that right to another. No citation of legal authority was made by Mexican counsel to support such an interpretation of the Mexican Commercial Code.

It was argued, with considerable reason, it seems to me, by counsel for the United States that the denial by the judge at Monterrey and by the *sindico*, Isla, of any standing on the part of Venable as a lessee to apply for the release of the locomotives was a denial of justice under well-known principles of international law securing to an alien the right to be heard in the courts. A denial of justice, as that term is understood in international law, of course can not be predicated upon the refusal of a court to hear a cause because a court has no jurisdiction, as when a nation does not allow itself to be sued in tort, or when the courts have not jurisdiction to pass upon questions of a political nature. But it seems clearly to be an established principle of international law that a foreign litigant should have the same opportunity to establish his case as a citizen has. On this point see Ralston, *International Arbitral Law and Procedure*, p. 47; *Revue Générale de Droit International Public*, Volume XIII, pp. 22-23; case of *Duthil and Faisans*, under the Convention of January 15, 1880, between the United States and France, Boutwell's Report, p. 91. It seems to be clear that both the judge and the *sindico* took the position that the one obstacle to the release of the engines was that the owner should apply and did not apply. This position, counsel for Mexico contended, was properly grounded on Mexican law. If that be a correct construction of Mexican law, then of course the court would not by a refusal to deliver to a lessee be denying Venable remedies granted by Mexican law to Mexican nationals, and if he suffered a denial of justice, that was inherent in the law.

Counsel for the United States discussed very fully the point that evidently both the judge at Monterrey and the *sindico*, Isla, knew that property not part of the assets of the Burrowes Company had been seized. The fact that documentary evidence so obviously established the ownership of the locomotives, the rights of the lessees, and the consequent nonliability of the locomotives to seizure as part of the assets of the Burrowes Company, furnish, I think, a satisfactory explanation of the character of the proceedings which took place when the receiver, Greenstreet, accompanied by Mexican counsel, undertook to obtain the release of the locomotives from the judge at Monterrey and the *sindico*, Isla. Counsel for Mexico discussed different kinds of proceedings which he stated could properly have been employed. To my mind there is nothing in the Mexican Commercial Code indicating that procedure with regard to the release of property which for some reason has been taken possession of, although not a part of the assets of a bankrupt, is not similar to procedure under the bankruptcy law of the United States and doubtless the laws of other countries. Such property naturally is generally promptly released by proceedings of an informal character. Obviously no other form of proceedings would be proper, except in a case in which contentious questions are raised with regard to ownership, in which case, of course, formal litigation becomes necessary. No proper law could permit an unnecessary despoiling of an owner of property against which there is no claim. And undoubtedly it is incumbent on officials to

take precaution against the seizure of such property. In the United States officials acting under the direction of the court may release property; under the Mexican Commercial Code it would appear that property must be released on an order of the judge, unless creditors effect an agreement. There appears to be nothing in the Code from which it may be inferred that property clearly not part of the assets of the bankrupt could not be released by the judge acting even on his own initiative. As bearing on Mexican law and procedure it is interesting to note from the record that two tank cars under lease to the Mexican National Railways were seized in connection with the proceedings against the Burrowes Company. A communication was addressed to the *síndico*, Isla, setting forth the fact with regard to the ownership and the lease, and asking for the release of the cars, whereupon Isla promptly recorded an expression of opinion to the effect that the cars were not subject to detention by the judge in bankruptcy.

Counsel for Mexico criticized Botello for the advice which he gave to Venable, and criticized the court for conducting proceedings that are called "informal". I am unable to perceive that the criticism is deserved in either case. Botello was selected as counsel, it is explained in the Memorial, because of his distinction as a lawyer. It seems incomprehensible to me that a lawyer of standing in Monterrey should not be familiar with such a simple question of proper practice as the application to the appropriate authorities in a bankruptcy proceeding for the release of property clearly no part of the assets of a bankrupt. Furthermore, the hearing which the judge at Monterrey conducted when Greenstreet, the receiver appointed by the Texas court, appeared with counsel before the judge seems to me to be a kind of simple proceeding one should expect in a matter of that kind. At that hearing there was, very appropriately, it seems to me, laid before the judge an abundance of documents revealing the ownership of the engines and the situation of the lessees. It was not a proceeding to give effect to a foreign judgment. It is pertinent to bear in mind that the judge found no fault with this procedure, which I think therefore we must assume is a perfectly regular one in Mexico. In reaching these conclusions I naturally have in mind the particular functions of the judge in dealing with the release of property clearly no part of a bankrupt's assets. Of course, generally speaking, proceedings before judicial tribunals are of a formal character.

The principles with respect to the reserve with which an international tribunal should deal with the examination of proceedings of domestic courts against which complaint is made have repeatedly been discussed before the Commission. To my mind it would be a strange process of reasoning by which the Commission would undertake, on the one hand, to regard as improper action of the judge in giving a hearing of this kind, having the purpose of affording to an alien the opportunity to present by ample proof matters such as were laid before the court, and, on the other hand, to regard as proper a ruling on the part of the judge that a lessee had no standing in court and that the locomotives could only be returned to an owner in a foreign land, a company which for obvious reasons made known to the court, such as the complete protection which it had in a bond and other practical reasons, would not appear and ask for the release of the locomotives.

At the point where Venable found himself baffled in all efforts to avoid being subjected to a loss of \$150,000, and being prevented from carrying out his contractual obligations toward the Illinois Central Railroad Com-

pany, the situation which he had to face may be briefly indicated. At the instigation of Burrowes the locomotives were seized on the order of Rochín. Within a short time, apparently about six hours after the seizure became effective, the property was attached to satisfy a debt of about \$900.00, and efforts to obtain the release of the property not belonging to the debtor resulted in failure. Bankruptcy was declared, and all efforts to obtain the release of property, clearly no part of the bankrupt's assets, likewise resulted in failure. The judge would render no judgment for release on his own initiative or in response to the representations made to him "informally" by Botello or those made to him by Greenstreet, the receiver appointed by the Texas court, although it was obviously clear to the judge that property not part of the bankrupt's assets was being held to the great loss of an interested person. The *síndico* would not release the property, although he likewise knew that he was holding property not the assets of the bankrupt, and he met a proceeding to obtain a release by a series of dilatory pleas. Evidently no rights of anybody were adjudicated by the court. See American Memorial, p. 18; Mexican Brief, p. 99.

An action of involuntary bankruptcy is a very serious and drastic proceeding. A bankrupt is deprived of his business assets and they are applied to debts of creditors. The general purpose of proceedings of this kind are probably very similar under domestic laws throughout the world. In the United States a bankruptcy proceeding is regarded as similar in principle to a proceeding in equity. In all countries unquestionably it is the duty of officials acting in a bankruptcy case to conduct proceedings with the utmost expedition consistent with a proper course of procedure and with the greatest possible care to safeguard the rights of the bankrupt and the rights of the creditors. The court once having declared bankruptcy and initiated the proceedings, it was obviously the duty of all functionaries connected with these proceedings to carry them through in this manner and to dispose of the relative rights of all parties. Apparently the rights of nobody have been settled. The proceedings seem to be at present in the situation they occupied when they were instituted, and property worth approximately \$200,000 which was seized and held, although not the property of the bankrupt, has been stolen or destroyed. The action of administrative and judicial authorities responsible for this situation constitutes, the United States contends, a denial of justice.

All questions discussed in connection with this claim with respect to Mexican law and procedure in relation to the disposition of the assets of a bankrupt in satisfaction of claims of creditors are entirely irrelevant to a proper disposition of the case. The Commission is not called upon to reach conclusions with regard to such matters. There is not before the Commission any question with regard to the duties of a judge or a *síndico* or an interventor in dealing with the assets of a bankrupt. The fundamental point in the case before the Commission obviously is whether there is responsibility on the Mexican Government because of the treatment of property which was not part of a bankrupt's estate and which was taken possession of by Mexican authorities and stolen after it was seized. It can obviously not be denied that the intermeddling of Rochín effectively deprived Venable from control over his property. Likewise Venable was of course absolutely deprived of control over the property when the court decreed attachment and later decreed bankruptcy. It seems to me that it can not be plausibly urged that when authorities of a government, judicial,



administrative or military, take possession of the property of an alien, and no safeguards are provided against loss through destruction or theft, it can properly be alleged in defense of allegations of responsibility for such action that the property, after having been taken, was turned over to persons for whom the government assumes no responsibility, and that therefore there can be no liability for destruction or theft of such property.

It would seem to me strange if counsel for Mexico is correct in his contention that the *sindico* can not be regarded under Mexican law as an official of the court, and that he is merely a representative of the estate of the bankrupt, a "private person", as he was called, for whom there is no responsibility on the part of Mexico. The *sindico* under Mexican law besides being a custodian of property subject to direction of the judge having jurisdiction in the bankruptcy proceedings seems also to perform in a measure duties such as are performed by the referee under the bankruptcy law of the United States, who in a sense might be called a sub-judge. On this point see Articles 1442, 1489, and 1490 of the Commercial Code of Mexico. The determinations of such a sub-judge with regard to the nature of claims presented by creditors against a bankrupt, the property that is subject to the payment of debts, the debts that are due, preferences of claims, are all questions of a judicial character which may ultimately come before the court for final action. But if it is a fact that such judicial questions are not dealt with in any way by the *sindico*, they, of course, are handled by the judge. Surely it can not be said that under Mexican law property may be seized by order of a court and that thereupon all the important proceedings with regard to the disposition of property not belonging to a bankrupt and with regard to the proof of debts and the distribution of property to satisfy those debts are entirely left by the judge to creditors to be adjusted as private, nonjudicial matters, the creditors being turned loose to help themselves to the estate of the bankrupt. Nor can it be plausibly maintained that in a case in which the property of an alien is involved there is no responsibility on the part of Mexico for anyone whatever may happen to the property.

It is shown by the Mexican Commercial Code that the judge has jurisdiction in the matter of release of property not part of the assets of a bankrupt and it is shown by the record in the case that the *sindico* took some action in matters of this kind subject to the control of the judge. It seems to me that the language of the Code does not lend itself to an interpretation sustaining such a view of the private character of the duties of a *sindico* and the nonresponsibility of a judge who has jurisdiction in a case of bankruptcy. But even if this were the situation with respect to Mexican law, I am of the opinion that the existence of Mexican law of this nature would not relieve the Mexican Government from responsibility for the deprivation of property during the course of bankruptcy proceedings, and more particularly with regard to property, *such as is involved in the instant claim which was not part of the assets of a bankrupt.*

Under the law of the United States the receiver and trustee and other persons connected with bankruptcy proceedings are officers of the court. Under international law a nation has responsibility for the conduct of judicial officers. It was suggested by counsel for the United States that, if in connection with a bankruptcy proceeding, or as distinguished from the disposition of assets of a bankruptcy, a proceeding to obtain the release of property not part of the assets of a bankrupt, such officials of a court.

were guilty of gross misconduct, the United States could not deny responsibility for their acts in the light of Article I of the Convention of September 8, 1923, under which the contracting parties are responsible for the acts of officials or others acting for either Government. And I am of the opinion that the Government of Mexico can not be without responsibility for persons performing the same kind of duties in Mexico merely by the fact, if it be a fact, that such persons are not designated or considered as officers under Mexican law. Mexican law requires them to conserve property seized in bankruptcy proceedings. It is the character of functions which persons perform and the manner in which those functions are discharged that determine the question of responsibility.

In connection with the decision in the claim of *Massey*, Docket No. 352,<sup>1</sup> the Commissioners expressed the view that it is a sound principle that whenever misconduct on the part of persons engaged in governmental functions, whatever may be their particular status under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of such persons. In my opinion the same general principle of responsibility is applicable to conduct resulting in a direct injury to an alien—to his person or his property. Counsel for Mexico asserted that legal action might be taken against the persons responsible for the theft and destruction of the locomotives. Undoubtedly that is a proper provision of Mexican law. But under Article V of the Convention of September 8, 1923, it can not be pleaded in defense of a claim that the claimant has failed to resort to local remedies. The two Governments deemed it to be desirable to eliminate any such defense. I understand that the Mexican Government allows itself to be sued in tort; the United States does not. But even in the United States there would perhaps be at least what might be called a theoretical remedy in all cases in which claims are made against the Government of the United States, because actions could be maintained against the persons directly responsible for alleged wrongful acts upon which claims are predicated.

I do not mean to imply that a government must be regarded for every purpose as an insurer of property in custody of its representatives, as to be responsible, for example, for property taken by professional highwaymen against whose acts reasonable police measures could not have been effective. Such a situation is not presented by the record in this case, which shows that the property was directly in charge of a lawyer for the Mexican National Railways under governmental control, and of Familiar, one of the superintendents of the Railways, and further shows the manner in which the locomotives were dismantled to which reference has heretofore been made. In the instant case responsibility for the theft and destruction of the property seems to me to be obviously clear, unless we take the view, to my mind clearly unsound, that Mexico is responsible for neither the judge nor the *sindico*.

There is another aspect of the case which to my mind clearly reveals the responsibility of the Government of Mexico. It appears to be a well-established principle of international law that a denial of justice may be predicated on the failure of the authorities of a government to give effect

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<sup>1</sup> See page 155.

to the decisions of its courts. See the *Putnam* case, Docket No. 354;<sup>1</sup> the *Youmans* case, Docket No. 271;<sup>2</sup> and the *Mallén* case, Docket No. 2935.<sup>3</sup> decided by this Commission; also the *Montano* case, Moore, *International Arbitrations*, vol. 2, p. 1630; the *Fabiani* case, *ibid.*, vol. 5, p. 4878; and the case of *W. R. Grace & Co. against Peru*, *Foreign Relations of the United States*, 1904, p. 678. The *Lord Nelson* case, decided under the Special Agreement of August 18, 1910, between the United States and Great Britain, interestingly illustrates the point. American Agent's *Report*, p. 432. Claim was made in this case by the British Government on account of the seizure of the British schooner *Lord Nelson* shortly before the declaration of war between the United States and Great Britain in 1812. An American court pronounced the seizure of the vessel to be illegal, directed the vessel to be sold and the proceeds of the sale to be paid to the owner. The court's direction with regard to the payment to the owners was not complied with, because the funds were embezzled by the clerk of the court. In the proceedings before the Arbitral Tribunal the American Agent admitted liability in the claim for \$5,000.00, the principal amount claimed, and left to the consideration of the Tribunal the question whether interest should be included in the award. The Tribunal rendered an award in the case which included the principal sum of \$5,000.00 and interest amounting to \$18,644.38.

Venable originally had a possessory right with respect to the seized locomotives. Later he obtained a complete title to them. No matter how long or before what courts, or by what methods, Venable had prosecuted litigation for the recovery of the locomotives, he could never have obtained justice through the return of the locomotives, because they were stolen and destroyed while in custody of persons who obtained control over them by legal processes—whatever may be their nature. Neither the Mexican court at Monterrey nor any other court could ever have given effect to a decision restoring the engines to Venable or to anybody else. The record discloses that the remnants of the engines are now junk. They were not auctioned to satisfy debts of creditors.

Questions were raised in the Answer with regard to the standing of Venable as claimant. There is no doubt with regard to the American citizenship of Venable. If it should be considered that, in spite of his ownership of all interest in the claim there was any necessity for the allotment from the Merchants Transfer and Storage Company, a Mexican company, which accompanies the Memorial, there can be no doubt as to the satisfactory character of an allotment executed by the Board of Directors of the company in favor of the owner of all the property of the company.

Irrespective of what may be said with regard to all other points in the case, I am of the opinion that it is clear that Mexico must be held liable on two points, both directly concerned with the destruction and theft of the locomotives. Is Mexico responsible for the seizure of property by administrative and judicial action, the continued detention of the property, and the destruction and theft of property following such seizure? It is clear that, on one hand, no court could ever render a judgment restoring the locomotives which are ruined and worthless, and certainly that fact is as

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<sup>1</sup> See page 151.

<sup>2</sup> " " 110.

<sup>3</sup> " " 173.

determinative of responsibility as the failure of Mexican authorities to give effect to a judgment for restoration would have been if such a judgment had been rendered and the property had been destroyed and stolen after rendition of the judgment so as to render impossible the execution of the judgment. Certified copies of the court records in the proceedings before the judge at Monterrey were filed by the Government of Mexico, and copies of some of these records accompany the American Memorial. No record is revealed of any decision of the court finally adjudging the property rights of anybody in any of these proceedings. The situation about six years after proceedings were begun is assuredly significant of their character. It is equally clear, on the other hand, that compensation must be made for property of which possession was taken by Mexican judicial authority after seizure by administrative action and which was destroyed and stolen with the acquiescence or cooperation of someone appointed by the court to cooperate with the court, in accordance with the requirements of Mexican law, to safeguard it.

In 1922 a judgment was rendered against the National Surety Company in favor of the Illinois Central Railroad Company for the value of the four locomotives, namely, \$150,000, together with interest and costs, amounting in all to \$153,725.00. Venable, being liable to the Surety Company in that amount, a judgment was rendered against him therefor with interest, in all \$154,340.10. This entire sum he paid to the Surety Company. See Memorial, pp. 365, 356, 360 and evidence filed by the United States March 8, 1927. The Railroad Company assigned all its interest in the locomotives to the Surety Company which in turn assigned its interests to Venable. By the terms of the arrangement which Venable made with the insurance companies which had insured the engines, all their rights to the property were assigned to Venable. By an order of the Texas court which decreed a receivership for the Burrowes company, Greenstreet, the receiver in that proceeding, was directed to execute and deliver to Venable an assignment and transfer of all the interests of the Burrowes Rapid Transit Company in the locomotives and any and all claims which the company might have or assert against any person, firm, partnership, corporation, or government arising from injury to or detention of the locomotives. The items of damages stated in the Memorial are as follows:

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| (1) To amount of the principal of this claimant's confession of judgment to the National Surety Company . . . .   | \$154,340.10 |
| (2) To amount of personal expenses of H. G. Venable in Monterrey, Mexico, in September, 1921, for himself, C. L. Eddy, Duke Oatman, and Mrs. Kathleen Hull Harvey . . . . | 4,050.00     |
| (3) To amount paid A. Zambrano e Hijos, September 15th, 1921, for draft . . . . .   | 1,250.00     |
| (4) To amount paid Lic. Salome Botello prior to January 1st, 1923 . . . . .   | 750.00       |
| (5) To amount paid Lic. Salome Botello between January 1st, 1923, and August 1st, 1925 . . . . .  | 500.00       |
| (6) To amount of personal expense of H. G. Venable in seeking collection of claim in November and December, 1922 . .  | 2,200.00     |
| (7) To personal expenses of H. G. Venable in seeking collection of claim in January, February, and March, 1923. . .   | 2,200.00     |

(8) To total amount paid to and through Hicks, Hicks, Dickson & Bobbitt to August 1st, 1925 . . . . .	4,227.14
(9) To expense obligation to Winston, Strawn & Shaw . . . . .	3,654.63
(10) To expense to and through O. M. Fitzhugh prior to October 1st, 1922 . . . . .	9,166.66
(11) To expenditure to O. M. Fitzhugh in February, 1923 . . . . .	648.52
(12) To expense to O. M. Fitzhugh in March, April, July, and August, 1924, in seeking payment of claim from Mexican officials . . . . .	797.79
(13) To expense of O. M. Fitzhugh in preparing proof of claim from January 1st, 1925, to August 1st, 1925 . . . . .	550.00
Total on August 1, 1925 . . . . .	184,334.84

I am of the opinion that the award in favor of the claimant should include the value of the four locomotives fixed in the aforesaid lease, namely, \$150,000, less 21,000 Mexican pesos or \$10,468.50, the amount which the Mexican Government has stated it would take to repair one of the engines which was wrecked while in charge of employees of the Mexican National Railways. For those damages it would seem Mexico became liable to the Burrowes Company or to Burrowes under the terms of the Burrowes-Perez contract. However, the damages were not adjusted or liquidated at the time when all rights of Burrowes with respect to the locomotives became vested in Venable. I think the Government of Mexico may properly be given the benefit of the doubt with regard to any rights the Burrowes company may have had against the Mexican Government for damages for the destruction of this locomotive. The sixth, seventh, and twelfth items of the claim for expenses in seeking a collection from the Mexican authorities totalling \$5,197.79 may properly be included in an award, the total sum of which should be \$144,729.29. I am of the opinion that interest should clearly be included in the award. Venable has been deprived of property and subjected to large financial loss, and the amount of damages is a sum of money fixed with absolute precision. The following extract from the opinion of the Tribunal in the *Lord Nelson* case in the arbitration under the Special Agreement of August 18, 1910, between the United States and Great Britain, *supra*, is pertinent to the instant case:

"In international law, and according to a generally recognized principle, in case of wrongful possession and use, the amount of indemnity awarded must represent both the value of the property taken and the value of its use (Rutherford's Institutes, Bk. 1, ch. XVII, sec. V; VI Moore's International Law Digest, p. 1029; Indian Choctaw's Case, Law of Claims against Governments, Report 134, 43 Cong., 2nd sess., House of Representatives, Washington, 1875, p. 220, *et seq.*).” American Agent's *Report*, p. 434.

The practice of international tribunals with respect to the inclusion of interest in pecuniary awards is discussed at some length in the decision rendered by the Commission on December 6, 1926, in the *Illinois Central Railroad Company* case, Docket No. 432.<sup>1</sup>

<sup>1</sup> See page 134.

*Fernández MacGregor, Commissioner:*

1. I concur with the statements of the Presiding Commissioner in paragraphs 1 to 5, 24 and 28 to 32 of his opinion, and I dissent with him in regard to his views on the question of the responsibility of Mexico for Rochín's telegram. I set forth below some private views regarding the questions in which I concur, as, agreeing on the grounds of international law on which they are predicated, I believe that they explain themselves by means of a more minute, although unnecessary, consideration of Mexican law. I also give the reasons for my dissent in the points to which I refer above.

*Telegram of Rochín*

2. The first act of the Mexican Government which, according to the Government of the United States, implies the responsibility of Mexico is that committed by C. C. Rochín in his capacity of Superintendent of Transportation of the National Railways of Mexico and Connecting Lines Under Government Control, when he sent telegraphic instructions to prevent the Burrowes locomotives Nos. 2280, 2281, 2282, and 2283 from leaving Mexican territory. It is affirmed that such an act is illegal, because it put an obstacle to the legitimate right which Venable had, as joint lessee of the Illinois Central with Burrowes, to comply with the contract for the lease of the locomotives, which required the lessees to return same fifteen days after the lessor gave written notice for that purpose. To judge this responsibility attributed to the Mexican Government it is necessary to establish the juridical condition of the locomotives in question, Burrowes and Venable, respectively, in relation to the officials of the National Railways of Mexico. Burrowes was the only person that the National Railways of Mexico recognized and the only one with whom they had contracted, as proven by the contract of April 13, 1921. According to this contract Burrowes obtained the privilege of using the tracks of the National Railways of Mexico to carry freight with the rolling stock furnished by himself. The National Railways of Mexico obtained on their part, in addition to the stipulated profit for the use of their tracks, the possibility of filling, by using the rolling stock of Burrowes, the scarcity of such material from which the Railways were suffering. Venable entered into the contract made by him and Burrowes with the Illinois Central on a date subsequent to the signing of Burrowes' contract with the Railways. It is logical to suppose that he knew of this contract, and, therefore, that he agreed even to the possibility of not being able to perform his contract with the Illinois Central, inasmuch as, surely, by this contract the locomotives had to be returned fifteen days after the Illinois Central asked for them; and, on the other hand, the contract of Burrowes with the Railways gave the latter (Clauses VI and VII) the right to retain the locomotives if there were any unpaid freight. Moreover—and this has to be taken into account very much—Venable gave material possession of the locomotives to Burrowes, who always appeared juridically before the National Railways as the legal possessor of the rolling stock through some title or other. But he did not make known before any authority of Mexico his interest in the locomotives or in the contract of Burrowes with the Railways, before difficulties arose, and he did so, when they arose, only in an indirect way. For this reason, when Burrowes, through his agents Hammeken and Toussaint, went to Rochín explaining that he was having trouble with the agents in charge of the offices of the Burrowes Rapid

Transit Co. in the frontier; that the locomotives were going to leave the tracks of the National Railways and Mexican territory by order of Wittington (who was not subordinated, surely in this case to Burrowes, but to Venable); Rochín, Superintendent of Traffic, as already stated, could legally render aid to Burrowes, helping him to maintain a possession from which some persons who, like Venable, had in no way made known their interest in the locomotives, were endeavoring to remove him *without bringing any judicial action in Mexico*. It is not necessary to admit that Rochín as alleged by the Mexican Agency, may have only wished to safeguard the interests of the Railways, making use of the power given him by articles VI and VII of the contract of April 13, 1921; it suffices that Rochín may have considered that Burrowes, who was the party asking for the detention of the locomotives, *was, in Mexico and to the National Railways, the legal possessor of said locomotives*; and, further, that said Railways were connected by contract with Burrowes for the use of all the latter's rolling stock. If in the absence of a contract between Burrowes and the Railways Rochín had interfered for the purpose of detaining the locomotives in his mere capacity of a Mexican authority, then, perhaps, he could have been considered responsible, on account of intermeddling administratively in a matter which might be litigious. But, as already said, Rochín was not acting for the Railways as an authority, but in so far as they were moral persons who had contracted with Burrowes, and on this ground Rochín's action does not appear improper from an international point of view. The National Railways furnished the personnel that handled all the rolling stock of Burrowes; this personnel was at the orders of Rochín in his capacity of Traffic Superintendent; Rochín, then, could, by merely withdrawing such personnel, stop the locomotives, which would have meant, perhaps, a failure to perform their contract with Burrowes, for which failure only the latter could have sued the said Railways, to the exclusion of Venable, who never dealt with them.

3. There is another aspect of this fact, which it is very important to take into account. It is alleged that, without Rochín's telegram, the locomotives would not have been attached; that it would not have been necessary to ask for an adjudication of the bankruptcy of the Burrowes Rapid Transit Company; and, finally, that the locomotives in question would not have been lost. It must be noted in this respect, that Bateman had commenced an executory process against Burrowes since September 1st, and that such executory process was at the stage of an attachment since September 2nd, attachment which could be executed at any moment, even without Rochín's intervention. The evidence in the record says only that, on September 3rd, the locomotives in question were running towards the frontier between Mexico and the United States, but nothing is said as to where they were before eleven o'clock in the morning of that day, at which time Rochín sent his disputed telegram. In any manner, it appears that this telegram could detain the locomotives in Monterrey, which is situated at least eight hours by train from the frontier, and this supposing that the locomotives were to have free use of the tracks and did not have to await the movements of the other trains which ran in that section. In those eight hours available, during which the locomotives were in Mexican territory, Bateman could well have secured the attachment in any place other than Monterrey, by the use of telegraphic warrants, and, therefore, it appears that it is not established that Rochín's act may have been the cause and origin of the total loss of the locomotives or of any other loss or damage which may be attributed to the Mexican Government.

*Judicial Procedure*

4. The American Agency has alleged that the Mexican Courts which had cognizance of this case in different ways, carried out the proceedings improperly, giving cause for the imputation of a mis-administration of justice on the part of Mexico. The proceedings which were instituted in the courts of Mexico can be divided into two parts: (a) Those instituted in the First Civil Court of Letters of the city of Monterrey, Mexico, on the motion of R. L. Bateman, to obtain the attachment of three of the locomotives, Nos. 2280, 2281, and 2282, and other property alleged to belong to the Burrowes Rapid Transit Co., and (b) those instituted subsequently by H. G. Venable before the same Judge, to obtain an adjudication of the bankruptcy of said company, and the return of said locomotives to their owner.

5. The record of this claim shows that R. L. Bateman had been an employee of the Burrowes Rapid Transit Company, and that the latter owed him the amount of 1,950 pesos, covering salaries due. On September 1, 1921, Bateman appeared in Court with the document in which Burrowes as representative of said Company, acknowledged the indebtedness, and he asked that said Burrowes be summoned in Court to ratify his signature, so as to prepare the executory process. On September 2nd, the Judge ordered that Burrowes be summoned in Court in order to ratify his signature, within three work days after said Burrowes had been served with the summons. On that same date, at 4 p.m., Burrowes appeared in Court and ratified as his signature, that which was on the bottom of the document in question. The American Agency holds that the fact that Burrowes hastened to ratify his signature before the term fixed by the Judge for his doing so, reveals bad faith on the part of Burrowes and improper action on the part of the Court that consented to such a thing, for it can be inferred that the Court was in connivance with the parties in the action, to precipitate the events. The so-called annotated irregularity does not involve a violation of either the domestic law or international law. The term fixed by the Judge for the ratification of signature by Burrowes was a period of time allowed in his favor, and it is a principle recognized by all systems of law, that a party may waive the rights and terms which the law grants him if no third party suffers. Even on the supposition that the term were obligatory also for the Judge, it could not be shown that his failure to avail himself of such term constitutes the violation of a principle of international law, as it has been repeatedly held that judicial proceedings cannot be passed on by arbitral tribunals except when they may reveal a notorious injustice or wide deviation from standards generally accepted by nations.

6. The moment Burrowes ratified his signature, his indebtedness to Bateman filled the necessary requisites to institute an executory process with prompt results. (Articles 1391 and 1392 of the Code of Commerce of Mexico.) The Judge, therefore, ordered that such proceeding be held on September 3, 1921, at the petition of Bateman filed on the 2nd. The Executor of the Court, in compliance of this order, asked Burrowes to pay the debt to Bateman, and as he could not do so, it was proceeded with an attachment at 5 p.m., a regular hour according to Mexican law. (Articles 1064, 1392, 1393, 1394, 1395, and 1396 of the Code of Commerce.) The American Government alleges, that property was attached in an amount many times greater than that sufficient to cover the indebtedness to Bateman,



contrary to provisions of Art. 1392 of the Code of Commerce, which provides "that property be attached in amount sufficient to cover the debt and costs", and that this also constitutes a misadministration of justice. Mexican law (Art. 1392 cited) does not say clearly that only the property strictly necessary to cover the amount claimed must be attached; and it must be repeated here that, as in this case the protection which could arise from the limitation on the attachment is also given in favor of the debtor, the latter could waive it, as he did when he consented to the attachment of everything which was pointed by Bateman, who, on the other hand, did nothing more than specify the general designation made first by Burrowes of the entire business. Moreover, Mexican law grants to any interested person the right to oppose an attachment, alleging in Court the pertinent reasons therefor. (Articles 1394 and 1395 of the Code of Commerce and Title XII of the Code of Civil Procedure of the Federal District, supplementary to the Code of Commerce.)

7. With respect to the attachment proceeding, it is also alleged that it was carried out at an unusual hour in the afternoon of September 3rd. Mexican law is the only law that could determine in this case the working days and hours for the carrying out of such a proceeding, and, as a matter of fact, Articles 1064 and 1065 of the Mexican Code of Commerce solve this question and even authorize the Judge to avail himself of other than working days and hours when, in his judgment, there is necessity for it. An international tribunal, even in case that there should be a violation of provisions of this nature, could not, perhaps, hold that there is a misadministration of justice, except in very special cases.

8. The most serious charge made against this attachment is that it was decreed by the Judge on things which were not the property of Burrowes, since the locomotives belonged to the Illinois Central Railroad Company. There is no evidence that during the attachment proceedings instituted by Bateman the Judge may have had official knowledge of the fact that the locomotives were property of a third party and not of Burrowes. The Executor of the Court who carried out the attachment did not have the duty to know or attend to this question, for an attachment is always placed on property that is in the possession of the debtor, without prejudice to the right of the true owner to appear in Court and establish his ownership, exercising the legal acts which correspond to him. (Articles 1394 and 1395 of the Code of Commerce and Title XII of the Code of Civil Procedure of the Federal District cited.) It has not been proved that such provisions of Mexican law are a deviation from those which are contained, with respect to the same matter, in the codes of other nations, and they do not violate any principle of international law, in view of the fact that they do not ignore the rights of the true owner but merely set down the manner in which said owner must exercise them, which is well within the sovereign rights of a State. The Illinois Central Railroad Company, or any representative of its right, had always available the means of taking action against such attachment; and if they did not take such action in the manner prescribed by Mexican laws, their fault, ignorance, or negligence can not be laid on the authorities or on the Government of Mexico.

9. It is established in the record, that several other persons who had claims against the Burrowes Rapid Transit Company, followed the same procedure as that of Bateman, instituting executory proceedings and obtaining the attachment of the same locomotives and of some other things belonging to the insolvent company. Seeing the lack of success of his

extrajudicial representations and upon advice of Salomé Botello, a Mexican lawyer, Venable thought that the best method of obtaining the return of the locomotives in question was to appear as a direct creditor of the Burrowes Rapid Transit Company, endeavoring to have the bankruptcy of said company declared. He, therefore, purchased the credit of Messrs. Zambrano e Hijos, who had already obtained an attachment in their favor, in one of the executory proceedings instituted, as stated above, and as assignee of such credit, he asked, on September 15th, and obtained, on September 17th, from the First Judge of Civil Letters of the City of Monterrey, an adjudication of bankruptcy of the Burrowes Rapid Transit Company.

10. It has been alleged that the Mexican judge who appointed Isla as Trustee of the bankruptcy of the Burrowes Rapid Transit Company, committed a serious violation of international law by not requiring from said Trustee any kind of bond or security before receiving the property of the bankrupt. It has also been alleged that if Mexican law does not contain provisions to such effect, it reveals an insufficiency which may involve a misadministration of justice. Mexican law does not require that the appointed Trustee furnish security. (Article 1417 of the Mexican Code of Commerce.) Several systems of municipal law of other countries are in the same condition, although practice and publicists may show the inconvenience of the Assignee not giving security for the fulfillment of his commission. (See *Cyclopedia of Law and Procedure*, Vol. 34, pp. 150 and 250; Percerou, *op. cit.*, pp. 228, *et seq.*) There is no violation, on this ground, of municipal law or international law.

11. At the beginning Venable and Lic. Botello attempted to obtain the return of the locomotives by making unofficial representations before the Judge of the bankruptcy, to whom they explained the way in which they looked at the matter, alleging that said locomotives did not belong to Burrowes Rapid Transit Company, but to the Illinois Central Railroad Company. Both the Assignee of the bankruptcy and the Judge paid no attention to the verbal requests made by claimant, and this is the basis of another allegation of misadministration of justice made by the American Agency. Steps of similar character were taken by Mr. W. C. Greenstreet, Receiver in another bankruptcy of the same Burrowes Rapid Transit Company, adjudicated by the 49th Judicial District Court of Texas on September 1st, as a result of action taken by Venable before this Court since the latter part of August, 1921. The question then arises as to whether a judge has the obligation of considering petitions or motions made before him in a manner different from that prescribed by his law of procedure. The answer is simple, for international theory and practice are in accord, that every State has the right to set down the rules according to which actions may be brought in its courts. Mexican law establishes that all mercantile suits shall be prosecuted in writing. (Article 1055 of the Code of Commerce.) The Judge could not therefore enter a petition made in an appearance—that is, made verbally in any manner—conformably with article 126 of the Code of Civil Procedure of the Federal District, supplementary to the Code of Commerce. For such reason the Mexican judge could consider the unofficial petitions of Venable and of Greenstreet as nonexistent, without this involving the laying aside of any right existing under his domestic law or under international law.

12. Venable saw, then, that his unofficial representations did not produce, as they could not produce, any effect, and he then addressed himself to

the Judge in writing, asking from the Assignee the return of the locomotives in question, basing his petition on the provisions of Articles 998 and 999 of the Code of Commerce. The Judge submitted this petition to the Trustee, so that the latter would answer it as he thought advisable, which he did, filing, for the time being, so-called dilatory pleas, which pleaded chiefly lack of juridical capacity of Venable to demand the locomotives and vagueness of the petition he had presented. The American Agency contends that, in view of the terms of Art. 998 of the Mexican Code of Commerce, which provides that property which may exist in the estate of bankrupt, ownership of which has not been transferred to the bankrupt, by a legal and irrevocable title, shall be considered as of outside ownership and shall be placed at the disposition of its legitimate owners, the locomotives should have been placed immediately at Venable's disposition. It overlooks the fact that the same article cited provides that this return can be made only *(a) upon previous confirmation of the right of the owner in a meeting of creditors, or (b) through a final decree.* In the present case, Venable himself chose the second method, and in order to have a final decree in his favor, it was necessary that there should be a suit with all necessary proceedings. The action brought by Venable was an ordinary mercantile suit which had to be prosecuted in accordance with the provisions of Articles 1377 to 1390 of the Code of Commerce. In such a suit, dilatory pleas may be filed according to Art. 1379. Upon the filing of such pleas, the Judge could open, according to the same article, a period of ten days for the presentation of evidence, as he did. Mexican laws of procedure were, therefore, not violated, as alleged by the American Agency, and it is evident that if this suit was not decided by a final decree—which might have placed the locomotives in Venable's possession, if he had succeeded in proving his capacity—it was due to the fact that he abandoned the proceedings prematurely and without any reason, which makes him unentitled to complain before this Commission on account of the results of his own negligence. It has also been alleged with regard to this point, that the Judge allowed Leal Isla to answer the suit of Venable beyond the term set down for it. According to Mexican law, Venable should have charged the other party with contempt of court (Art. 1078 of the Code of Commerce), and then the proceedings would have continued on, Leal Isla losing the right to answer. Venable can not now complain of his own negligence.

13. Severe criticism has been made of the attitude of the Mexican Judge and Trustee in refusing to return the locomotives (a refusal which, on the other hand, was only extrajudicial and in answer to unofficial representations made by claimant, as proven) to any person other than their legitimate owner—the Illinois Central Railroad Company. It is contended that Art. 998 of the Code of Commerce provides that, in case of a bankruptcy, all the property, ownership of which has not been transferred to the bankrupt by legal and irrevocable title, must be returned to its owner; it is further alleged that Art. 999 of the Code of Commerce, Section IV, provides that property and merchandise which the bankrupt may have on lease, be considered as included in this provision, which was the case with the locomotives in question, as acknowledged by the Judge and the Trustee in their conversations with Botello and with Greenstreet. A long commentary on the two cited articles has been presented in an effort to show that the word "owner" must be interpreted in a broad sense, that it must include any person who may have any right on the property in question other than the right of ownership, provided there is no possibility

of the bankrupt himself having the right of ownership over the thing claimed. All the reasons adduced in support of this argument may be acceptable in Anglo-Saxon law, but, in the first place, there exists a principle that something which is clear according to the law does not have to be interpreted, and in the instant case Mexican law provides that the things covered by Art. 998 of the Code of Commerce be returned to their legitimate owners. In the second place, the theory which is the basis, in cases of bankruptcy, for the need of returning *only to its legitimate owners* the property found in the bankrupt's possession, over which he may not have an ownership title, has for its object avoiding difficulties in the bankruptcy, which might arise if property were returned to other persons, as errors might be committed, for which the owner would later have the right to complain against the bankrupt estate. By returning the things to the owner, all complications are avoided; once he is in possession of the property, the legitimate owner can return it to a third party interested therein, where there is some contract between the owner and such third party. Such, it appears, is the theory followed by Mexican law<sup>1</sup>, by French law, and by other systems of law. (Percerou, *Faillites et Banqueroutes*, Ed. 1913, Vol. II, pp. 146, *et seq.*; Lyon Caen et Renault, *Manuel de Droit Commercial*, Ed. 1924, pp. 1075, *et seq.*) These authors take up and comment on this power which an owner has, to withdraw from the bankrupt mass the property title to which has not passed irrevocably to the bankrupt, calling such power and giving it the effects of a "right of revindication".

Now, then, according to Roman law, which is the basis of practically all the systems of law of Latin countries, the action of "revindication" can be brought only by the owner or his representative. (See Maynz, *Droit Romain*, ed. 1891, Vol. I, p. 773.) All the cited laws further impose on the owner who claims any property that may be in the bankrupt's possession the indispensable annoyance of instituted proceedings which may establish the right of ownership before the Trustee and the Judge of the bankruptcy. It is not here attempted to determine in what way provisions of the nature of those here considered may violate international law.

#### *Destruction of the locomotives*

14. The principal point in this claim is to determine the participation and responsibility of the Mexican authorities in the deterioration and almost total loss of the locomotives while the latter were in the possession of the Assignee of the bankruptcy, Leal Isla, who, in turn, had delivered them to Familiar, Terminal Superintendent of the National Railways in Monterrey. It is evident, of course, that the latter was charged with the care and material conservation of the locomotives. The evidence presented by the Mexican Agency proves that Leal delivered them to Familiar "in his capacity of Superintendent". The question arises, therefore, as to whether Familiar could perform that act in representation of the National Railways. A Superintendent is an agent; hence, he cannot bind his principal (in this case the National Railways, and through them the Mexican Government) except within the scope of his agency. It has not been proven that a Superintendent of the Railways can receive as a deposit rolling stock belonging

<sup>1</sup> (Vide *Diario de Jurisprudencia*, Vol. IX, No. 46. Decision of the 2nd Sala del Tribunal Superior. *Korff Honsberg y Cia. vs. Ingenio Constanca*.)

to private persons, under the responsibility of the Railways. A Superintendent has generally only administrative duties relative to the traffic of the trains. No one can believe that a Superintendent may have universal powers, specially outside of matters which concern the movement of trains. The resulting conclusion is that Familiar received the deposit of the locomotives in his private capacity and not in his official character, not being able, therefore, to bind Mexico with his private acts or omissions.

15. Leal Isla was also an official of the Railways (Consulting Attorney), and the same problem arises in regard to him. The Mexican Government alleges that a Consulting Attorney has no other duties than solving the legal questions presented to him; that, for the rest, he can exercise his profession freely just like any other lawyer. It seems, then, that Leal participated in the bankruptcy proceedings as a mere private person, and not as an official, for which reason his acts in this respect do not imply the responsibility of Mexico.

16. It has been insistently alleged, that the Assignee of a bankruptcy is an official of the government, basing such allegation on various provisions of Mexican law (Articles 1416 and 1417 of the Code of Commerce). Without going into a discussion of the laws of all countries, it may be affirmed that in many of them assignees do not have an official character. Thus, for instance, in French law: "Les syndics ne sont ni des fonctionnaires publics, ni des officiers ministeriels". (Lyon-Caen et Renault, *Manuel de Droit Commercial*, ed. 1924, p. 1010.) This is the case in Mexican law (Art. 972 of the Code of Commerce), as it has been alleged by the Mexican Agent. Therefore, the acts or omissions of assignees can not be directly imputed on the court that appoints them, nor on the government of which it is a dependency.

17. It has also been alleged that, according to Mexican law (Art. 1416 of the Code of Commerce), the judge having cognizance of the bankruptcy "shall provide for the conservation of the estate, appointing to such effect a provisional assignee and a supervisor". From this provision it is endeavored to deduce that the judge is directly in charge of the conservation and care of said estate, being responsible for any deterioration or loss thereof. Such is not the case, in the first place, on account of a merely grammatical interpretation of the cited article. It is stated therein that the judge *shall provide for* the conservation of the estate; not that he *shall have* the conservation of it. To provide means to facilitate what is necessary or convenient for an end. The judge then has to issue dispositions or make necessary preparations for the conservation of the estate, but not conserve it directly. The same article says what is convenient or necessary for the end of conserving the estate—to wit, the appointment of a provisional assignee and a supervisor, to that effect. Articles 1418, 1419, 1420, 1422, and others of the Code of Commerce of Mexico corroborate this grammatical interpretation in providing that the management, administration, and care of the estate belong to the provisional assignee. This theory is further supported by the general theory of the duties of a government. Such an entity is instituted to watch over the general interest of the community, and not to care for the private interests of individuals. Bankruptcy proceedings, it is true, are of general order, but the estate of a bankrupt is conserved for the benefit of a certain group of private persons, comprised of the creditors. No governmental dependency is empowered or organized to manage an estate as if it were a private person. In a bankruptcy, as already stated, the bankrupt

loses the possession and administration of his estate, which goes over to the mass of creditors, represented by the assignee who exercises both functions. But while the court having cognizance of a bankruptcy does not have itself the possession and administration of the estate, but delivers it to the assignee, it does have the important and very serious duty to see that the assignee is a fit person and performs his duties faithfully and honestly. A court failing to do this would incur international responsibility if property of foreigners were involved, because it is the duty of the judicial power of a nation to prevent and punish attacks on private property. Mexican law establishes peremptory terms within which the assignee must perform his duties, and the judge must order the different proceedings of the bankruptcy. Some of these terms are obligatory for the judge without the necessity of a petition from one of the parties, as, for instance, the term fixed by Art. 1437 of the Code of Commerce, which provides that upon the conclusion of the inventory, without the need of a petition by the assignee, the judge shall issue a decree ordering that the vouchers of the credits be presented to him within specific terms. Art. 1442 of the same Code contains a similar provision, and there are other articles of Mexican law (1486, 1487, etc.) which, correctly interpreted, provide that the bankruptcy proceedings must be terminated within a definite period of time. Moreover, the supervisor appointed must watch that the assignee never allows the lapse of the terms which may be established by law for any of his duties (Art. 1422). There is another provision which obliges the assignee to present a project of privileged creditors, at the latest six months after the first meeting of creditors is held (Art. 1489). The State Attorney, on the other hand, must represent the absent creditors and exercise their rights (Art. 1439 of the Code of Commerce). All this shows that Mexican law was careful to watch that an abnormal condition, which involves the dispossession of the bankrupt's property and the administration thereof and the nonliquidation and nonpayment of the creditors, may be as brief as circumstances may permit, with the object that none of the parties interested in the bankruptcy may suffer. In the instant case it is in no way established that the assignee and the supervisor may have fulfilled their duties, neither is it established that the judge or State Attorney may have shown surprise or taken steps to put an end to this irregularity which, on account of its prolongation, gave rise to the almost total deterioration of the locomotives in the possession of the assignee. This responsibility weighs on the Mexican court that did not apply its law, to the detriment of the interests of foreigners.

18. However, while the negligence of the judge is obvious, one must not fail to take into account that there was also inexplicable negligence on the part of the interested parties. The judge extended himself to the point of unofficially explaining to Venable and to Greenstreet (appointed by the courts of Texas) that, according to Mexican law, the locomotives in question could be delivered only to the Illinois Central, their legitimate owner. The latter company knew very well this decision unofficially, as proven in the documents filed as evidence; (it seems, moreover, that it was officially notified, at the petition of the Mexican State Attorney, that it ought to press such rights formally), and due to an entirely selfish motive, it refused to press its rights, conformably with Mexican law, before the Mexican court. The Illinois Central, to a certain extent, abandoned its property in the possession of the assignee. Were the Illinois Central to appear directly before this Commission as a claimant, doubtless the Commission would have to take into account the negligence of said Company,

as it has already been established by arbitral practice among nations. Hence, Venable, who is the cessionary of the negligent owner, must suffer the consequences of the negligence. Furthermore, Venable himself, personally, showed inexplicable negligence in the case; knowing that the locomotives could not be returned without bringing formal action in the court with jurisdiction over the bankruptcy, he instituted such action and abandoned it immediately after the assignee filed certain dilatory pleas and the judge opened a term for the filing of evidence to clear that point. Both the assignee and the judge had the right to act in such a manner, according to Mexican law, as already stated. Had Venable continued the proceedings which he chose himself (he could have formally asked for the locomotives from the assignee without suing him, Art. 998 of the Code of Commerce) and proven his capacity before the Court, he would have obtained the return of the locomotives, as it is proven that Gimble did, representing companies which were in the same circumstances as the Illinois Central. Venable also showed negligence in another respect; the assignee attempted to enter into a contract with him which would place the locomotives in his hands, as the assignee contended that no one would have taken better care of them than the person who claimed to be entitled to them. But, unfortunately, Venable was not able to furnish the security required from him, and the transaction was not carried out. Finally, the assignee attempted to lease the locomotives in question to Daniel Flores or to F. Z. Westrup—and not to the Railways, as alleged (page 65 of the Brief of the United States)—upon payment of a rental which, although admittedly low, at least secured the care of the locomotives and guaranteed their return in good condition. Venable opposed himself to this transaction and the locomotives remained in the hands of the assignee of a bankrupt estate which did not have the funds to cover the necessary expenses for watching and preserving the said locomotives. All these facts which reveal negligence on the part of the Illinois Central and Venable, while they do not entirely prevent these parties from claiming damages before this international tribunal, can, at least, induce the Commission to take them into account when determining the amount of damages.

*Collision of Locomotive No. 2283*

19. This claim includes the value of a locomotive, which, together with others, was leased by the Illinois Central to the Burrowes Rapid Transit Company and to the Merchants Transfer & Storage Company, and which became practically useless as a result of a collision that occurred on August 21, 1921, while running from Saltillo to Monterrey, operated by employees of the National Railways. The train with which this locomotive collided was equally operated by employees of said Railways. International tribunals do not award damages except in cases where the facts appear clear and proven. But in this case there is, further, a perfectly legal and unequivocal agreement which throws the burden of proof of the negligence on the party that suffered the damage. Clause XXIII of the Burrowes contract stipulates that the Railways shall not be responsible for the damage suffered by the locomotives by reason of accidents, and to such effect Burrowes waives Articles 1442 and 2512 of the Mexican Civil Code, which establish the presumption of guilt of the debtor or the bearer in case of loss of the thing involved. Clause XXIV of the same Burrowes contract provides that the

Railways shall consider claims for damages to the locomotives, etc., when it is shown in an evident manner that they are liable through imprudence or neglect of its employees. In view of the foregoing, claimant or its assignee ought to have explained all the circumstances regarding the collision, which has not been done. In fact, the evidence relative to this point is indeed insufficient; there is an affidavit of the engineer who was driving the locomotive in question and who deposes, briefly, that locomotive No. 2283 was running from Saltillo to Monterrey, pulling train No. 23; that this train was due to meet train No. 24 at Kilometer No. 950; that said train No. 24 failed to make the meeting and lost its rights, giving to No. 23 the right of way; that upon reaching Kilometer 952, train No. 23 met train No. 24 on a sharp curve which made it impossible for him to see this train, for which reason the collision became inevitable. There are two other documents which contain the damages suffered by locomotive No. 2283 and an estimate of the cost of repairs which had to be done to it, said estimate amounting to a total of 21,000 pesos. The American Agency alleges that it is wholly unnecessary to determine which of the crews of the two trains was responsible for the accident, inasmuch as both trains were operated by crews furnished by the National Railways of Mexico, which fact makes the latter, in any event, responsible for the collision. The Mexican Agency alleges that it belonged to claimant to prove in an evident manner the liability of the Railways, conformably with clause XXIII of the contract, already quoted, adding that the accident could have well been caused through no fault of any of the two crews of the trains, thus bringing to light a third proposition in the dilemma set forth by the American Agency. As a matter of fact, it is possible that the accident may have occurred through no fault or negligence of either crew. It seems established that engineer Lozano, who was driving the Burrowes locomotive, acted in accordance with his instructions and with due precaution; that is to say, with no fault; but this does not necessarily prove that the engineer of the other locomotive was at fault. Many facts are lacking, to judge the acts of this engineer; the direction in which the two locomotives in question were going is not known; whether there was a station or employee of the Railways at Kilometer 950 to give an order to the trains is not known; the cause of the failure of train No. 24 to make due connections at Kilometer 950 is not known; it is not known whether the fact of not making that connection gave to train No. 23 the right to continue on a clear track; the traffic rules applicable to the case are not known. Under such circumstances, I believe that no liability can be imputed on the National Railways for the collision.

20. But while it is true that in view of the vagueness of the facts this Commission can not consider Mexico responsible for the collision that destroyed locomotive No. 2283, it is also true that the National Railways should have returned to Burrowes or his assignees the remains of the locomotive which suffered the damage. The value of the locomotives leased by the Illinois Central to Burrowes was stipulated in the corresponding contract at the sum of \$37,500; the estimate made of the approximate cost of the repairs to locomotive No. 2283 is, as already stated, 21,000 pesos. The difference between these two amounts is, in my opinion, the value of the remains of the locomotive in question, which Mexico would be obliged to return; for this reason I believe that Mexico must pay, on this ground, the sum of \$27,000.00.



21. The Government of Mexico, on its part, alleges, in regard to the point under consideration, that from the sum which may be paid to claimant as damages, there must be deducted the sum of 11,117.63 pesos and \$920, which the Railways have a right to collect from Burrowes and from his firm for freight and other expenses due. I believe that such a contention must be rejected, because the Burrowes Rapid Transit Co. had become bankrupt; the credit which the Railways had against it had to be included among the claims of the other creditors, and in no manner would it have been guaranteed by the four locomotives, which belonged to the Illinois Central and which, according to Article 998 of the Code of Commerce, could have been recovered by the latter company.

### *Collusion of Officials*

22. After examining each of the acts of the Mexican officials who took part in this case, to determine the responsibility that the Government of Mexico may have, it remains established that there is no conspiracy as alleged by the American Agency in such categorical terms. In more than one place in its pleadings and its briefs, the theory is advanced that, beginning with Rochin's telegram, followed by the last term allowed by the Department of Hacienda for the re-exportation of the locomotives, the attachment executed by the First Court of Letters of Monterrey, the refusal of this Court to deliver the locomotives to Venable, insisting that only the Illinois Central, which was their owner, could receive them, and coming finally to the unfortunate destruction of such locomotives in the possession of Assignee Leal Isla, one can perceive the desire of the Mexican Government and of all its authorities to appropriate illegally the locomotives, instead of obtaining them through lawful means (Pages 138, 139, 140, 158, and 159 of the Brief of the United States). Such a serious imputation is not supported by evidence and is merely based on the frail inference that, as the Mexican Government forms one whole, it is to be supposed that what one department of the Government does is immediately known by all the other departments. This method of reasoning seems absolutely venturesome and opposed by the reality of things. A government is a complicated mechanism of agencies which operate in the most widely separated portions of a given territory; it is illogical to suppose that an act of one of these agencies, performed in the farthest corner of the state may be immediately known and taken into account by the other agencies or departments of the government. A single matter always has various aspects, and each of them is known and handled by a separate department, without having any connection with the other departments, as only this makes possible the division of labor. In the instant case, the Department of Hacienda, which had cognizance of the exportation of the locomotives in question, had in mind only that aspect of the matter and decided it conformably with its own laws. The National Railways, on their part, only had to know those circumstances which referred to the contract entered into with Burrowes. The Court of Monterrey, in effecting the attachment petitioned by Bateman, could not take cognizance—nor did it have the duty to do so *ex officio*—of all the other circumstances of Burrowes or his locomotives, for, as already stated, Mexican courts only take into consideration the facts and petitions which are officially presented to them, and, moreover, it has not been proven that the First Court of Letters of Monterrey knew at the beginning, even unofficially, that the

locomotives belonged to the Illinois Central or to Venable. The same Court, although it later knew unofficially the juridical position of the locomotives in Mexican territory in compliance of its own law, could not return them except to their owner, the Illinois Central. Finally, the deterioration of the locomotives is directly imputable on the Assignee of the bankruptcy of the Burrowes Rapid Transit Company, who is a private party personally responsible for his acts or omissions. The Mexican Judge, it has already been proven, was responsible for the noncompliance of his law which obliged him to terminate the bankruptcy proceedings within a certain period, a fact which implied that he ought to have ordered the Assignee, also within a certain period, to render a report on his work as Assignee. The charge made to the effect that the locomotives in question were used by the National Railways, has not been proven; this charge is made in two affidavits (those of W. C. Greenstreet and Ed Mims), in which the affiants do not refer to facts in which they took part, but to facts which they allege to know by hearsay, and, there is to be noted, further, the identity of the terms in which they make such affirmations. Aside from this, it is established in the record that the National Railways were suffering from a scarcity of rolling stock; that various companies, in addition to the Burrowes Rapid Transit Company, were running their trains on the tracks of the Railways of Mexico, so that, even admitting that the missing parts of the locomotives were removed using the apparatus and tools of said Railways, this would only reveal lack of watchfulness, but not that the removal was made in order that the Railways would use such parts, for they could well have been used by the other companies that were doing the same business as the Burrowes Rapid Transit Co. I do not believe, therefore, that there has been proven the collusion alleged to have existed among all the authorities of Mexico for the detestable purpose of larceny.

23. In view of all the above stated circumstances, I consider that the sum of \$140,000.00, at which the Presiding Commissioner estimates the damages suffered by the claimant, is the proper amount that the Mexican Government must pay.

#### *Decision*

All of the Commissioners are of the opinion that a pecuniary award should be rendered in favor of the claimant. Two of the Commissioners compute the damages to the claimant in the amount of \$140,000.00. The other Commissioner computes the damages in the amount of \$144,729.29. The sum of \$140,000.00 must therefore be the award of the Commission. Two of the Commissioners are of the opinion that interest should not be included in the award, and interest must therefore be disallowed. The Commission accordingly decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of H. G. Venable, the sum of \$140,000.00 (one hundred and forty thousand dollars) without interest.

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RUSSELL STROTHER (U.S.A.) *v.* UNITED MEXICAN STATES.*(July 8, 1927. Pages 392-393.)*

CRUEL AND INHUMANE IMPRISONMENT.—EFFECT UPON CLAIM OF ESCAPE OF CLAIMANT FROM PRISON. Claim based upon cruel and inhumane imprisonment and other grounds *allowed*, notwithstanding that for part of period claimant had escaped from jail.

*Fernández MacGregor, Commissioner :*

1. This claim is presented by the United States of America in behalf of Russell Strother, an American Citizen who, as alleged in the Memorial, was arbitrarily and illegally detained by the Mexican authorities who held him prisoner for a long period in violation of Mexican laws and subjected him to cruel and inhuman treatment during the entire period of such detention.

2. According to the record, Strother was one of the men who, together with Harry Roberts and others, were charged with having taken part in an assault on the home of one Eduardo F. Watts, on May 5, 1922, in the vicinity of Ebano station, State of San Luis Potosí, Mexico. All the facts in connection with this claim are the same as those stated in the relative paragraphs of the decision rendered by this Commission, November 2, 1926, in the claim presented by the United States of America in behalf of *Harry Roberts*, Docket No. 185,<sup>1</sup> with the only difference that Strother, together with other convicts, escaped from the prison where he was confined with his companions, on May 16, 1923, and he is charged with being the intellectual and material author of the offense of escaping from prison with the aggravating circumstances of assault on the guard and warden of the jail of Ciudad Valles, State of San Luis Potosí, Mexico. He was reapprehended two days after his escape; that is, Friday, May 18, 1923.

3. Mexico has alleged, on her part, that the circumstance that Strother escaped from the jail where he was confined, as stated, if it does not preclude the claimant from appearing before this Commission to demand an indemnification for damages suffered, should, at least, be taken into account when awarding his damages. The United States, on the other hand, contends that when Strother was reapprehended he suffered on this account cruel treatment which Roberts did not suffer and that he is entitled to greater damages.

4. I consider that the facts set forth in the preceding paragraph should not have any effect on the solution of this case, which is in all its other aspects similar to that of *Harry Roberts*, the considerations of fact and law stated in the Commission's decision referred to above, being applicable to it. Therefore, I am of the opinion that the claimant should be given an award of \$8,000.00.

*Van Vollenhoven, Presiding Commissioner :*

I concur in Commissioner Fernández MacGregor's opinion.

*Nielsen, Commissioner :*

I concur in Commissioner Fernández MacGregor's opinion.

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<sup>1</sup> See page 77.

*Decision*

On the above grounds the Commission decides that the Government of the United Mexican States must pay to the Government of the United States of America, on behalf of Russell Strother, the sum of \$8,000.00 (eight thousand dollars), without interest.

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

(July 15, 1927. Pages 394-396.)

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CONTRACT CLAIMS.—CLAIM *quantum meruit*. Claimant performed dredging services for Carranza Government without written contract. Claim for services rendered measured on basis of compensation claimant had previously been receiving in vicinity *allowed*.

*Cross-reference:* Am. J. Int. Law, Vol. 22, 1928, p. 452.

*Nielsen, Commissioner:*

1. Claim is made in this case by the United States of America in behalf of the United Dredging Company, an American corporation, to recover compensation in the sum of \$33,625.76, currency of the United States, for services performed in an attempt to salvage the Mexican gunboat *Veracruz*, in the Pánuco River near Tampico, Tamaulipas, Mexico, where the vessel was sunk in 1914. Interest is claimed on the amount of \$33,625.76 from July 6, 1914, until the date of payment of any pecuniary award rendered by the Commission. The facts underlying the claim may be briefly summarized as follows:

2. On or about June 18, 1914, Sr. M. Urquidi, at that time Captain of the port of Tampico, which was then under the control of forces of General Carranza, came to the office of the claimant in the city of Tampico, together with Sr. José Certucha, who had formerly been Captain of the port, and as the representative of the Chief of the Constitutionalist Army Sr. Urquidi requested the Vice President of the claimant company to undertake the work of pumping out the sunken gunboat with a view to salvaging it. It is alleged that it was stipulated that the work should be done under the orders and directions of engineers who in turn were acting under orders of General Carranza; and further alleged that the claimant undertook the work and proceeded to perform it under specific orders and directions of the engineers, and that the claimant company itself advanced funds necessary to meet daily expenses. It appears that the claimant operated a dredge called the *Galveston* for a period of sixteen days from about the twentieth of June, 1914, to about the sixth of July, 1914, and that the claimant company was thereupon informed by General Carranza that because of a lack of funds, the work of salvage must be suspended. No written contract with respect to the work in question was made, but the allegations of the Memorial are supported by affidavits of Benjamin T. Davis, Vice President of the claimant company; Benjamin Anderson, employed by the company as a superintendent; Oscar Sternberg, Captain

of the *Galveston*, the claimant company's dredge; and W. A. H. Connor, employed as auditor and accountant for the company. The Reply is accompanied by other affidavits and daily reports of the work performed with the dredge for the period during which the salvage operations were carried on.

3. The amount of the claim is computed on the basis of a charge for the services performed at the rate of \$2,101.61 a day, that being the sum which the dredge *Galveston* and its crew were earning in and about the port of Tampico shortly before the services for which compensation is sought were undertaken.

4. It is contended in behalf of the United States that Mexico is responsible for obligations of the so-called "Constitutionalists" headed by General Carranza who as successful revolutionists established themselves in power in Mexico.

5. It is admitted in the Mexican brief that the dredge *Galveston* rendered to the Carranza Government the services described in the Memorial, and it is stated that there is no doubt that the *Galveston* was the property of the United Dredging Company. However, a question is raised whether the services were rendered by the claimant company or by Edwin R. Davis, with whom the claimant had certain contractual relations. In the Mexican Answer there is a discussion of provisions of a written contract made on May 30, 1913, under which E. R. Davis undertook to perform extensive dredging and construction work in the port of Tampico. It is clear, however, that the work of salvaging the gunboat *Veracruz* at the request of General Carranza's representative was a matter entirely distinct from the contract of May 30, 1913, which therefore is of no concern in relation to the instant case. There is nothing in the record to indicate that E. R. Davis had any connection with the arrangement made between the claimant company and General Carranza. No question being raised as to responsibility for obligations incurred by General Carranza, or as to the performance of the services for which compensation is sought, or as to the propriety of the amount claimed for those services, an award should be rendered in favor of the claimant in that amount.

6. Questions in relation to the nationality of the claimant raised in the Mexican Answer have been clarified in the American Reply, and there is no doubt as to the right of the United States to maintain the claim in behalf of the claimant company.

7. Interest should be allowed on the sum due for services rendered by the plaintiff. Perhaps it might be considered that this sum became due when the work was interrupted, and that therefore interest should be computed from that time, but the evidence with regard to the arrangement under which the services were rendered is too vague to reach a positive conclusion on that point. I am of the opinion that interest may properly be computed from the date on which a memorandum of this claim was filed, namely, August 13, 1925.

*Van Vollenhoven, Presiding Commissioner :*

I concur in Commissioner Nielsen's opinion.

*Fernández MacGregor, Commissioner :*

I concur in Commissioner Nielsen's opinion.

*Decision*

The Commission decides that the Government of the United Mexican States shall pay to the Government of the United States of America on behalf of the United Dredging Company, the sum of \$33,625.76 (thirty three thousand six hundred and twenty-five dollars and seventy six cents) with interest at the rate of six per centum per annum from August 13, 1925, to the date on which the last award is rendered by the Commission.

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CHARLES S. STEPHENS AND BOWMAN STEPHENS (U.S.A.) *v.*  
UNITED MEXICAN STATES.

(*July 15, 1927, concurring opinion by American Commissioner, July 15, 1927.*  
*Pages 397-401.*)

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RESPONSIBILITY FOR ACTS OF AUXILIARY MILITARY FORCES.—RECKLESS USE OF ARMS.—DIRECT RESPONSIBILITY. American subject was killed by shot recklessly fired by member of auxiliary military forces in executing order of sergeant to stop car in which decedent was travelling. *Held*, direct responsibility established.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Killer of American subject was allowed to escape from military arrest, was never apprehended, and officer responsible for his escape was never punished therefor. *Held*, indirect responsibility established.

NECESSITY OF PECUNIARY LOSS AS BASIS FOR CLAIM.—COLLATERAL RELATIVES AS PARTIES CLAIMANT. Brothers of deceased American subject held entitled to claim for indignity and grief suffered in his death, even though no pecuniary damage could be shown.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—ADMISSIBILITY OF PROOF OF FACTS OCCURRING AFTER FILING OF MEMORIAL. Tribunal considered, but did not finally rule on, admissibility of evidence of pertinent facts occurring after filing of memorial.

*Cross-references:* Am. J. Int. Law. Vol. 22, 1928, p. 448; Annual Digest, 1927-1928, pp. 233, 266; British Yearbook, Vol. 9, 1928, p. 159.

*Van Vollenhoven, Presiding Commissioner :*

1. This claim is put forward by the United States of America on behalf of Charles S. Stephens and Bowman Stephens, American nationals. Their brother, the American national Edward C. Stephens, a bachelor, was killed about 10 p. m., on March 9, 1924, by a shot fired by a member of some Mexican guards or auxiliary forces between Parral (Hidalgo del Parral), Chihuahua, and his residence, Veta Grande. Stephens was making the return trip from Parral, where he had passed the afternoon, travelling in a motor car in the company of two friends, a gentleman and a lady. At a point quite near the township of Villa Escobedo a shot was fired at the car, which killed Stephens instantly. The very young and very ignorant guard or soldier who caused his death, one Lorenzo Valenzuela, was

arrested by the civil authorities, but handed over on March 11 or 12, 1924, to the military authorities at their request. On April 30, 1924, however, Colonel Hermógenes Ortega, when ordered to discharge the auxiliary forces (or guards) under his command, discharged also this military prisoner. Valenzuela after his escape never was apprehended. Ortega, who was responsible for the escape, was prosecuted, and was sentenced by the Judge of First Instance at Parral on January 12, 1926, to three years' imprisonment; but apparently was acquitted on appeal by the Supreme Court of Justice of the State of Chihuahua about February 9, 1926. The United States alleges that Mexico is liable for the unlawful killing by Valenzuela, and moreover for not protecting Stephens, not prosecuting Valenzuela, and not punishing Ortega, and claims an indemnity of \$50,000.00 in favor of the deceased's two brothers, with interest thereon.

2. As to the nationality of the claim, which has been challenged, the Commission might refer to paragraph 3 of its opinion rendered in the case of *William A. Parker* (Docket No. 127)<sup>1</sup> on March 31, 1926. The nationality of the claim would seem convincingly established.

3. As to interests in the claim, the eldest brother of the deceased Stephens suffered a remote pecuniary loss by his death, in that the deceased together with this brother supported an aged aunt living in a sanitarium, by contributing at first the sum of \$75.00 a month, and later the sum of \$65.00 a month, an amount which the eldest claimant alone paid after his brother's death. The youngest brother, who since 1924 appears to be suffering from melancholy or some mental disorder, would seem from the record not to have sustained any financial damage. When international tribunals thus far allowed *satisfaction* for indignity suffered, grief sustained and other similar wrongs, it usually was done *in addition to* reparation (compensation) for material losses. Several times awards have been granted for indignity and grief not combined with direct material losses; but then in cases in which the indignity or grief was suffered by the claimant himself, as in the *Davy* and *Maal* cases (*Ralston, Venezuelan Arbitrations of 1903*, 412, 916). The decision by the American German Mixed Claims Commission in the *Vance* case (*Consolidated edition, 1925*, 528) seems not to take account of damages of this type sustained by a brother whose *material* losses were "too remote in legal contemplation to form the basis of an award" (the claim in the *Candlish* case was disallowed on entirely different grounds; *Consolidated edition, 1925*, 544). The same Commission, however, in the *Vergne* case, awarded damages to a mother of a bachelor son (not to his half-brother and half-sister), though "the evidence of pecuniary losses suffered by this claimant cognizable under the law is somewhat meager and unsatisfactory" (*Consolidated edition, 1926*, at 653). It would seem, therefore, that, if in the present case injustice for which Mexico is liable is proven, the claimants shall be entitled to an award in the character of satisfaction, even when the direct pecuniary damages suffered by them are not proven or are too remote to form a basis for allowing damages in the character of reparation (compensation).

4. The State of Chihuahua, during the period within which the tragic event occurred, was one among the scenes of the revolution of Adolfo de la Huerta which lasted from November, 1923, to April, 1924 (see paragraph 11 of the Commission's opinion in the *Home Insurance Company* case, Docket

<sup>1</sup> See page 35.

No. 73).<sup>1</sup> Since nearly all of the federal troops had been withdrawn from this State and were used farther south to quell this insurrection, a sort of informal municipal guards organization—at first called “defensas sociales”—had sprung up, partly to defend peaceful citizens, partly to take the field against the rebellion if necessary. It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were “acting for” Mexico or for its political subdivisions.

5. Valenzuela, that night, was on duty with two other men, under a sergeant. They were acting apparently under the “General ordinance for the army” of June 15, 1897, which was binding also on civilians living in Mexico, and Article 176 of which obligates all individuals who are halted by sentries to answer and stop. When the four men saw Stephens’ car come near, the sergeant ordered two of them to halt it, not adding that they should fire. Nevertheless Valenzuela fired, with fatal result. It is uncertain from the record, whether the soldiers first had called out to the occupants of the car, as under the ordinance of 1897 they should have done.

6. There should be no difficulty for the Commission to hold that Valenzuela when trying to halt the car acted in the line of duty. But holding that these guards were entitled to stop passengers on this road and, if necessary, to use their guns pursuant to Article 176 just mentioned, does not imply that Valenzuela *executed* this authorization of the law in the right way. On the contrary, the use he made of his firearm would seem to have been utterly reckless. The guards should have realized that, even for foreigners aware of the conditions of the State of Chihuahua at that period, their wearing no uniforms rendered it difficult to recognize them as persons entitled to halt them, and that before indulging in stronger measures great care was indispensable because of their having the appearances of peasants, or even bandits. Being under the orders of a sergeant, the guards should have halted the car in accordance with his instructions, and Mexico contends that they were merely ordered to stop the automobile, without being ordered to fire at it. The excuse proffered by the killer that he merely intended to “intimidate” Stephens would seem too trite to deserve the Commission’s attention; see paragraph 3 of the opinion in the *Swinney* case (Docket No. 130),<sup>2</sup> paragraph 3 of the opinion in the *Roper* case (Docket 183),<sup>3</sup> paragraph 1 of the opinion in the *Falcón* case (Docket No. 278),<sup>4</sup> and paragraph 6 of the opinion in the *Teodoro García* case (Docket No. 292).<sup>5</sup> Bringing the facts to the tests expounded in paragraph 5 of the last cited opinion, there can be no doubt about the reckless character of the act. To hold this means a different thing from establishing that Valenzuela’s act under Mexican law was punishable, a question which it is not for this Commission to decide; see paragraph 3 of the Commission’s opinion in the *Teodoro García* case (Docket No. 292).

7. Responsibility of a country for acts of soldiers in cases like the present one, in the presence and under the order of a superior, is not doubtful. Taking account of the conditions existing in Chihuahua then and there, Valenzuela must be considered as, or assimilated to, a soldier.

<sup>1</sup> See page 48.

<sup>2</sup> See page 98.

<sup>3</sup> See page 145.

<sup>4</sup> See page 104.

<sup>5</sup> See page 119.



8. Apart from Mexico's direct liability for the reckless killing of an American by an armed man acting for Mexico, the United States alleges indirect responsibility of Mexico on the ground of denial of justice, since Valenzuela was allowed to escape and since the man who released him, Ortega, never was punished. Both facts are proven by the record, and reveal clearly a failure on the part of Mexico to employ adequate measures to punish wrongdoers; compare paragraphs 18 and 25 of Commissioner Nielsen's opinion in the *Massey* case (Docket No. 352).<sup>1</sup>

9. Mexico has contended that this Commission, in any case submitted to it, can only take cognizance of facts which occurred before the filing of the Memorial, and therefore should ignore the *second* court sentence, that of February, 1926, acquitting Ortega. Since, however, in the present claim the date of the Memorial was December 17, 1925, and that of the *first* court sentence, which convicted Ortega, was January 12, 1926, it is immaterial whether Mexico's contention is right or wrong. If it is right, Ortega has been at liberty since the day on which he released Valenzuela (April 30, 1924) and never was convicted; if it is wrong, Ortega has been at liberty all that time and finally was acquitted.

10. Taking account of both Mexico's direct responsibility and its denial of justice, and of the loss sustained by the claimants as it was discussed in paragraph 3, an amount of \$7,000.00, without interest, would seem to express best the personal damage caused the two claimants by delinquencies for which Mexico is liable.

*Nielsen, Commissioner :*

I am of the opinion that there is legal liability on the part of Mexico in this case, and that a pecuniary award may properly be rendered in conformity with principles of law underlying awards made by the Commission in other cases. Peaceful American citizens were proceeding in an automobile in a locality where travel was neither forbidden nor restricted. I think that the record clearly shows that the killing of one of them, Edward C. Stephens, by a Mexican soldier, in the presence and under the command of an officer, was inexcusable; that the person who did the shooting was allowed to escape; and that the person who permitted the escape was not punished, although he was charged with the offense of permitting the escape of a prisoner.

*Fernández MacGregor, Commissioner :*

I concur in the opinion of the Presiding Commissioner.

#### *Decision*

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of Charles S. Stephens and Bowman Stephens, the sum of \$7,000.00 (seven thousand dollars), without interest.

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<sup>1</sup> See page 155.

CHARLES E. TOLERTON (U.S.A.) *v.* UNITED MEXICAN STATES.*(July 15, 1927, concurring opinion by American Commissioner, July 15, 1927.**Pages 402-403.)*

FAILURE TO PROTECT.—FAILURE TO APPREHEND OR PUNISH. Evidence held insufficient to establish a failure to protect or a failure to apprehend and punish attackers of American subjects.

*Cross-reference:* Am. J. Int. Law, Vol. 22, 1928, p. 452.

*Van Vollenhoven, Presiding Commissioner :*

1. Claim is made by the United States of America in behalf of Charles E. Tolerton, an American national, who, as a member of a party of six Americans, was attacked in the afternoon of January 19, 1905, between the ranch Tasajera, Sonora, Mexico, and Covache, Sonora, Mexico, by a group of Yaqui Indians; who succeeded in saving his life; but who suffered from the occurrence a mental shock and material damages for which, it is alleged, Mexico is liable on the grounds of lack of protection of the claimant and lack of prosecution and punishment of his assailants. The United States claims reparation and satisfaction in the sum of \$50,000.00.

2. From the record, lack of protection is not convincingly proven. The claimant testifies that when their party (then seven gentlemen and a lady) was about to leave La Colorada, Sonora, for their trip to a mining camp some one hundred miles off, they had a written order from the civil and military authorities at Hermosillo, the capital of Sonora, for an escort of soldiers; but that they were refused such escort by the local military authorities at La Colorada on the ground that their party was too large to need one. The American Consul at Nogales, Sonora, relates a statement by Tolerton and another member of his party, who had the good fortune to escape, Miller, according to which they were refused an escort at La Colorado on the pretext of the horses being tired. The Governor of Sonora, however, states that the party was given the opportunity of an escort pursuant to the orders from Hermosillo, but that, on the instigation of the said Miller, they were unwilling to wait for it. Evidence submitted by Mexico with reference to the Mexican policy as to granting escorts in Sonora at that period renders the uncorroborated statements of the claimant and his associate (who has filed a separate claim) improbable.

3. As to lack of prosecution and punishment, two different contentions are submitted. One is Tolerton's statement to the effect that when, after having reached Covache on January 19 and visited the Tasajera ranch, he returned to Covache on January 20 about 7 p. m., he found there some forty or fifty Mexican soldiers under an officer who had been expressly sent from La Colorada to persecute the assailants, but were intoxicated and unwilling to take the field. This statement is unsupported. The other contention alleges that the assailants never were prosecuted or punished. It seems impossible to consider this contention disproven by so loose and strange a statement as that made on March 4, 1905, by the Governor of Sonora and reading that "several of the murderers were captured by myself and made them pay with their lives for the crime committed and

we are in active pursuit of the balance"; but there is not sufficient evidence that in this region and this period the Mexican Government could successfully have taken other measures than those of the character of military expeditions against Yaqui Indians as it repeatedly dispatched. Therefore, there would not seem to be sufficient proof warranting a pronouncement of improper lack of prosecution.

4. On the above grounds, the claim should be disallowed.

*Nielsen, Commissioner :*

I am of the opinion that the claim must be disallowed on the sole ground that there is not sufficient evidence convincingly to prove either the lack of proper protection or the absence of appropriate steps to apprehend and punish the persons who attacked the party of which Tolerton was a member.

*Fernández MacGregor, Commissioner :*

I concur in the disallowance of the claim for the reasons expounded by my two colleagues.

#### *Decision*

On the above grounds the Commission decides that the claim presented by the Government of the United States of America on behalf of Charles E. Tolerton must be disallowed.

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### F. R. WEST (U.S.A.) *v.* UNITED MEXICAN STATES.

(*July 21, 1927, concurring opinion by American Commissioner, July 21, 1927. Pages 404-407.*)

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FAILURE TO APPREHEND OR PUNISH.—EFFECT OF ACT OF AMNESTY. American subject was killed during course of pay roll robbery by bandits, to whom amnesty was thereafter granted as rebels by the President of Mexico. Claim *allowed*.

*Cross-references:* Am. J. Int. Law, Vol. 22, 1928, p. 452; Annual Digest, 1927-1928, p. 212; British Yearbook, Vol. 9, 1928, p. 163.

*Van Vollenhoven, Presiding Commissioner :*

1. Claim for damages in the amount of \$25,000.00 is made in this case by the United States of America on behalf of F. R. West, an American national, on account of the murder of his son Edgar G. West, an American oil well driller, near Nanchital, Veracruz, Mexico, on December 2, 1922, by Mexican bandits who thereafter were granted amnesty by Mexico. The murder was an ordinary case of wanton killing and robbery void of any political background, West being a member of a party of some nine Americans, two Mexicans and one Chinese, who took the pay roll of their oil company (El Aguila, S. A.) from Puerto México, Veracruz, to Ixhuatlán, travelling first by boat and thereafter by gasoline motor train. About 8.30 a. m. this train was fired upon from ambush by some fifteen bandits, who

killed West, another American (a tool dresser by the name of Snapp), and the Mexican motorman, took the pay roll and the watch of one of the party, and disappeared. About 10.30 a. m. a Mexican officer with some one hundred soldiers arrived on the spot, but did not apprehend the culprits. On December 30, 1922, the Mexican Government issued an amnesty act, which—it is alleged—was interpreted by the Mexican President on August 21, 1923, so as to cover the murder of West and Snapp. The perpetrators, as far as the record shows, never were either prosecuted or punished.

2. The nationality of the claim, which was challenged, would seem to have been sufficiently proven under the principles asserted in paragraph 3 of the opinion in the *William A. Parker* case (Docket No. 127),<sup>1</sup> rendered March 31, 1926.

3. There would seem no doubt but that granting amnesty for a crime has the same effect, under international law, as not punishing such a crime, not executing the penalty, or pardoning the offense. If proven, it fastens upon Mexico an indirect liability. Article 1 of the decree of December 30, 1922, which is the pertinent provision here, reads (translated): "Amnesty is hereby granted to those guilty of rebellion and sedition and any act committed in connection therewith up to the date of the publication of the present act and beginning with the year 1920". On August 21, 1923, the undersecretary of the Mexican Home Office wrote to the El Aguila Company the following letter (translated) :

FEDERAL EXECUTIVE POWER,  
DEPARTMENT OF INTERIOR.

Despatch No. 3346. Number 7870.

Subject : That it is not possible to accede to the petition as stated in the enclosure herewith attached.

COMPañÍA DE PETRÓLEO "EL AGUILA." S. A.,  
*Avenida Juárez 92, 94, City.*

In reply to your courteous memorial of the 4th instant, in which the aid of the President of the Republic is requested in order to prosecute the rebel leader Protasio Rosales and his followers, who were recently granted amnesty, for having been the authors of the attack committed December 2 of last year, upon the group of oil well drillers returning to their camps at Ixhuatlán, in which attack two Americans and one Mexican were killed, by advice of the First Magistrate, I have to state that the rebel Protacio Rosales and his followers having been granted amnesty by the War Department in accordance with what is ordered in the decree of December 30, last, for the crimes of rebellion and sedition and related crimes, and one of these latter being dealt with in the concrete case now denounced, it is not possible to accede to your request.

Universal suffrage. No reelection.

THE UNDERSECRETARY:  
(S.) VENEZUELA.

MEXICO, D. F., AUGUST 21, 1923.

When, on October 4, 1923, the oil company inquired of the Mexican Home Office, whether there had not been a misunderstanding in applying the amnesty act to the perpetrators of the crime of December 2, 1922, the

<sup>1</sup> See page 35.

chief clerk of the Division of Justice replied under date of October 11, 1923, that the company "should make application to the proper authorities as this Department has no power to institute any investigation concerning the aforementioned case".

4. It is not for this Commission to interpret the amnesty act; the only point of importance is how Mexico construed it. In this respect the letter of August 21, 1923, leaves no doubt. It states that it is written on behalf of the President himself; it establishes that it relates to the perpetrators, known or unknown, of the "concrete" crimes of December 2, 1922; and it contends that these crimes cannot be prosecuted because of the fact that they are within the scope of the amnesty act. The subsequent letter of October 11, 1923, fails to contain any statement to the contrary made on behalf of the President of the United Mexican States.

5. Mexico alleged that the letter of August 21, 1923, could not purport to interpret or construe the amnesty act, since the President and the Home Office were not authorized to construe it, but the judiciary only. It would seem that the first part of this contention is disproven by the text of the letter.

6. Mexico alleged that after receiving the second letter dated October 11, 1923, it would have been the duty of the oil company to have proceedings initiated in order to give the judiciary an opportunity to decide whether the amnesty act was applicable to West's murder. There is nothing in the amnesty act which suggests the existence of such a duty.

7. Since Mexico has issued an amnesty act and since the President of Mexico has held that it covered the murder of West, Mexico has granted amnesty to West's murderers, and has voluntarily deprived itself of the possibility of prosecuting and punishing them. The indirect liability which it thereby incurred would seem to be expressed best by awarding the claimant a sum of \$10,000.00, without interest.

*Nielsen, Commissioner :*

I concur in the conclusion of the Presiding Commissioner with regard to responsibility on the part of Mexico in this case. It is clear that proper steps were not taken to apprehend the murderers of West. Whatever may be the proper construction and application of the amnesty mentioned in the Presiding Commissioner's opinion, the reference to it in the record serves to furnish conclusive evidence with respect to the failure on the part of the Mexican authorities to take steps looking to the apprehension and punishment of those who attacked the party of which West was a member.

*Fernández MacGregor, Commissioner :*

I concur in the Presiding Commissioner's opinion.

#### *Decision*

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of F. R. West, \$10,000.00 (ten thousand dollars), without interest.

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T. J. SNAPP (U.S.A.) *v.* UNITED MEXICAN STATES.*(July 21, 1927. Pages 407-408.)*

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FAILURE TO APPREHEND OR PUNISH.—EFFECT OF ACT OF AMNESTY. Claim arising under same circumstances as those of *F. R. West* claim *supra* allowed.

*Cross-references:* Am. J. Int. Law, Vol. 22, 1928, p. 455; British Yearbook, Vol. 9, 1928, p. 163.

*(Text of decision omitted.)*

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SALOME LERMA VDA. DE GALVAN (UNITED MEXICAN STATES)  
*v.* UNITED STATES OF AMERICA.*(July 21, 1927. Pages 408-411.)*

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FAILURE TO APPREHEND OR PUNISH. Claim for death of Mexican subject, whose murderer was indicted by grand jury but never brought to trial or punished, *allowed*.

*Cross-references:* Am. J. Int. Law, Vol. 22, 1928, p. 455; Annual Digest, 1927-1928, p. 218; British Yearbook, Vol. 9, 1928, p. 159.

*Nielsen, Commissioner :*

1. Claim is made in this case in the amount of 50,000 pesos, by the United Mexican States, in behalf of Salomé Lerma de Galván, mother of Adolfo Pedro Galván, a Mexican citizen, who was killed in August, 1921, at Driscoll, Texas, by an American citizen named Hugh K. Kondall. The facts in the case as disclosed by the record may be briefly summarized.

2. Kondall and Galván were employed as foreman and laborer, respectively, in the construction of a bridge at a point about a half mile north of the depot at Driscoll. On the morning of August 25, 1921, Galván had a slight altercation with the son of Kondall who supplied drinking water to the workmen. It appears that Kondall was angered when he learned of the episode and proceeded to his house where he probably procured a pistol. He thereupon returned to the place where Galván was working. There is evidence that the latter, when he knew that Kondall was armed with a pistol, proceeded with a raised hammer in his hand toward the spot where Kondall and another man were standing, and that Kondall thereupon twice shot Galván who died shortly thereafter.

3. Kondall was immediately taken into custody by the local authorities and charged with murder. On August 29, 1921, he was given a preliminary hearing before a justice of the peace at which several eye witnesses of the shooting were examined. The accused was required to give a bond in the amount of \$25,000 for his appearance before the Criminal District Court

of Nueces County, at its October, 1921, term. No indictment was returned against Kondall at that term of the court, but in the following March an indictment was found against him, charging him with the murder of Galván, and trial was set for April 20, 1922. Subsequently the accused was admitted to bail in the sum of \$5,000.

4. Accompanying the American Answer is a copy of the criminal court docket in this case from which the following is an extract:

April 7, 1922. Case set for Thursday April 13, 1922, 10 A. M. Venire of fifty ordered for that date and hour. Writ returnable Tuesday.

April 17, 1922. Case continued by agreement.

December 14, 1922. Continued by operation of law.

4/30/23. Set for May 14. Special venire of 60 ordered.

5/14/23. Set for May 21.

5/22/23. Continued by agreement.

11/12/23. Set for 11/21.

6/5/24. Continued by operation of law.

5/8/25. Set for May 20. Venire of 50 men.

5/20/25. Continued illness of parties.

5. From additional evidence filed by the United States it is shown that the trial of Kondall was further continued at the instance of the State "because of a defaulting witness" and set for hearing at the term of court beginning on October 25, 1926, and still further continued at that term of court until April, 1927, on account of absence of material witnesses for the State.

6. The record contains an affidavit executed on November 24, 1925, by George C. Westervelt, District Attorney for the Counties of Nueces, Kleberg, Kenedy, Willacy and Cameron, Texas. It is stated in this affidavit that several subpoenas were issued for the appearance at the several terms of court of Louis F. Johnston, an eye witness to the shooting of Galván, and that the State could not safely and successfully go to trial without the production of this witness.

7. It is alleged in behalf of Mexico that there was an unnecessary delay in the prosecution of a person charged with a capital crime, and that under international law the United States should make compensation in satisfaction of a denial of justice. This case presents no difficulties. The question at issue is whether it reveals a failure of compliance with the general principle of international law requiring authorities to take proper measures to apprehend and punish a person who appears to be guilty of a crime against an alien. The Commission is bound to conclude that there was a clear failure on the part of the authorities of the state of Texas to act in conformity with this principle. There was no difficulty in the apprehension of Kondall, and a preliminary trial was promptly held. At this trial testimony was given from which it seems to be obvious that a grand jury could not properly fail to return an indictment for murder against Kondall. An indictment was found by a grand jury in March, 1922. After that it is plain that the authorities failed to take the proper steps to try the accused. There is no satisfactory explanation of continuances of the proceedings from time to time. Justification for the failure to bring the accused to justice cannot be found on the ground stated in the affidavit made by the District Attorney as late as November 24, 1925, that a certain eye witness had not been located. There is no reason to suppose that the legal machinery of the state of Texas is so defective that in a case in which a preliminary trial

reveals that there were at least five eye witnesses to the shooting of Galván the authorities during a period of six years after the shooting found themselves unable to conduct a proper prosecution. If any such defect had existed it would not be an adequate defence to the claim presented by Mexico. If witnesses actually disappeared during the course of the long delay in the trial, then as argued by counsel for Mexico, that would be evidence of the evils incident to such delay. It may be observed that the argument in behalf of the United States appeared to be directed more to the question of the measure of damages than to a justification of the delay in the proceedings against the accused.

8. I am of the opinion that in the light of the principles underlying decisions rendered by the Commission in the past an award may properly be made in this case in the sum of \$10,000.

*Van Vollenhoven, Presiding Commissioner :*

I concur in Commissioner Nielsen's opinion.

*Fernández MacGregor, Commissioner :*

I concur in Commissioner Nielsen's opinion.

#### *Decision*

The Commission decides that the Government of the United States of America shall pay to the Government of the United Mexican States in behalf of Salomé Lerma de Galván the sum of \$10,000 (ten thousand dollars) without interest.

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### GEORGE DAVID RICHARDS (U.S.A.) *v.* UNITED MEXICAN STATES.

*(July 23, 1927, concurring opinion of American Commissioner, July 23, 1927. Pages 412-416.)*

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**FAILURE TO PROTECT.** Where foreigners had been killed in region over two years previously but Mexico had furnished an armed guard of a number larger than that decedent was willing to have accompany him, and which he had accordingly reduced in size, subsequent killing of American citizen *held* not due to lack of protection.

**DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—DILATORY PROSECUTION.** Where trial of those accused of murder of American subject had continued for over six years without final disposition, claim *allowed*.

*Cross-references:* Am. J. Int. Law, Vol. 22, 1928, p. 660; Annual Digest, 1927-1928, p. 225; British Yearbook, Vol. 9, 1928, p. 159.

*Fernández MacGregor, Commissioner :*

1. This claim is presented by the United States of America against the United Mexican States demanding from the latter, in behalf of George



David Richards, an American citizen, an indemnization for damages suffered on account of the death of his father, David Emile Richards, also an American citizen, who was engaged in superintending the construction of a road in the vicinity of Merba Santa, near Chivela, State of Oaxaca, Mexico, and who was killed on August 26, 1921, under the circumstances hereinafter related: It seems that there had been difficulties between certain occupants of the land of the Chivela Estate and its owners, on account of certain taxes that the latter were endeavoring to collect from the former; the Mexican Government, upon request, had granted an escort of three soldiers for the protection of Richards, two of whom were accompanying him on horse-back at the time of the events, and upon reaching a point located several kilometers from the Yerba Santa. he was ambushed by several men who fired on him two shots, which wounded him in the upper right arm and in the right thigh; it seems that the soldiers, believing that Richards was dead, left him and went to notify their superior, who was the 2nd Lieutenant of a detachment of soldiers garrisoned in the ranch-house; the Lieutenant proceeded to the place where the attempt had been committed, and found only the body of Richards with the wounds mentioned without the appearance of having been robbed. The claimant Government alleges that the Mexican Government is responsible for the failure to afford adequate protection to Richards notwithstanding it knew the conditions of insecurity which prevailed in that region, shown by the fact that some other American and another foreigner had been killed two years before in that region, and for the failure to apprehend and punish adequately the guilty parties, although their names were known through a letter which the deceased had written during his life to a friend called Hart, an American citizen, owner of the estate, expressing to him the fear of being murdered by order of certain individuals whose names he gave.

2. With respect to the alleged lack of protection, it is proven, of course; that the Mexican Government had endeavored to safeguard the life of Richards, even placing at his disposal a special guard, which Richards himself reduced, making his trip with only two soldiers; it does not seem that anything else could be done, in view of the circumstances; it is further proven that the military authorities had detachments in that region with the object of keeping order. Attacks on the lives and property of individuals cannot be prevented many times, unfortunately, even by using the most efficacious preventive measures, and it seems that the fact, that other foreigners should have been killed there two years before, does not sufficiently prove a state of disorder which would require special measures. It is also proven that, at the request of Hart, Richards' friend, the former was furnished a detachment the services of which were satisfactory. Therefore, the allegation of lack of protection cannot be made a ground for the present claim.

3. With regard to the failure to apprehend and punish the guilty parties, the following is established in the record: due to the request of either the American Consul or Richards' friends, or due to the report rendered by the Lieutenant who proceeded at once to the scene of the events, an investigation was initiated in the Mixed Court of First Instance of the District of Juchitán, Oaxaca. It appears that the decree docketing the case was issued on August 28th, that is, two days after the murder was committed; on September 3rd, orders were issued for the apprehension of Alejandro Jiménez, Dionisio Carrasco, Mariano Mendoza and Mariano López,

presumably guilty of the crime committed, according to the letter which Richards wrote to Hart; on September 4th a decree was issued for the formal imprisonment of said men, who had already been arrested, the corpus delicti having also been proven with the autopsy made on the corpse of the deceased and with the testimony of several witnesses, including Hart; the same decree contained orders for the apprehension of Apolinar Carrasco and Otón Velázquez, who were considered also involved in the crime, but it seems that neither of these two men was found or arrested. It is presumable that the proceedings may have continued until March 17, 1922, on which date the Judge issued an order releasing the men detained, basing his action in that they had proven an alibi by showing that they were not and could not be in the place of crime, since they were in different and very distant places; on March 22, 1922, the Prosecuting Attorney filed an appeal against such decree, but the Judge did not admit said appeal until March 2, 1925; the same Prosecuting Attorney, on March 4, 1925, requested the apprehension of the accused, Velázquez and Carrasco, who had not been arrested up to that date; the case on appeal went to the Court of Appeals on March 19, 1925; the latter dictated its decision on appeal on August 1, 1925, revoking the decree which was issued by the lower court and which released the accused, and ordering them again confined in jail, the prosecution to be continued, basing itself on the fact that the testimony of the witnesses who helped to prove the alibi looked false and, specially, on the fact that the four accused could have been the intellectual authors of the crime and not its material authors only. There is no evidence showing that this apprehension may have been effected or that the prosecution may have been continued in any manner, it appearing only that a District Judge, probably in an "amparo" filed by the accused before him, granted a temporary injunction against the act complained of (probably that of re-apprehension), under date of August 15, 1925.

4. According to the foregoing facts, no irregularities appear in the procedure, which may amount to a deficiency and, therefore, carry international responsibility, until the time when the Prosecuting Attorney appealed from the decree which released the accused (March 20, 1922). From then on, there occur unexplainable delays, the first being that of the appeal having been admitted only almost three years afterwards (March 2, 1925); the Court of Appeals revoked the decree of liberty and ordered the re-apprehension of the accused on August 1, 1925, but Mexico has not presented any evidence of the continuation of the prosecution, or of their having been finally judged. More than six years, then, have elapsed without the judgment of the parties presumably responsible for Richards' death, and it appears that the delays have no excuse, for which reason Mexico is clearly liable on this ground.

5. The Government of Mexico alleged that at the time when the United States presented the claim, that is, on December 17, 1924, no claim had accrued, because the proceedings had been regular up to then, and there was, for that reason, no damage for which claim could be made, in view of the fact that the deficiencies, if there be such, did not become apparent until April 13, 1925. I believe that this argument should not be taken into consideration, because the appeal of the Prosecuting Attorney filed on March 22, 1922, should have been decided shortly thereafter and it was not, the supposed delinquents having remained free since then, and because there is the fact that two of them, Velázquez and Carrasco, were never

apprehended. The subsequent delays are incorporated into those which existed at the time of filing this claim.

6. The Government of Mexico also alleged that the present claim did not accrue prior to September 8, 1923, the date on which the two Contracting Parties in this arbitration concluded their general claims convention, and that therefore it was erroneously filed under Article VI, instead of under Article VII, of said treaty. For the reasons stated under paragraph 5, there would seem no doubt but that the present claim accrued prior to the signing of the general claims convention.

7. In view of the above considerations, I believe that the Government of the United Mexican States must pay to the Government of the United States of America, on behalf of George David Richards, the sum of \$9,000 without interest.

*Van Vollenhoven, Presiding Commissioner :*

I concur in Commissioner Fernández MacGregor's opinion.

*Nielsen, Commissioner :*

I concur with Commissioner MacGregor's conclusion as to liability on the part of Mexico in this case. In my opinion it is clear that proper steps were not taken to apprehend and punish persons guilty of the murder of David Emile Richards.

#### *Decision*

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of George David Richards, \$9,000.00 (nine thousand dollars) without interest.

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#### MARY ANN TURNER (U.S.A.) *v.* UNITED MEXICAN STATES.

(*July 23, 1927, concurring opinion by Mexican Commissioner, July 23, 1927. Pages 416-421.*)

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ILLEGAL ARREST. Evidence *held* not to establish unjustified arrest.

DENIAL OF JUSTICE.—ILLEGAL IMPRISONMENT.—DETENTION BEYOND LEGAL PERIOD.—CRUEL AND INHUMANE IMPRISONMENT. American subject was held in jail beyond legal period for investigation of crime of which he was accused. He became ill and died during his imprisonment, though ill-treatment while he was in jail was not proved. *Held*, respondent government was responsible for risks incident to illegal custody.

MEASURE OF DAMAGES. When American subject died during illegal imprisonment, though not as a result of ill-treatment, *held* damages will not be allowed for his death but instead for the bad effect upon his health of his illegal custody and for pecuniary damage, grief and indignity suffered by his widow, claimant herein.

*Cross-references:* Am. J. Int. Law, Vol. 22, 1928, p. 663; Annual Digest, 1927-1928, pp. 226, 483; British Yearbook, Vol. 9, 1928, p. 160.

*Van Vollenhoven, Presiding Commissioner :*

1. This claim is presented by the United States of America in behalf of Mary Ann Turner, an American national through the naturalization of her husband, against the United Mexican States, on account of damages suffered from the death of her said husband, Edward Turner, a naturalized American national. Turner, who in the Spring of 1899 was a locomotive engineer in Mexico, had the misfortune to be involved in a train collision on March 20, 1899, at Encinar, Veracruz, which caused the death of the fireman serving on the other colliding engine. Turner was arrested about April 1, 1899, and sent first to the prison hospital at Orizaba, Veracruz, and afterwards to the prison in that place. He was free on bail until an uncertain date after June 14, 1899; was in jail again (first in Orizaba, the last few weeks in Veracruz) until January 28, 1900; and on the last date he died, without having had a trial. The United States alleges direct responsibility of Mexico for an illegal arrest, undue and illegal delay of proceedings, and inhuman treatment in prison, all of which contributed to causing Turner's death, and claims on behalf of his widow damages in the sum of \$50,000.00, with interest thereon.

2. The nationality of the claim has been challenged by Mexico in its answer, but after the filing of additional evidence by the United States this challenge was abandoned.

3. An unjustified arrest of Turner has not been proven. Under Mexican law, negligence in causing a railway accident resulting in one's death is punishable, and both Turner and the engineer of the other colliding train, one Clark, were arrested. The fact that Clark was convicted on March 17, 1900 (two months after Turner's death), for having caused this collision certainly can not prove that in March or April, 1899, there did not exist sufficient ground for an arrest and formal imprisonment of the deceased.

4. As to undue and illegal delay of court proceedings in the District Court at Veracruz in Turner's case, Mexico has pleaded that it is impossible to produce evidence because of the court records having been destroyed by American naval forces in April, 1914. The statement, made not only in the reply brief, but repeated during the oral hearings, is palpably erroneous. Annex I of the Answer established that the records of the Veracruz jail (*el archivo de la Cárcel de Veracruz*, as the Answer says), had been destroyed in 1914, among them the record of 1900 (*los expedientes de 1900*) and that therefore the respondent Government could furnish no information about what happened to Turner *in that jail* in the last month of his life. This information obtained from the jail warden at Veracruz was transmitted by the governor of the State of Veracruz, who resides at Jalapa, Veracruz. These statements which in no wise are related either to court records, to Jalapa, or to the year 1899, are reproduced in the Mexican reply brief (filed May 24, 1927) by contending "that as stated in Annex I of the Answer, the court records of Jalapa, Veracruz, from at least 1899 to 1914, were destroyed by the Army of the United States of America at the time that these American troops landed at and were in possession and control of the port of Veracruz. Among the said court records thus destroyed the documentation of the Mexican Judiciary concerning the said Turner was to be found". Additional evidence, filed by Mexico itself on May 11, 1927, to-wit, only thirteen days before the reply brief, shows that the court records in question, if not in Veracruz, might be either in the archives of the former

or present circuit courts at Puebla, Mexico City or Querétaro, that they apparently have been mislaid or destroyed by Mexican officials, and that even at this time Mexico feels uncertain where they ought to be. This means that Mexico can not possibly, as it endeavored to do, invoke in its favor or as an excuse, this lack of counterproof proceeding from the court record, and that its absence in this case is entirely different from the situation existing in the *Faulkner* case (Docket No. 47),<sup>1</sup> according to paragraph 5 of the Commission's opinion in that case.

5. From the record as it stands, and especially from a letter of the American Ambassador of September 4, 1899, and one of the Mexican Foreign Minister of December 26, 1899, it would seem probable that, if some investigations were made, they must have been slow and unsatisfactory, and that the accused was not allowed to play a part of any importance in them. It need not be established that gathering evidence in the case of a railway collision of this type and in this part of the country is a simpler task than gathering evidence of a backwoods murder by unknown individuals.

6. The record contains various statements about the time during which Turner was deprived of his liberty. Mexico contends that he was arrested on or about March 20, but released on bail on March 30, 1899; the American Ambassador, on the other hand, contends that both Turner and Clark were imprisoned on April 1, 1899. Mexico alleges that Turner's bail was cancelled and he himself placed at the disposal of the Judge on or about June 14, 1899, but that while the application of the guarantor was being dispatched, Turner succeeded in escaping, and that he was apprehended in Mexico City. The date on which Turner returned to jail is uncertain. When, however, the Mexican Foreign Minister, according to his letter of September 5, 1899, to the American Ambassador, applied to the Judge at Veracruz for information about the prisoner Turner, he was never informed by that Judge (as far as the record shows) that his supposition about Turner's being in jail was erroneous; nor did this Judge, when asked for an explanation about the apparent slowness of the investigations, ever allege (as far as the record shows) that they had been seriously interrupted because of any escape of Turner. On the record as it stands, it may be safely assumed that Turner was in jail at least from about September 1, 1899, on; the more so as—according to a statement furnished by the Supreme Court of the Nation—Turner on November 27, 1899, presented a petition requesting that the indictment in his case be quashed, and he probably did not do so until after he had waited in jail a considerable length of time for a trial. Under the conditions of the record there is no reason to give Mexico the benefit of the doubt against statements made by the American Embassy, when these in themselves are probable and not contradicted by any evidence.

7. According to the Mexican federal code of criminal procedure, which was applicable, the first state of the proceedings, that of the preliminary investigations, should have ended within five months after the date on which the accused came at the disposal of the judge (some date between March 20 and April 1, 1899, both dates inclusive). If he was apprehended shortly after June 14, 1899, and therefore had been at the disposal of the Judge from about April 1, 1899, on, then he was illegally in jail from about September 1, 1899. But even if it is considered uncertain whether he was

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<sup>1</sup> See page 67.

at the Court's disposal between June 14, and September 1, 1899, then at any rate he was illegally in jail from about November 15, 1899, on; and since the illness from which he died must have begun or at any rate increased during the two months between the middle of November, 1899, and January 28, 1900, Mexico must be liable for what befell Turner during this period of illegal custody. Though there is no convincing proof that his death was caused by his treatment in prison, there can be no doubt but that, if at liberty, he would have been able to take better measures for restoring his health than he could do either in prison, or in a prison hospital. If having a man in custody obligates a government to account for him, having a man in *illegal* custody doubtless renders a government liable for dangers and disasters which would not have been his share, or in a less degree, if he had been at liberty.

8. Ill-treatment of Turner in jail is not proven in itself. No letters written either by him or to him while he was in prison connect up his death with inhuman treatment. The evidence exclusively consists of later statements by his widow, and of manifestly exaggerated letters from his lawyer, not corroborated by any contemporary testimony from some impartial authority having firsthand knowledge. But it is proven, on the one hand, that a man reported to be of broken health, who died on January 28th, was reprimanded by a jail warden on or about January 20th because of "bad conduct" (*mala conducta*); and on the other hand, that the Judge at Vera Cruz, being requested by the Federal District Attorney for information "whether it is true that he (Turner) is almost in a dying condition", telegraphed on January 26, 1900 (only two days before Turner's death), that Turner was in "the best condition possible consistent with his position as an accused" (*se halla en las mejores condiciones posibles atenta su calidad de procesado*). Instead of observing that this statement overlooked the fact that Turner, not having been tried, should have been considered and treated as an innocent man, Mexico attempts to amplify the Judge's statement by contending that this statement shows that while in prison, Turner "constantly was of bad behavior".

9. This is a case of alleged direct responsibility for acts of authorities. Mexico, on the record, cannot be held responsible for Turner's death; but it should be held responsible for the bad effect of its illegal and careless custody on Turner's health. An amount of damages of \$4,000.00, (four thousand dollars) without interest, would seem to express best the direct pecuniary damage, grief and indignity sustained by the claimant.

*Nielsen, Commissioner :*

I am of the opinion that Turner was clearly the victim of mistreatment. He evidently was not in jail for the entire period of ten months between the date of his arrest on March 20, 1899, as stated in the Memorial, or some days later, and the date of his death on January 28, 1900. But though he was free on bail a part of that time, he was continuously under accusation. There is no satisfactory explanation in the record why he was not tried. Evidence in the record indicates to my mind that he was innocent of the charge preferred against him, even though his arrest may have been justified. It seems to me to be clear that the accusation against him was of such a nature that its merits could speedily have been determined by a court.

*Fernández MacGregor, Commissioner :*

I concur with paragraphs 1 to 6 of the Presiding Commissioner's Opinion. It appears clear to me, notwithstanding the vagueness of the evidence presented by both sides in this case, that Turner was held prisoner without being brought to trial for a period which could be from three to five months more than he should have been, according to Mexican law, and that this fact, which means a violation of human liberty, renders Mexico liable conformably with principles of international law. Therefore, I believe that the claimant must be awarded the sum proposed by the Presiding Commissioner.

#### *Decision*

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of Mary Ann Turner, \$4,000.00 (four thousand dollars), without interest.

#### B. E. CHATTIN (U.S.A.) *v.* UNITED MEXICAN STATES.

*(July 23, 1927, concurring opinion by American Commissioner, July 23, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 422-465.)*

EFFECT UPON CLAIM OF ESCAPE OF CLAIMANT FROM PRISON. The fact that claimant escaped from jail and was a fugitive from justice *held* not to bar his Government's right to espouse his claim.

DENIAL OF JUSTICE.—ILLEGAL ARREST. Evidence to support the validity of an arrest need not be of same weight as that to support a conviction.

DIRECT AND INDIRECT RESPONSIBILITY.—MEASURE OF DAMAGES. Direct and indirect responsibility defined and distinguished. Measure of damages in each category considered.

IRREGULARITIES IN JUDICIAL PROCEEDINGS.—UNDUE DELAY IN JUDICIAL PROCEEDINGS.—CONSOLIDATION OF CRIMINAL CASES WITHOUT REASON.—FAILURE TO INFORM ACCUSED OF CHARGE AGAINST HIM.—INSUFFICIENT HEARING OR TRIAL.—FAILURE TO MEET ORDINARY JUDICIAL STANDARDS. Evidence *held* sufficient to establish various irregularities and undue delay in judicial proceedings as well as failure to meet ordinary judicial standards.

INFLUENCING OF TRIAL BY GOVERNOR OF STATE.—EXORBITANT BAIL.—FAILURE TO PROVIDE COUNSEL OR INTERPRETER TO ACCUSED.—FAILURE TO CONFRONT ACCUSED WITH WITNESSES. Evidence *held* not to establish certain irregularities in judicial proceedings.

FAILURE TO SWEAR WITNESSES.—INTERNATIONAL STANDARD. A failure to swear witnesses, when not required by Mexican law, *held* not to involve a failure to meet international standards.

CONVICTION ON INSUFFICIENT EVIDENCE. Claim that claimant was convicted on insufficient evidence *held* not established.

UNDUE SEVERITY OF PENALTY IMPOSED. A court in its discretion may impose a severe penalty for the embezzlement of four pesos, so long as such penalty is permissible under the law.

CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Claim for mistreatment in prison *held* not established. Corroboration of allegations of claimant is required.

MEASURE OF DAMAGES. Measure of damages, in light of evidence, in case involving direct responsibility, considered. Fact that claimant had escaped from prison and was not in jail for entire period involved *held* to lessen damages.

*Cross-references:* Am. J. Int. Law, Vol. 22, 1928, p. 667; Annual Digest, 1927-1928, p. 248; British Yearbook, Vol. 9, 1928, p. 157.

*Van Vollenhoven, Presiding Commissioner :*

1. This claim is made by the United States of America against the United Mexican States on behalf of B. E. Chattin, an American national. Chattin, who since 1908 was an employee (at first freight conductor, thereafter passenger conductor) of the Ferrocarril Sud-Pacífico de México (Southern Pacific Railroad Company of Mexico) and who in the Summer of 1910 performed his duties in the State of Sinaloa, was on July 9, 1910, arrested at Mazatlán, Sinaloa, on a charge of embezzlement; was tried there in January, 1911, convicted on February 6, 1911, and sentenced to two years' imprisonment; but was released from the jail at Mazatlán in May or June, 1911, as a consequence of disturbances caused by the Madero revolution. He then returned to the United States. It is alleged that the arrest, the trial and the sentence were illegal, that the treatment in jail was inhuman, and that Chattin was damaged to the extent of \$50,000.00, which amount Mexico should pay.

2. Mexico has challenged the claimant's citizenship on account of its being established by testimonial evidence only. Under the principles expounded in paragraph 3 of the Commission's opinion in the case of *William A. Parker* (Docket No. 127)<sup>1</sup> rendered March 31, 1926, the American nationality of Chattin would seem to be proven.

3. The circumstances of Chattin's arrest, trial and sentence were as follows. In the year 1910 there had arisen a serious apprehension on the part of several railroad companies operating in Mexico as to whether the full proceeds of passenger fares were accounted for to these companies. The Southern Pacific Railroad Company of Mexico applied on June 15, 1910, to the Governor of the State of Sinaloa, in his capacity as chief of police of the State, co-operating with the federal police, in order to have investigations made of the existence and extent of said defrauding of their lines within the territory of his State. On or about July 8, 1910, one Cenobio Ramírez, a Mexican employee (brakeman) of the said railroad, was arrested at Mazatlán on a charge of fraudulent sale of railroad tickets of the said company, and in his appearance before the District Court in that town he accused the conductor Chattin—who since May 9, 1910, had charge of trains operating between Mazatlán and Acaponeta, Nayarit—as the principal in the crime with which he, Ramírez, was charged; whereupon Chattin also was arrested by the Mazatlán police, on July 9 (not 10),

<sup>1</sup> See page 35.



1910. On August 3 (not 13), 1910, his case was consolidated not only with that of Ramírez, but also with that of three more American railway conductors (Haley, Englehart and Parrish) and of four more Mexicans. After many months of preparation and a trial at Mazatlán, during both of which Chattin, it is alleged, lacked proper information, legal assistance, assistance of an interpreter and confrontation with the witnesses, he was convicted on February 6, 1911, by the said District Court of Mazatlán as stated above. The case was carried on appeal to the Third Circuit Court at Mexico City, which court on July 3, 1911, affirmed the sentence. In the meantime (May or June, 1911) Chattin had been released by the population of Mazatlán which threw open the doors of the jail in the time elapsing between the departure of the representatives of the Diaz regime and the arrival of the Madero forces.

*Forfeiture of the right to national protection*

4. Mexico contends that not only has Chattin, as a fugitive from justice, lost his right to invoke as against Mexico protection by the United States, but that even the latter is bound by such forfeiture of protection and may not interpose in his behalf. If this contention be sound, the American Government would have lost the right to espouse Chattin's claim, and the claim lacking an essential element required by Article 1 of the Convention signed September 8, 1923, would not be within the cognizance of this Commission. The motive for the alleged limitation placed on the sovereignty of the claimant's Government would seem to be that a government by espousing such claim makes itself a party to the improper act of its national. International awards, however, establishing either the duty or the right of international tribunals to reject claims of fugitives from justice have not been found; on the contrary, the award in the *Pelletier* case (under the Convention of May 28, 1884, between the United States and Hayti) did not attach any importance to the fact that Pelletier had escaped from an Haytian jail, nor did Secretary Bayard do so in expounding the reasons why the United States Government did not see fit to press the award rendered in its favor (Moore, at 1779, 1794, 1800). In the *Roberts*<sup>1</sup> and *Strother*<sup>2</sup> cases (Docket Nos. 185 and 3088) this Commission virtually held that protection of a fugitive from justice should be left to the discretion of the claimant government, and it did so more explicitly in the *Massey* case (Docket No. 352; paragraph 3 of Commissioner Nielsen's opinion).<sup>3</sup> A similar attitude was taken in cases in which forfeiture of the right to protection was alleged on other grounds. In paragraph 6 of its opinion in the *Macedonio J. Garcia* case (Docket No. 607),<sup>4</sup> the Commission held that the American claimant's participation in Mexican politics was not a point on which the question of the right of the United States to intervene in his behalf, and therefore the question of the Commission's jurisdiction, could properly be raised, but that the pertinency of this point could only be considered in connection with the question of the validity of the claim under international law. In the *Francisco Mallén* case (Docket No. 2935)<sup>5</sup> none of the Commissioners held that misstatements or even misrepresentations by the individual

<sup>1</sup> See page 77.

<sup>2</sup> See page 262.

<sup>3</sup> See page 155.

<sup>4</sup> See page 108.

<sup>5</sup> See page 173.

claimant could furnish a ground for the Commission to reject the claim as an unallowable one. It is true that more than once in international cases statements have been made to the effect that a fugitive from justice loses *his* right to invoke and to expect protection—either by the justice from which he fled, or by his own government—but this would seem not to imply that his government as well loses *its* right to espouse its subject's claim in its discretion. The present claim, therefore, apart from the question whether a man who leaves a jail which is thrown open may be called a fugitive from justice, should be accepted and examined.

#### *Illegal arrest*

5. It has been alleged, in the first place, that Chattin, contrary to the Mexican Constitution of 1857, was arrested merely on an oral order. The Court's decision rendered February 6, 1911, stated that the court record contained "the order dated July 9, which is the written order based on the reasons for the detention of Chattin"; and among the court proceedings there are to be found (a) a decree ordering Chattin's arrest, dated July 9, 1910, and (b) a decree for Chattin's "formal imprisonment", dated July 9, 1910, as well. Even if the first decree had been issued some hours after Chattin's arrest, for which there is no proof except the statement by the police prefect that Chattin was placed in a certain jail on the Judge's "oral order", the irregularity would have been inconsequential to Chattin. The Third Circuit Court at Mexico City, when called upon to examine the second decree given on July 9, 1910, held on October 27, 1910, that it had been regular but for the omission of the crime imputed (which was known to Chattin from the examination to which he was previously submitted on July 9, 1910), and therefore the Court affirmed it after having amended it by inserting the name of Chattin's alleged crime. The United States has alleged that, since the sentence rendered on February 6, 1911, held that "the confession of the latter" (Ramírez) "does not constitute in itself a proof against the other" (Chattin), the Court confessed that Chattin's arrest had been illegal. No such inference can be made from the words cited, though the thought might have been expressed more clearly; a statement, insufficient as evidence for a conviction, can under Mexican law (as under the laws of many other countries) furnish a wholly sufficient basis for an arrest and formal imprisonment.

#### *Defective administration of justice*

6. Before taking up the allegations relative to irregular court proceedings against Chattin and to his having been convicted on insufficient evidence, it seems proper to establish that the present case is of a type different from most other cases so far examined by this Commission in which defective administration of justice was alleged.

7. In the *Kennedy* case (Docket No. 7)<sup>1</sup> and nineteen more cases before this Commission it was contended that, a citizen of either country having been wrongfully damaged either by a private individual or by an executive official, the judicial authorities had failed to take proper steps against the person or persons who caused the loss or damage. A governmental liability proceeding from such a source is usually called "indirect liability", though,

<sup>1</sup> See page 194.

considered in connection with the alleged delinquency of the government itself, it is quite as direct as its liability for any other act of its officials. The liability of the government may be called remote or secondary only when compared with the liability of the person who committed the wrongful act (for instance, the murder) for that very act. Such cases of *indirect governmental liability* because of lack of proper action by the judiciary are analogous to cases in which a government might be held responsible for denial of justice in connection with nonexecution of private contracts, or in which it might become liable to victims of private or other delinquencies because of lack of protection by its executive or legislative authorities.

8. Distinct from this so-called indirect government liability is the *direct responsibility* incurred on account of acts of the government itself, or its officials, unconnected with any previous wrongful act of a citizen. If such governmental acts are acts of *executive* authorities, either in the form of breach of government contracts made with private foreigners, or in the form of other delinquencies of public authorities, they are at once recognized as acts involving direct liability; for instance, collisions caused by public vessels, reckless shooting by officials, unwarranted arrest by officials, mis-treatment in jail by officials, deficient custody by officials, etc. As soon, however, as mistreatment of foreigners *by the courts* is alleged to the effect that damage sustained is caused by the *judiciary* itself, a confusion arises from the fact that authors often lend the term "denial of justice" as well to these cases of the second category, which are different in character from a "denial of justice" of the first category. So also did the tribunal in the *Yuille, Shortridge & Company* case (under the British memorandum of March 8, 1861, accepted by Portugal; De Lapradelle et Politis, II, at 103), so Umpire Thornton sometimes did in the 1868 Commission (Moore, 3140, 3141, 3143; *Burn, Pratt* and *Ada* cases). It would seem preferable not to use the expression in this manner. The very name "denial of justice" (*dénégation de justice, déni de justice*) would seem inappropriate here, since the basis of claims in these cases does not lie in the fact that the courts refuse or deny redress for an injustice sustained by a foreigner because of an act of someone else, but lies in the fact that the courts themselves did injustice. In the British and American claims arbitration Arbitrator Pound one day put it tersely in saying that there must be "an injustice antecedent to the denial, and then the denial after it" (Nielsen's *Report*, 258, 261).

9. How confusing it must be to use the term "denial of justice" for both categories of governmental acts, is shown by a simple deduction. If "denial of justice" covers not only governmental acts implying so-called indirect liability, but also acts of direct liability, and if, on the other hand, "denial of justice" is applied to acts of executive and legislative authorities as well as to acts of judicial authorities—as is often being done—there would exist no international wrong which would not be covered by the phrase "denial of justice", and the expression would lose its value as a technical distinction.

10. The practical importance of a consistent cleavage between these two categories of governmental acts lies in the following. In cases of direct responsibility, insufficiency of governmental action entailing liability is not limited to flagrant cases such as cases of bad faith or wilful neglect of duty. So, at least, it is for the non-judicial branches of government. Acts of the *judiciary*, either entailing direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient

unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man. Acts of the executive and legislative branches, on the contrary, share this lot only then, when they engender a so-called *indirect* liability in connection with acts of others; and the very reason why this type of acts often is covered by the same term "denial of justice" in its broader sense may be partly in this, that to such acts or inactivities of the executive and legislative branches engendering *indirect* liability, the rule applies that a government cannot be held responsible for them unless the wrong done amounts to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. With reference to *direct* liability for acts of the executive it is different. In the *Mermaid* case (under the Convention of March 4, 1868, between Great Britain and Spain) the Commissioners held that even an act of mere clumsiness on the part of a gunboat—a cannon shot fired at a ship in an awkward way—when resulting in injustice renders the government to whom that public vessel belongs liable (De Lapradelle et Politis, II, 496; compare Moore, 5016). In the *Union Bridge Company* case the British American arbitral tribunal decided that an act of an executive officer may constitute an international tort for which his country is liable, even though he acts under an erroneous impression and without wrongful intentions (Nielsen's *Report*, at 380). This Commission, in paragraph 12 of its opinion in the *Illinois Central Railroad Company* case (Docket No. 432)<sup>1</sup> rendered March 31, 1926, held that liability can be predicated on nonperformance of government contracts even where none of these aggravating circumstances is involved; and a similar view regarding responsibility for other acts of executive officers was held in paragraph 7 of its opinion in the *Okie* case (Docket No. 275),<sup>2</sup> rendered March 31, 1926, and in paragraph 9 of the first opinion in the *Venable* case (Docket No. 603).<sup>3</sup> Typical instances of direct damage caused by the judiciary—"denial of justice" improperly so called—are the *Rozas* and *Driggs* cases (Moore, 3124-3126; not the *Driggs* case in Moore, 3160); before this Commission the *Faulkner*, *Roberts*, *Turner* and *Strother* cases (Docket Nos. 47, 185, 1327 and 3088) presented instances of this type, in so far as the allegation of illegal *judicial* proceedings was involved therein. Neither in the *Rozas* and *Driggs* cases, nor in the *Selkirk* case (Moore, 3130), the *Reed and Fry* case (Moore, 3132), the *Jennings* case (Moore, 3135), the *Pradel* case (Moore, 3141), the *Smith* case (Moore, 3146), the *Baldwin* case (Moore, 3235), the *Jonan* case (Moore, 3251), the *Trumbull* case (Moore, 3255), nor the *Croft* case (under the British memorandum of May 14, 1855, accepted by Portugal; De Lapradelle et Politis, II, at 22; compare Moore, 4979) and the *Costa Rica Packet* case (under the Convention of May 16, 1895, between Great Britain and the Netherlands; La Fontaine, 509, Moore, 4948) was the improper term "denial of justice" used by the tribunal itself. The award in the *Cotesworth & Powell* case made a clear and logical distinction between the two categories mentioned in paragraphs 7 and 8, above; "denials of justice" on the one hand (when tribunals refuse redress), and "acts of notorious injustice" committed by the judiciary on the other hand (Moore, at 2057, 2083).

<sup>1</sup> See page 134.

<sup>2</sup> See page 54.

<sup>3</sup> See page 219.

11. When, therefore, the American Agency in its brief mentions with great emphasis the existence of a "denial of justice" in the *Chattin* case, it should be realized that the term is used in its improper sense which sometimes is confusing. It is true that *both* categories of government responsibility—the direct one and the so-called indirect one—should be brought to the test of international standards in order to determine whether an international wrong exists, and that for *both* categories convincing evidence is necessary to fasten liability. It is moreover true that, as far as acts of the *judiciary* are involved, the view applies to *both* categories that "it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country" (*Garrison's* case; Moore, 3129), and to *both* categories the rule applies that state responsibility is limited to judicial acts showing outrage, bad faith, wilful neglect of duty, or manifestly insufficient governmental action. But the distinction becomes of importance whenever acts of the *other* branches of government are concerned; then the limitation of liability (as it exists for *all* judicial acts) does not apply to the category of direct responsibility, but only to the category of so-called indirect or derivative responsibility for acts of the executive and legislative branches, for instance on the ground of lack of protection against acts of individuals.

*Irregularity of court proceedings*

12. The next allegation on the American side is that *Chattin's* trial was held in an illegal manner. The contentions are: (a) that the Governor of the State, for political reasons, used his influence to have this accused and three of his fellow conductors convicted; (b) that the proceedings against the four conductors were consolidated without reason; (c) that the proceedings were unduly delayed; (d) that an exorbitant amount of bail was required; (e) that the accused was not duly informed of the accusations; (f) that the accused lacked the aid of counsel; (g) that the accused lacked the aid of an interpreter; (h) that there were no oaths required of the witnesses; (i) that there was no such a thing as a confrontation between the witnesses and the accused: and (j) that the hearings in open court which led to sentences of from two years' to two years and eight months' imprisonment lasted only some five minutes. It was also contended that the claimant had been forced to march under guard through the streets of Mazatlán; but the Commission in paragraph 3 of its opinion in the *Faulkner* case (Docket No. 47)<sup>1</sup> rendered November 2, 1926, has already held that such treatment is incidental to the treatment of detention and suspicion, and cannot in itself furnish a separate basis for a complaint.

13. As to illegal efforts made by the Governor of Sinaloa to influence the trial and the sentence (allegation a), the only evidence consists in hearsay or suppositions about such things as what the Governor had in mind, or what the Judge has said in private conversation; hearsay and suppositions which often come from persons connected with those colleagues of *Chattin's* who shared his fate. To uncorroborated talk of this kind the Commission should not pay any attention. The record contains several allegations about lawyers being unwilling to give or to continue their services because of fear of the Governor of Sinaloa; but the only statement of this kind proceeding from a lawyer himself relates to an undisclosed behavior on

<sup>1</sup> See page 67.

his part which displeased quite as much the college where he was teaching as a professor, as it displeased the Governor of the State. Among these lawyers who presented bills for large fees, but, according to the record, did not take any interest at all in their clients, and did not avail themselves of the rights accorded by Mexican law in favor of accused persons, there was one who seems to have been willing, only if he were appointed official consulting attorney for the American consulate, not merely to become quite active but also to drop at once his fear of the Governor. It took another lawyer thirty eight days to decline a request to act as counsel on appeal. If really these lawyers have behaved as it would seem from the record, their boastful pretenses and feeble activities were not a credit to the Mexican nation. The Government of Mexico evidently cannot be held liable for that; but if conditions sometimes are in parts of Mexico as they were then in Sinaloa, it might be well to explicitly obligate the Judge by law to inform the accused ones of their several rights, both during the investigations and the trial.

14. For the advisability or necessity of consolidating the proceedings in the four cases (allegations b), here is only slight evidence. Yet there is; and it would seem remarkable that, if the court record can be relied upon in this respect, this point was not given any attention during the investigations and the trial. Among the scanty pieces of evidence against Chattin there exists on the one hand a stub (No. 21), on which Chattin, by a statement made on October 28, 1910, admitted having written on April 24, 1910 (that is, before he came in charge of the track Mazatlán—Acaponeta, and was still on the track Culiacán-Mazatlán) the words "This man is O. K.—Chattin" (there is no addressee's name on the original), and of which he could give no other explanation than that it was issued to "recommend a friend who travelled on the line"; and on the other hand there was produced a stub (No. 23) reading "5/24/10.—Chattin—The two parties are O. K.—Haley", regarding which Haley stated on October 29, 1910, "that he wrote it on May 24th last for the purpose of recommending some intimate friends". These recommendations of travelling friends not only might raise suspicions in connection with the allegation ascribed to Camou and made in court by Batriz (both of them accused Mexican brakemen) that there was one general system of understandings between the several railway conductors, but it also shows that there might have been good reasons to connect the cases of at least Chattin and Haley; and as the cases of Haley and Englehart had been already naturally connected from the beginning, it would seem reasonable that at least the cases of these three men had been linked up. However, the Court which had taken these stubs from secret documents presented to it on August 3, 1910, by the railroad company, instead of making them an object of a most careful inquiry, neither informed Chattin and his colleagues about their origin, nor examined Haley and Chattin as to the relation existing between them. More than two months after the consolidation, to-wit on October 12, 1910, testimony was given that Ramírez, in the south of Sinaloa, had delivered passes to Guaymas, Sonora; but neither is there any trace of an investigation as to this connecting link between the acts of several conductors. Since no grounds were given for the consolidation of the cases, and not a single effort was made to throw any more light on the occurrences from this consolidation, all disadvantages resulting therefrom for those whose cases might have been heard at much earlier dates (Haley, Englehart and Parrish) must be imputed to the Judge. The present claimant, however, Chattin,

is the one who has not suffered from the consolidation, since his case was slowest in maturing for trial and since the others were waiting for him.

15. For undue delay of the proceedings (allegation c), there is convincing evidence in more than one respect. The formal proceedings began on July 9, 1910. Chattin was not heard in court until more than one hundred days thereafter. The stubs and perhaps other pieces of evidence against Chattin were presented to the Court on August 3, 1910; Chattin, however, was not allowed to testify regarding them until October 28, 1910. Between the end of July, and October 8, 1910, the Judge merely waited. The date of an alleged railroad ticket delinquency of Chattin's (June 29, 1910) was given by a witness on October 21, 1910; but investigation of Chattin's collection report of that day was not ordered until November 11, 1910, and he was not heard regarding it until November 16, nor confronted with the only two witnesses (Delgado and Sarabia) until November 17, 1910. The witnesses named by Ramírez in July were not summoned until after November 22, 1910, at the request of the Prosecuting Attorney, with the result that, on the one hand, several of them—including the important witness Manuel Virgen—had gone, and that, on the other hand, the proceedings had to be extended from November 18, to December 13. On September 3, 1910, trial had been denied Parrish, and on November 5, it was denied Chattin, Haley and Englehart; though no testimony against them was ever taken after October 21 (Chattin), and though the absence of the evidence ordered on November 11 and after November 22 was due exclusively to the Judge's laches. Unreliability of Ramírez's confession had been suggested by Chattin's lawyer on August 16, 1910; but it apparently was only after a similar suggestion of Camou on October 6, 1910, that the Judge discovered that the confession of Ramírez did not "constitute in itself a proof against" Chattin. New evidence against Chattin was sought for. It is worthy of note that one of the two new witnesses, Estebán Delgado, who was summoned on October 12, 1910, had already been before the police prefect on July 8, 1910, in connection with Ramírez's alleged crime. If the necessity of new evidence was not seriously felt before October, 1910, this means that the Judge either has not in time considered the sufficiency of Ramírez's confession as proof against Chattin, or has allowed himself an unreasonable length of time to gather new evidence. The explanation cannot be found in the consolidation of Chattin's case with those of his three fellow conductors, as there is no trace of any judicial effort to gather new testimony against these men after July, 1910. Another remarkable proof of the measure of speed which the Judge deemed due to a man deprived of his liberty, is in that, whereas Chattin appealed from the decree of his formal imprisonment on July 11, 1910—an appeal which would seem to be of rather an urgent character—"the corresponding copy for the appeal" was not remitted to the appellate Court until September 12, 1910; this Court did not render judgment until October 27, 1910; and though its decision was forwarded to Mazatlán on October 31, 1910, its receipt was not established until November 12, 1910.

16. The allegation (d) that on July 25, 1910, an exorbitant amount of bail, to-wit a cash bond in the sum of 15,000.00 pesos, was required for the accused is true; but it is difficult to see how in the present case this can be held an illegal act on the part of the Judge.

17. The allegation (e) that the accused has not been duly informed regarding the charge brought against him is proven by the record, and to

a painful extent. The real complainant in this case was the railroad company, acting through its general manager; this manager, an American, not only was allowed to make full statements to the Court on August 2, 3, and 26, 1910, without ever being confronted with the accused and his colleagues, but he was even allowed to submit to the Court a series of anonymous written accusations, the anonymity of which reports could not be removed (for reasons which he explained); these documents created the real atmosphere of the trial. Were they made known to the conductors? Were the accused given an opportunity to controvert them? There is no trace of it in the record, nor was it ever alleged by Mexico. It is true that, on August 3, 1910, they were ordered added to the court record; but that same day they were delivered to a translator, and they did not reappear on the court record until *after* January 16, 1911, when the investigations were over and Chattin's lawyer had filed his briefs. The court record only shows that on January 13, and 16, 1911, the conductors and one of their lawyers were aware of the existence, not that they knew the contents, of these documents. Therefore, and because of the complete silence of both the conductors and their lawyers on the contents of these railroad reports, it must be assumed that on September 3, 1910, when Chattin's lawyer was given permission to obtain a certified copy of the proceedings, the reports were not included. Nor is there evidence that, when two annexes of the reports (the stubs mentioned in paragraph 14 above) were presented to the conductors as pieces of evidence, their origin was disclosed. It is not shown that the confrontation between Chattin and his accusers amounted to anything like an effort on the Judge's part to find out the truth. Only after November 22, 1910, and only at the request of the Prosecuting Attorney, was Chattin confronted with some of the persons who, between July 13 and 21, inclusive, had testified of his being well acquainted with Ramírez. It is regrettable, on the other hand, that the accused misrepresents the wrong done him in this respect. He had not been left altogether in the dark. According to a letter signed by himself and two other conductors dated August 31, 1910, he was perfectly aware even of the details of the investigations made against him; so was the American vice-consul on July 26, 1910, and so was one H. M. Boyd, a dismissed employee of the same railroad company and friend of the conductors, as appears from his letter of October 4, 1910. Owing to the strict seclusion to which the conductors contend to have been submitted, it is impossible they could be so well-informed if the charges and the investigations were kept hidden from them.

18. The allegations (f) and (g) that the accused lacked counsel and interpreter are disproven by the record of the court proceedings. The telegraphic statement made on behalf of the conductors on September 2, 1910, to the American Embassy to the effect that they "have no money for lawyers" deserves no confidence; on the one hand, two of them were able to pay very considerable sums to lawyers, and on the other hand, two of the Mexicans, who really had no money, were immediately after their request provided with legal assistance.

19. The allegation (h) that the witnesses were not sworn is irrelevant, as Mexican law does not require an "oath" (it is satisfied with a solemn promise, *protesta*, to tell the truth), nor do international standards of civilization.

20. The allegation (i) that the accused has not been confronted with the witnesses—Delgado and Sarabia—is disproven both by the record of



the court proceedings and by the decision of the appellate tribunal. However, as stated in paragraph 17 above, this confrontation did not in any way have the appearance of an effort to discover what really had occurred. The Judge considered Ramírez's accusation of Chattin corroborated by the fact that the porter of the hotel annex where Chattin lived (Rojas) and an unmarried woman who sometimes worked there (Viera) testified about regular visits of Ramírez to Chattin's room; but there never was any confrontation between these four persons.

21. The allegation (j) that the hearings in open court lasted only some five minutes is proven by the record. This trial in open court was held on January 27, 1911. It was a pure formality, in which only confirmations were made of written documents, and in which not even the lawyer of the accused conductors took the trouble to say more than a word or two.

22. The whole of the proceedings discloses a most astonishing lack of seriousness on the part of the Court. There is no trace of an effort to have the two foremost pieces of evidence explained (paragraphs 14 and 17 above). There is no trace of an effort to find one Manuel Virgen, who, according to the investigations of July 21, 1910, might have been mixed in Chattin's dealings, nor to examine one Carl or Carrol Collins, a dismissed clerk of the railroad company concerned, who was repeatedly mentioned as forging tickets and passes and as having been discharged for that very reason. One of the Mexican brakemen, Batriz, stated on August 8, 1910, in court that "it is true that the American conductors have among themselves schemes to defraud in that manner the company, the deponent not knowing it for sure"; but again no steps were taken to have this statement verified or this brakeman confronted with the accused Americans. No disclosures were made as to one pass, one "half-pass" and eight perforated tickets shown to Chattin on October 28, 1910, as pieces of evidence; the record states that they were the same documents as presented to Ramírez on July 9, 1910, but does not attempt to explain why their number in July was eight (seven tickets and one pass) and in October was ten. No investigation was made as to why Delgado and Sarabia felt quite certain that June 29 was the date of their trip, a date upon the correctness of which the weight of their testimony wholly depended. No search of the houses of these conductors is mentioned. Nothing is revealed as to a search of their persons on the days of their arrest; when the lawyer of the other conductors, Haley and Englehart, insisted upon such an inquiry, a letter was sent to the Judge at Culiacán, but was allowed to remain unanswered. Neither during the investigations nor during the hearings in open court was any such thing as an oral examination or cross-examination of any importance attempted. It seems highly improbable that the accused have been given a real opportunity during the hearings in open court, freely to speak for themselves. It is not for the Commission to endeavor to reach from the record any conviction as to the innocence or guilt of Chattin and his colleagues; but even in case they were guilty, the Commission would render a bad service to the Government of Mexico if it failed to place the stamp of its disapproval and even indignation on a criminal procedure so far below international standards of civilization as the present one. If the wholesome rule of international law as to respect for the judiciary of another country—referred to in paragraph 11 above—shall stand, it would seem of the utmost necessity that appellate tribunals when, in exceptional cases, discover-

ing proceedings of this type should take against them the strongest measures possible under constitution and laws, in order to safeguard their country's reputation.

23. The record seems to disclose that an action in *amparo* has been filed by Chattin and his colleagues against the District Judge at Mazatlán and the Magistrate of the Third Circuit Court at Mexico City, but was disallowed by the Supreme Court of the Nation on December 2, 1912.

*Conviction on insufficient evidence*

24. In Mexican law, as in that of other countries, an accused can not be convicted unless the Judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal never can replace the important first element, that of the Judge's being convinced of the accused's guilt; it can only in extreme cases, and then with great reserve, look into the second element, the legality and sufficiency of the evidence.

25. It has been alleged that among the grounds for Chattin's punishment was the fact that he had had conversations with Ramírez who had confessed his own guilt. This allegation is erroneous; the conversations between the two men only were cited to deny Chattin's contention made on July 13, 1910, that he had only seen Ramírez around the city at some time, without knowing where or when, and his contention made on July 9, 1910, to the effect that he did not remember Ramírez's name. It has been alleged that the testimony of Delgado and Sarabia merely applied to the anonymous passenger conductor on a certain train; but the record clearly states that the description given by these witnesses of the conductor's features coincided with Chattin's appearance, and that both formally recognized Chattin at their confrontation on November 17, 1910. Mention has been made, on the other hand, of a docket of evidence gathered by the railway company itself against some of its conductors; though it is not certain that the Court has been influenced by this evidence in considering the felony proven, it can scarcely have failed to work its influence on the penalty imposed.

26. From the record there is not convincing evidence that the proof against Chattin, scanty and weak though it may have been, was not such as to warrant a conviction. Under the article deemed applicable the medium penalty fixed by law was imposed, and deduction made of the seven months Chattin had passed in detention from July, 1910, till February, 1911. It is difficult to understand the sentence unless it be assumed that the Court, for some reason or other, wished to punish him severely. The most acceptable explanation of this supposed desire would seem to be the urgent appeals made by the American chief manager of the railroad company concerned, the views expressed by him and contained in the record, and the dangerous collection of anonymous accusations which were not only inserted in the court record at the very last moment, but which were even quoted in the decision of February 6, 1911, as evidence to prove "illegal acts of the nature which forms the basis of this investigation". The allegation that the Court in this matter was biased against American citizens would seem to be contradicted by the fact that, together with the four Americans, five Mexicans were indicted as well, four of whom had been caught and have subsequently been convicted—that one of these Mexicans was punished as severely as the Americans were—and that the lower penalties imposed on the three others are explained by motives which, even if not shared,

would seem reasonable. The fact that the Prosecuting Attorney who did not share the Judge's views applied merely for "insignificant penalties"—as the first decision establishes—shows, on the one hand, that he disagreed with the Court's wish to punish severely and with its interpretation of the Penal Code, but shows on the other hand that he also considered the evidence against Chattin a sufficient basis for his conviction. If Chattin's guilt was sufficiently proven, the small amount of the embezzlement (four pesos) need not in itself have prevented the Court from imposing a severe penalty.

27. It has been suggested as most probable that after Chattin's escape and return to the United States no demand for his extradition has been made by the Mexican Government, and that this might imply a recognition on the side of Mexico that the sentence had been unjust. Both the disturbed conditions in Mexico since 1911, and the little chance of finding the United States disposed to extradite one of its citizens by way of exception, might easily explain the absence of such a demand, without raising so extravagant a supposition as Mexico's own recognition of the injustice of Chattin's conviction.

#### *Mistreatment in prison*

28. The allegation of the claimant regarding mistreatment in the jail at Mazatlán refers to filthy and unsanitary conditions, bad food, and frequent compulsion to witness the shooting of prisoners. It is well known, and has been expressly stated in the *White* case (under the verbal note of July, 1863, between Great Britain and Peru; De Lapradelle et Politis, II, at 322; Moore, at 4971), how dangerous it would be to place too great a confidence in uncorroborated statements of claimants regarding their previous treatment in jail. Differently from what happened in the *Faulkner* case (Docket No. 47),<sup>1</sup> there is no evidence of any complaint of this kind made either by Chattin and his fellow conductors, or by the American vice-consul, while the four men were in prison; and different from what was before this Commission in the *Roberts* case (Docket No. 185),<sup>2</sup> there has not been presented by either Government a contemporary statement by a reliable authority who visited the jail at that time. The only contemporary complaint in the record is the complaint made by one H. M. Boyd, an ex-employee of the railroad company and friend of the conductors, and by the American vice-consul (both on September 3, 1910), that these prisoners were "held to a strict compliance with the rules of the jail while others are allowed liberties and privileges", apparently meaning the liberty of walking in the patio. The vice-consul in his said letter of September 3, 1910, moreover mentioned that one of the conductors regarding whom his colleagues wired "one prisoner sick, his life depends on his release", when allowed by the Judge to go to the local hospital, did not wish to do this; and in summing up he confined himself to merely saying "that there is some cause for complaint against the treatment they are receiving". All of this sounds somewhat different from the violent complaints raised in the affidavits. The hot climate of Mazatlán would explain in a natural way many of the discomforts experienced by the prisoners; the fact that Chattin's three colleagues were taken to a hospital or allowed to go there

<sup>1</sup> See page 67.

<sup>2</sup> See page 77.

when they were ill and that one of them had the services of an American physician in jail might prove that consideration was shown for the prisoner's conditions. Nevertheless, if a small town as Mazatlán could not afford—as Mexico seems to contend—a jail satisfactory to lodge prisoners for some considerable length of time, this could never apply to the food furnished, and it would only mean that it is Mexico's duty to see to it that prisoners who have to stay in such a jail for longer than a few weeks or months be transported to a neighboring jail of better conditions. The statement made in the Mexican reply brief that "a jail is a place of punishment, and not a place of pleasure" can have no bearing on the cases of Chattin and his colleagues, who were not convicts in prison, but persons in detention and presumed to be innocent until the Court held the contrary. On the record as it stands, however, inhuman treatment in jail is not proven.

### *Conclusion*

29. Bringing the proceedings of Mexican authorities against Chattin to the test of international standards (paragraph 11), there can be no doubt of their being highly insufficient. Inquiring whether there is convincing evidence of these unjust proceedings (paragraph 11), the answer must be in the affirmative. Since this is a case of alleged responsibility of Mexico for injustice committed by its judiciary, it is necessary to inquire whether the treatment of Chattin amounts even to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man (paragraph 11); and the answer here again can only be in the affirmative.

30. An illegal arrest of Chattin is not proven. Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court. Insufficiency of the evidence against Chattin is not convincingly proven; intentional severity of the punishment is proven, without its being shown that the explanation is to be found in unfairmindedness of the Judge. Mistreatment in prison is not proven. Taking into consideration, on the one hand, that this is a case of direct governmental responsibility, and, on the other hand, that Chattin, because of his escape, has stayed in jail for eleven months instead of for two years, it would seem proper to allow in behalf of this claimant damages in the sum of \$5,000.00, without interest.

### *Nielsen, Commissioner:*

I agree with the conclusions of the Presiding Commissioner that there is legal liability on the part of Mexico in this case. While not concurring entirely in the reasoning of certain portions of the Presiding Commissioner's opinion, including those found in paragraphs 6 to 11 inclusive, I am in substantial agreement with his conclusions on important points in the record of the proceedings instituted against Chattin and the other Americans with whose cases his case was consolidated. Irrespective of the question of the innocence or guilt of the claimant of the charge against him—whatever its precise nature was—I think it is clear that he was the victim of mistreatment.

Contention is made in behalf of the United States that the Governor of the state of Sinaloa, prompted by strong influence brought to bear upon him by the Southern Pacific Railroad Company, improperly undertook to influence the judge of the District Court at Mazatlán to convict the claimant and the other accused men in order that an example might be made of them. I do not think that this charge is substantiated by evidence in the record. A lawyer retained to act in this case withdrew and explained that by the action taken by him in the case he incurred the ill will of the Governor. The offenses for which the claimant and the other defendants in the case were charged was a crime under the federal law, but we find that the Governor appointed a commission to gather evidence against the accused. However it is explained that such action could properly under Mexican law be taken by him with regard to a federal offense, and it seems to me that this explanation cannot in the light of the information before the Commission be rejected. Other charges made by the United States with respect to the proceedings against the prisoners are enumerated in the Presiding Commissioner's opinion, and in a mass of vague evidence, and of technical questions of law concerning which there is considerable uncertainty, there are two outstanding points with respect to which the Commission may in my opinion reach a definite conclusion, namely, first, the delay in the proceedings that took place during the so-called period of investigation (*sumario*); and second, the character of the hearing that took place when the so-called period of proof (*plenario*) was reached. After a very careful consideration of the pleadings, the evidence and the oral and the written arguments, I think it is impossible not to say that the record reveals in some respects obviously improper action resulting in grave injury to the claimant and his fellow prisoners. Counsel for Mexico himself admitted and pointed out irregularities in the proceedings, while contending that they were not of a character upon which an international tribunal could predicate a pecuniary award.

So far as concerns methods of procedure prescribed by Mexican law, conclusions with respect to their propriety or impropriety may be reached in the light of comparisons with legal systems of other countries. And comparisons pertinent and useful in the instant case must be made with the systems obtaining in countries which like Mexico are governed by the principles of the civil law, since the administration of criminal jurisprudence in those countries differs so very radically from the procedure in criminal cases in countries in which the principles of Anglo-Saxon law obtain. This point is important in considering the arguments of counsel for the United States regarding irrelevant evidence and hearsay evidence appearing in the record of proceedings against the accused. From the standpoint of the rules governing Mexican criminal procedure conclusions respecting objections relative to these matters must be grounded not on the fact that a judge received evidence of this kind but on the use he made of it.

Counsel for Mexico discussed in some detail two periods of the proceedings under Mexican law in a criminal case. The procedure under the Mexican code of criminal procedure apparently is somewhat similar to that employed in the early stages of the Roman law and similar in some respects to the procedure generally obtaining in European countries at the present time. Counsel for Mexico pointed out that during the period of investigation a Mexican judge is at liberty to receive and take cognizance of anything placed before him, even matters that have no relation to the offense with which the accused is tried. The nature of some of the things

incorporated into the record, including anonymous accusations against the character of the accused, is shown in the Presiding Commissioner's opinion. Undoubtedly in European countries a similar measure of latitude is permitted to a judge, but there seems to be an essential difference between procedure in those countries and that obtaining in the Mexican courts, in that after a preliminary examination before a judge of investigation, a case passes on to a judge who conducts a trial. The French system, which was described by counsel for Mexico as being more severe toward the accused than is Mexican procedure, may be mentioned for purposes of comparison. Apparently under French law the preliminary examination does not serve as a foundation for the verdict of the judge who decides as to the guilt of the accused. The examination allows the examining judge to determine whether there is ground for formal charge, and in case there is, to decide upon the jurisdiction. The accused is not immediately brought before the court which is to pass upon his guilt or innocence. His appearance in court is deferred until the accusation rests upon substantial grounds. His trial is before a judge whose functions are of a more judicial character than those of a judge of investigation employing inquisitorial methods in the nature of those used by a prosecutor. When the period of investigation was completed in the cases of Chattin and the others with whom his case was consolidated, the entire proceedings so far as the Government was concerned were substantially finished, and after a hearing lasting perhaps five minutes, the same judge who collected evidence against the accused sentenced them.

Articles 86 and 87 of the Mexican federal code of criminal procedure read as follows:

"Art. 86. El procedimiento del orden penal tiene dos periodos; el de instrucción que comprende la serie de diligencias que se practican con el fin de averiguar la existencia del delito, y determinar las personas que en cualquier grado aparezcan responsables; y el del juicio propiamente tal, que tiene por objeto definir la responsabilidad del inculcado o inculcados, y aplicar la pena correspondiente.

"ART. 87. La instrucción deberá terminarse en el menor tiempo posible, que no podrá exceder de ocho meses cuando el término medio de la pena señalada al delito no baje de cinco años, y de cinco meses en todos los demás casos.

"Cuando por motivos excepcionales el juez necesitare mayor término, lo pedirá al superior inmediato indicando la prórroga que necesite. La falta de esta petición no anula las diligencias que se practiquen; pero amerita una corrección disciplinaria y el pago de daños y perjuicios a los interesados."<sup>1</sup>

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<sup>1</sup> *Translation.*—86. The criminal process has two periods; that of investigation (instrucción) which embraces the series of steps taken to the end of ascertaining the existence of the crime and determining the persons who in any degree whatsoever may appear responsible; and the trial proper which shall have as its object the defining of responsibility of the accused and the application of the corresponding penalty.

87. The investigation should be terminated in the shortest possible time, not to exceed eight months when the average penalty assigned for the crime is not less than five years and should not exceed five months in all other cases.

When, on account of exceptional reasons the judge may need a greater length of time, he shall ask his immediate superior, indicating the extension which is needed. The failure to so ask shall not annul the steps which already have been taken; but it shall place the judge liable to disciplinary corrective measures and the payment of damages to the parties interested.

In the proceedings in the trial of Chattin the period of investigation lasted approximately five months, and it may be that, considering the nature of the offense with which he was charged the maximum period prescribed by the code was not exceeded. But I think it is proper to note that although maximum periods are prescribed the code also properly requires that the period of investigation shall terminate in the least time possible. Moreover, the hearing after the period of investigation consumed practically no time, and without a determination of the question of guilt the accused Chattin was held for about seven months.

Although delays in criminal proceedings undoubtedly frequently occur throughout the world, I am of the opinion that it can properly be said that in the light of the record revealing the nature of the proceedings in Chattin's case, it was obviously improper to keep him in jail for either five or seven months during which he appealed without success to the judge for a proper disposition of his case. With respect to this period of imprisonment it should be noted that the amount of bail fixed by the judge, the sum of 15,000 pesos—a very large amount considering the nature of the offense charged—was for practical purposes the equivalent of imprisonment without bail.

The purpose of the investigation during which Chattin was held was to ascertain as prescribed in Article 86 of the criminal code, whether an offense had been committed and, to determine upon the persons who appeared to be guilty of such offense. The period of investigation in Mexican law may perhaps in a sense be regarded as a stage of a trial. And it may also be considered that in a measure the Mexican judge during the period of investigation performs functions similar to those carried on by police or prosecuting authorities in other countries, or similar to those of a common law grand jury. The distinguished Mexican diplomat and scholar, Matias Romero, makes the following comparison:

“So far, therefore, as a proceeding under one system may be said to correspond to a proceeding under the other, it may be said that the *sumario*, in countries where the Roman law prevails, corresponds practically to a grand jury indictment in Anglo-Saxon nations.” *Mexico and the United States*, Vol. I, p. 413.

The character of the proceedings in Chattin's case are described in some detail in the Presiding Commissioner's opinion. Chattin was arrested because a brakeman named Ramírez stated before the judge that these two men had been engaged in defrauding the railroad. It appears that after this statement, denied by Chattin, had been made the judge determined that it was not sufficient proof upon which to continue to detain him. He was finally convicted on the statement of two persons who stated that they paid to a person on the train whom the judge evidently considered to be identified as Chattin, 4 pesos on the 29th of June. The judge evidently was satisfied from the testimony of these two persons, and from records produced by the manager of the Southern Pacific Railroad that these witnesses rode on the train on the 29th of June, and that Chattin did not deliver the pesos to the railroad company on that same day. These things may be true, but considering the vague charge on which Chattin was originally held and the long period during which he was detained in prison, it seems to me that such a period of detention could not be justified, unless time and effort had been used to obtain more conclusive proof of guilt. In view of the fact that Chattin's case was consolidated with those of the three other conductors, it is proper in considering the propriety of the delays in Chattin's case to

take account of the character of proceedings in the other cases. All cases were terminated by the same decree of the court. The cases of the accused were consolidated. One of the men was brought from the state of Sonora to the state of Sinaloa after a series of loose proceedings. From the arguments advanced by counsel I am unable to perceive the propriety of this action in view of the general principle incorporated into Mexican law that crimes must be tried within the jurisdiction where they are committed. It seems to me to be clear that the case of each defendant was delayed by this process of consolidation, each case being affected by delays incident to other cases. However, while no court seems to have made any pronouncement with regard to a specific issue as to the propriety of such consolidation, inasmuch as a Mexican court was responsible for it, I do not feel that the Commission, in the light of the record before it can properly pronounce the action wrongful. The conductors accused together with Chatten so far as is revealed by the judicial decision rendered in their cases, were convicted on the testimony of certain persons that they had bought from brakeman tickets which were different from those in use on the day they were purchased from the brakeman and had been permitted by the conductors to use such tickets. If conductors knowingly received spurious tickets and profited from the sale of such tickets, they were evidently guilty of defrauding the railroad. However, it is not disclosed by the record of proceedings before the Commission that throughout the long period of retention any time was consumed in ascertaining whether or how the witnesses who testified against the accused knew that the tickets they bought were not of the kind in use on the day of purchase. There is no record that it was attempted to prove that the tickets bought from the brakeman could not be legally accepted by the conductors. There is no definite proof that the brakeman sold spurious tickets or that the conductors knowingly accepted spurious tickets. The brakeman might have fraudulently obtained possession of good tickets. Time was not consumed obtaining possibly important witnesses such as those mentioned in the Presiding Commissioner's opinion. Time was not taken to confront the accused with some important witnesses. Chatten, by taking an appeal against the decree of formal imprisonment did not delay the proceedings, since the investigation was carried on while the appeal was pending. Moreover, it appears that there was a delay of two months in remitting the appeal to a higher court, which required something more than another month to pass upon it, and its decision apparently was not received by the lower court until two weeks later.

When the preliminary investigation was ended the proceedings, so far as the Government was concerned, were virtually terminated. The law apparently permitted either the Government or the defendants to produce further evidence. The defendants submitted nothing, but their counsel rested the cases by presenting written statements in which the position was taken that no case had been made out against the accused in the light of the evidence before the court. I sympathize with that view, but do not consider that it is necessary nor proper for the Commission for the purpose of a determination of this case to reach a conclusion on that point. However, it seems to me that the record upon which the innocence or guilt of the accused was to be determined was of such a character that it was highly essential that the Government, in order to make a case against the accused, should have produced further evidence. And the fact that this was not done furnishes an additional, strong reason why the long period of deten-



tion of seven months cannot be justified by any necessity for such time in making the record upon which the accused men were convicted.

There are many things in the record apart from the records of judicial proceedings to which I think the Commission can give little or no weight. However, as bearing on the question of delay, I think it is proper to take note of a despatch dated July 29, 1910, addressed by Mr. Charles B. Parker, American consular representative at Mazatlán, to the Secretary of State at Washington. In that communication Mr. Parker reported that on July 25th the judge decided to grant bail to Chattin in the amount of 15,000 pesos. Mr. Parker further reports that he was informed by the district judge that there was "a clear case against two of the defendants, Haley and Englehart". It therefore appears that approximately four months before the termination of the period of investigation, and more than six months prior to the date of sentence, the judge expressed himself convinced of the guilt of two of the four accused men whose cases it seems to me were certainly not more susceptible of proof than those of the other defendants. Under date of September 3, 1910, Mr. Parker reported that he had been advised by the American Ambassador at Mexico City to insist on bail for one of the conductors who was sick, and that the judge had stated that the accused men could not be admitted to bail yet "because the case had not progressed far enough".

International law requires that in the administration of penal laws an alien must be accorded certain rights. There must be some grounds for his arrest; he is entitled to be informed of the charge against him; and he must be given opportunity to defend himself.

It appears to me from an examination of the record that the defendant Chattin first learned of the charge against him when he was called into court. It is not disclosed that a specific charge was made against him, but it is recorded that he stated "with regard to the facts under investigation" that he knew nothing about certain things which had been testified against him. In the decision rendered by a higher court on October 27th, sustaining the decree of formal imprisonment, it is said that it was not material that the crime charged was not specifically stated, and the crime is described "as it appears so far, embezzlement". The record does not show that any notice of the charge so stated was served on the defendant, although his lawyer probably could take notice from the record.

On December 17, 1910, a higher court sustained the decree of formal imprisonment against two of the conductors, and directed that the decree of imprisonment for the crime of embezzlement should be amended and that imprisonment should be decreed "for the crime of fraud with breach of trust". In a brief dated December 26, 1910, which was filed by the prosecuting attorney, the conclusion is expressed that offenses charged against the four conductors did not constitute the crime of embezzlement. It seems to me that there is an unfortunate degree of uncertainty on the point whether the defendants were ever properly notified of the offenses with which they were charged. However, I do not think that the Commission is in a position, in the light of the record, to formulate a conclusion that there was impropriety on this point. The subject is one with respect to which an international tribunal should attach more importance to matters of substance than to forms.

Much was said during the course of argument with regard to improper evidence in the record, particularly the anonymous accusations filed with

the judge by Brown, the superintendent of the Southern Pacific Railroad Company. The report seems to have been prepared by persons evidently resident in the state of California who were employed by Brown to make an investigation of rumors that conductors were defrauding the railroad company. In view of the nature of this report, it seems to be clear that the authors might well deem it proper and advisable not to sign it. Brown appeared in court on August 2nd and made sweeping charges against the four conductors. He stated that he had commissioned private detectives to make an investigation and as a result they succeeded in *proving* in the month of June, 1910, that the conductors and others, whom he did not remember, were appropriating money due the company, and that they had a well-organized "stealing scheme". This he could prove, he said, by delivering to the court notes which the detectives had made. He expressed a supposition that irregularities such as had caused the court's investigation had been occurring since the guilty employees entered the service of the company, and he stated that sometime ago many employees were discharged for irregularities. While Brown was submitting to the judge his conclusions, suppositions and offers of anonymous reports, the defendants were in jail. It seems to me that if Brown deemed it proper to exert himself as he did to bring about the conviction of the accused, he could have employed less crude and more efficient methods. I have already indicated the view that, having in mind the system of criminal jurisprudence in Mexico, any conclusions concerning objections to evidence of this character must be grounded not on the fact that the judge received it, but upon the nature of the use which he made of it. I do not question his motives nor competency, nor undertake to reach conclusions regarding his mental operations. But it is pertinent to note that the record of evidence collected during the period of investigation was the record on which the defendants were convicted. In view of the use made of the anonymous reports, as shown by the sentence given by the judge at Mazatlán on February 6, 1911, I cannot but conclude that these reports in some measure influenced the sentence.

The Commission has repeatedly expressed its views with regard to the reserve with which it should approach the consideration of judicial proceedings. Generally speaking, we must, of course, look to matters of substance rather than of form. Positive conclusions as to the existence of some irregularities in a trial of a case obviously do not necessarily justify a pronouncement of a denial of justice. I do not find myself able fully to concur in the general trend of the argument of counsel for the United States that the record of the trial abounds in irregularities which reveal a purpose on the part of the judge at Mazatlán to convict the accused even in the absence of convincing proof of guilt. A considerable quantity of correspondence and affidavits included in the record give color to a complaint of that nature against the judge. Whatever may be the basis for the charges found in evidence of this kind, I am of the opinion that the conclusions of the Commission must be grounded upon the record of the proceedings instituted against the accused. Having in mind the principles asserted by the Commission from time to time as to the necessity for basing pecuniary awards on convincing evidence of a pronounced degree of improper governmental administration, and having further in mind the peculiarly delicate character of an examination of judicial proceedings by an international tribunal, as well as the practical difficulties inherent in such examination, I limit myself to a rigid application of those principles in the instant case by concluding that the Commission should render an award, small in

comparison to that claimed, which should be grounded on the mistreatment of the claimant during the period of investigation of his case. While deeply impressed with the importance of a strict application of the principles applicable to a case of this character, such application does not, in my opinion, preclude a full appreciation of human rights which it was contended in argument were grossly violated, and which it is clearly shown were in a measure disregarded with resultant injury to a man who languished in prison for seven months and was severely sentenced on scanty evidence for the alleged embezzlement of four pesos. I do not think it can properly be said that he made an *escape* from jail at the end of eleven months of his sentence, when in a document produced by Mexico it is stated that the accused "were freed at the time the Madero forces entered" the place where they were imprisoned.

#### *Decision*

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of B. E. Chattin, \$5,000.00 (five thousand dollars), without interest.

#### *Dissenting opinion*

*Fernández MacGregor, Commissioner :*

1. This is a case in which the United States of America charges a court of the United Mexican States with maladministration of justice to the prejudice of four citizens of the United States who were prosecuted before said court for the crime of embezzlement. Two decisions appear in the record: One in first instance, dictated by the District Judge of Mazatlán, and another on appeal, dictated by the Justice of the Third Circuit Court of the Federation.

2. This Commission has expressed, in general, its idea of what constitutes a denial of justice, where this expression is confined to acts of judicial authorities only. In the decision rendered in the case of *L. F. H. Neer and Pauline E. Neer*, Docket No. 136,<sup>1</sup> is held that, without attempting to announce a precise formula, its opinion was:

"(1) That the propriety of governmental acts should be put to the test of international standards, and (2) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."

In the case of *Ida Robinson Smith Putnam*, Docket No. 354,<sup>2</sup> I held, with the assent of the Presiding Commissioner, in referring to the respect that is due to the decisions rendered by high courts of a state:

"The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country (case of *Margaret Roper*, Docket No. 183, paragraph 8)<sup>3</sup>. A question which has been passed on in courts of different jurisdiction by the

<sup>1</sup> See page 60.

<sup>2</sup> See page 151.

<sup>3</sup> See page 145.

local judges, subject to protective proceedings, must be presumed to have been fairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law."

The charges made against the procedure followed by the District Judge of Mazatlán must be judged in the light of these standards, which I believe justified and prudent. Such charges are, in short, the following: (1) That there was unlawful arrest or detention; (2) influence exercised by the Governor of the State of Sinaloa to have the accused convicted; (3) improper consolidation of the proceedings against the four conductors; (4) undue delay in the proceedings; (5) requirement of exorbitant bail for the provisional release of the accused; (6) lack of knowledge on the part of the accused as to the charges filed against them; (7) lack of counsel and interpreter on the part of the accused; (8) lack of oath by the witnesses who testified; (9) lack of confrontations between the witnesses and the accused; (10) lack of insufficiency of hearings in open court; (11) imposition of penalties out of proportion to the offenses committed; (12) lack of evidence of guilt of the accused and (13) bad treatment of the accused during their confinement in jail.

3. The unlawful arrest of the accused is not proven; neither is the undue influence of the Governor of the State of Sinaloa; nor the lack of counsel or interpreters; nor that the bail required may have been exorbitant; nor the absolute lack of evidence against the accused, nor that there may have been intentional severity in the sentence imposed; nor is it proven, finally, that the accused may have suffered bad treatment in prison. (See the opinion of the Presiding Commissioner.) On the other hand, the following charges are proven: (*a*) Lack of adequate investigation; (*b*) insufficiency of confrontation; (*c*) that the accused was not given the opportunity to know all the charges made against him; (*d*) delay in the proceedings; (*e*) lack of hearings in open court; and (*f*) continued absence of seriousness on the part of the Court.

4. The study which I have made confirms the Presiding Commissioner's conclusions with respect to the charges which he finds unfounded, so that it is necessary for me to examine only the remaining charges to compare them, if I find them sustained, with the standards of international law.

5. It has been alleged that the proceedings instituted against the four conductors should not have been consolidated, because there was no evidence to justify this step. The records show that the consolidation was decreed by the Judge on August 3, 1910; previous to this date the investigation made regarding Chaitin had already advanced; on July 19th the Judge received the police reports from Barraza and his associates, which the latter ratified in his presence, and it was only then that sufficient grounds were judged to exist to decree the consolidation. The latter is decreed when there are plausible reasons; complete evidence is not necessarily required. The consolidation means only a saving of time in the proceedings and unity in the judicial action; hence the consolidation always appears as necessary or proper at the beginning of the action, when all the evidence establishing a case has not yet been gathered. It is, therefore, sufficient that there may be a strong presumption, to order this purely economical proceeding, and in the instant case the mere statements of the first witnesses indicated that there might be some probable connection between the delinquent acts

that were imputed to the four conductors. In fact, Ramírez had testified that he sold tickets illegally in combination with Chattin, who was, in turn, in connivance with the other conductors; Barraza and his police associates testified that they had traveled on the railroad lines using false tickets which were always accepted by the corresponding conductors, asserting, further, that those who sold the tickets to them had claimed to be in connivance with the conductors, which could be corroborated to a certain extent by the fact that the unlawful ticket-sellers on one line of the railroad recommended Barraza and his associates to the unlawful sellers in another line of the railroad. The possible connection becomes the more probable when there are taken into account not only the cases of the conductors but those of the Mexican brakemen and other employees of the railroad who were involved in the affair. The Judge gave the reasons for his decree of consolidation, referring only to the applicable articles of the Federal Code of Criminal Procedure, and it suffices to see that Article 329 of said Code provides for this consolidation of actions brought for connected crimes; that Article 330 defines as connected crimes those committed by several persons, even if at diverse times and places, but through agreement among them; and, finally, that consolidation should be decreed *ex officio*; that is, by a voluntary act of the Judge (Art. 333) to justify such step. Moreover, the accused protested against the consolidation and the Judge limited himself to answering them; that if they filed their complaint in due form he would consider it. A consolidation can not, in general, cause irreparable damage to the defendants; although the most advanced action has to wait for the more backward actions to mature, nevertheless the legal provisions which oblige the Judge to terminate the preliminary investigation (*instrucción*) of the cases within a definite period of time (five months in this case) remain in force; so that it is not evident that the consolidation could have prejudiced (in the international sense of this term) any of the defendants in this case. The Presiding Commissioner is of the opinion that Chattin was, in this case, the one who could suffer the least by the consolidation. I consider that legally Chattin was the one who could suffer the most by the consolidation, for the reason that the proceedings against him were the most advanced and had to wait for the proceedings against the other conductors, or other persons involved in this case, to mature. But aside from all this reasoning which only serves to explain a question of domestic law, I am of the opinion that a judicial decision of a sovereign state can not be attacked by another state before an arbitral tribunal, because domestic precepts regarding consolidation may have been violated, as such internal violations can not constitute a violation of international law or result in damage clearly shown to have been suffered by citizens of the claimant government.

6. With regard to the undue delay in the proceedings, the record shows at once that certain proceedings could have been carried out with more diligence. The tickets and other documents contained in the record could have been exhibited to Chattin before it was actually done; the Judge did nothing in the case, between the end of July and the beginning of October, 1910; the witnesses who claimed to have handed four pesos to Chattin, testified on October 21st, and the report from the conductor on the money delivered to the company was not asked until November 11th; certain witnesses to whom Ramírez alluded in July were not summoned until November 22nd, which made it impossible for some of them, as Virgen, to be found, etc. But it must be noted that all these delays do not violate,

of course, any local law, since they refer only to the instruction period of the prosecution, which the Judge was carrying out, and the law allows him, at this stage, to use his discretion without any limits except that of terminating the preliminary investigation within a certain period, which was five months in the present case. (Art. 87 of the Federal Code of Criminal Procedure.) Now, Chattin's case was started on July 9, 1910, and on November 18th the Judge considered the investigation as completed, which means that he did it within the term of five months, to which I have referred above. In the *Roberts* case, Docket No. 185,<sup>1</sup> the Commission, referring to the time that an alien charged with crime may be held in custody pending the investigation of the charges against him, stated:

"Clearly there is no definite standard prescribed by international law by which such limits may be fixed. Doubtless an examination of local laws fixing a maximum length of time within which a person charged with crime may be held without being brought to trial may be useful in determining whether detention has been unreasonable in a given case."

The present case had been brought to trial on January 27, 1911, and it was decided in first instance on February 6th of the same year; that is to say, before the lapse of seven months after the initiation of the first proceeding instituted against Chattin. I believe that, from an international point of view, all incidental delays in general procedure disappear before an international tribunal, which can not call the Judge to account for each one of his acts, as if it were his hierarchical superior. This same criterion necessarily has to be applied to other defects which may be certainly found in the Judge's acts.

7. I do not believe that the accused was ignorant of a single one of the charges made against him, for the simple reason that the records formed in a criminal process are not secret, according to Mexican law, and are, from the time of their commencement, at the disposal of the defendants or their counsel, who have the right to attend all the proceedings for filing of evidence and other proceedings held in Court (Art. 20, section IV, of the Federal Constitution of 1857 and Art. 39 of the Federal Code of Criminal Procedure). There is no trace in the record in question of the fact that the accused, Chattin, was at any time deprived of these rights, and, on the contrary, it is established that on many occasions notice was served on him and his counsel of the different steps that were being taken in the process. It has been said in this connection that the accused had no knowledge of a document which contains a record of the investigations made by certain detectives from the United States at the request of the Southern Pacific Railroad of Mexico to ascertain whether the conductors of the trains of such railroad were defrauding the company by accepting tickets issued illegally. The record shows, under date of August 2nd, less than a month after the proceedings had been initiated, the statement of Elbert N. Brown, superintendent of the railroad in question, who referred to the private investigation made by the detectives from Los Angeles, California, U.S.A.; said superintendent made a further statement on August 3rd, and at the latter proceeding he exhibited a set of papers of 35 sheets containing the information that has been called secret. By decree of August 3rd, the judge ordered that the exhibited documents be annexed to the record and their corresponding translations be made, in view of the fact that they were in

<sup>1</sup> See page 77.

English, one Arturo E. Félix having been appointed translator for such purpose, and the latter accepted the commission and asked for the documents in question, which were delivered to him immediately. Later, on December 18th, the entire record was ordered to be placed in the hands of the defendant for three days so that he might take notes. Since the aforementioned documents were annexed to the record, and since the record could be consulted by the defendant and by his counsel, according to the legal provisions above cited, theoretically and legally Chattin could take notice of the charges placed against him as a result of the private investigation made by the detectives from Los Angeles, and, if neither he nor his counsel made use of their rights, such a circumstance can not furnish grounds for the responsibility of the District Judge of Mazatlán. It can not be argued that this disputed document was in the possession of the translator, for, even in such case, it was legally within the reach of the defendant and his counsel. It is an established fact that the counsel had knowledge of this information. Counsel Adolfo Arias, in the motion dated January 31, 1911, signed by Parrish, Englehart, and Haley, makes reference to the proceeding in which Brown delivered said documents (folio 192 of the record); counsel Fortino Gómez makes reference to the same secret testimony of the same detectives from Los Angeles, in his motion dated January 16, 1911, folio 209; and it is to be taken into account that all the counsel of the defendants in this case were wholly in agreement and communicated with one another in regard to the circumstances of the proceedings, as established in the record of this claim. It must be noted, also, that if the information adduced by Brown created an unfavorable impression which, it is said, was had by the Court towards the accused, the latter and his counsel could have eliminated such impression by presenting proper evidence which the Judge could not legally ignore. There is no proof of the defendant's having made use of this right, either. Finally, it must be also remembered that the Judge did not base himself in his decision on the results of this so-called secret information, for he limited himself to considering the real evidence of guilt which existed against the accused. In view of the above consideration, I believe that the charge under discussion can not be maintained.

8. It has been alleged that the trial proper (meaning by trial that part of the proceedings in which the defendants and witnesses as well as the Prosecuting Attorney and counsel appear personally before the Judge for the purpose of discussing the circumstances of the case) lasted five minutes at the most, for which reason it was a mere formality, implying thereby that there was really no trial and that Chattin was convicted without being heard. I believe that this is an erroneous criticism which arises from the difference between Angle-Saxon procedure and that of other countries. Counsel for Mexico explained during the hearing of this case that Mexican criminal procedure is composed of two parts: Preliminary proceedings (*sumario*) and plenary proceedings (*plenario*). In the former all the information and evidence on the case are adduced; the *corpus delicti* is established; visits are made to the residences of persons concerned; commissions are performed by experts appointed by the Court; testimony is received and the Judge can cross-examine the culprits, counsel for the defense having also the right of cross-examination; public or private documents are received, etc. When the Judge considers that he has sufficient facts on which to establish a case, he declares the instruction closed and places the record in the hands of the parties (the defendant and his counsel on the one side and the Prose-

cuting Attorney on the other), in order that they may state whether they desire any new evidence filed, and only when such evidence has been received are the parties in the cause requested to file their respective final pleas. This being done, the public hearing is held, in which the parties very often do not have anything further to allege, because everything concerning their interests has already been done and stated. In such a case, the hearing is limited to the Prosecuting Attorney's ratification of his accusation, previously filed, and the defendants and their counsel also rely on the allegations previously made by them, these two facts being entered in the record, whereupon the Judge declares the case closed and it becomes ready to be decided. This is what happened in the criminal proceedings which have given rise to this claim, and they show, further, that the defendants, including Chattin, refused to speak at the hearing in question or to adduce any kind of argument or evidence. In view of the foregoing explanation, I believe that it becomes evident that the charge, that there was no trial proper, can not subsist, for, in Mexican procedure, it is not a question of a trial in the sense of Anglo-Saxon law, which requires that the case be always heard in plenary proceedings, before a jury, adducing all the circumstances and evidence of the cause, examining and cross-examining all the witnesses, and allowing the prosecuting attorney and counsel for the defense to make their respective allegations. International law insures that a defendant be judged openly and that he be permitted to defend himself, but in no manner does it oblige these things to be done in any fixed way, as they are matters of internal regulation and belong to the sovereignty of States.

9. I have already expressed my opinion with regard to the general imputation that the accused were not informed of the charges that had been filed against them. But particular reference has been made, for instance, to the fact that the general manager of the railroad company was never confronted with the accused; that the confrontations between the accused and the witnesses who testified against them do not reveal effort on the part of the judge to find the truth; that no efforts were made to find witness Manuel Virgen, nor one Collins; that it was not attempted to establish whether it was eight or seven passes or tickets which were shown to Chattin on October 28, 1910, nor to ascertain the reason why the two witnesses on whose testimony the Judge based himself in convicting Chattin, said that the trip to which they were referring had been made on July 29th, and other charges of this nature. The Agent of Mexico averred that the general manager of the railroad was not the complainant, and that therefore it was not necessary to confront him with the prisoners. He argued that Brown had only advised the authorities that he suspected that the employees of the railroad were defrauding the company, but he made no specific charges against any individual employee. Under such circumstances he was neither a complainant nor a witness for the prosecution, because he did not refer to specific and certain facts imputable on any conductor. He added that, according to Mexican law in 1910, it was not constitutionally obligatory even to confront the accused with his accuser, specially in view of the fact that the real accuser in criminal causes is the State. Article 20 of the Constitution of 1857, in force in 1910, provides that it is the right of the accused to be informed as to the name of the accuser, if there be such, but not to be confronted with such accuser on motion of the Judge. The accused has, of course, the right to demand such confrontation and the Judge can not refuse to grant it.



10. I admit that the other deficiencies pointed out in the preceding paragraph exist and that they show that the Judge could have carried out the investigation in a more efficient manner, but the fact that it was not done does not mean any violation of international law. The Commission stated in its decision in the case of *L. F. H. Neer and Pauline E. Neer*, Docket No. 136:<sup>1</sup>

"It is not for an international tribunal such as this Commission to decide whether another course of procedure taken by the local authorities at Guana-cavi could be more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in willful neglect of their duties, or in a pronounced degree to improper action, or (2) that Mexican law rendered it impossible for them properly to fulfill their task."

I believe that this rule is perfectly applicable to this case; an ideal Judge or a more experienced Judge would have carried out the proceedings in a better way, but the Commission is not competent to judge such a question.

11. The negligence of the Judge in holding certain proceedings is alleged specially with respect to the evidence against the accused. The essential point is that the Judge may have had sufficient evidence to convict them and not that he may not have accumulated more evidence when he was able to do so. The first statement against Chattin was rendered by Cenobio Ramírez; the latter stated that various persons had seen him deal with Chattin; such persons having been summoned, Ramírez's allegations could not be corroborated in an evident manner and, perhaps, for this reason the Judge abandoned this clue by not summoning all the persons named by Ramírez, etc. But it is doubtless that two witnesses free from all impediment testified that Chattin had collected in the train four pesos for a passage without giving a receipt, which fact was thereafter verified by the report rendered by Chattin that day to the company, that the four pesos had not been accounted for by him. The Federal Code of Criminal Procedure provides, in its Article 264, that testimony rendered in the manner in which it was rendered against Chattin, constitutes full evidence. The crime of embezzlement is defined by Article 407 of the Penal Code, as follows:

"He who, fraudulently and to the prejudice of another, disposes wholly or in part of an amount of money in coin, in bank bills, or in paper currency; of a document entailing an obligation, release, or transfer of rights, or of any personal property belonging to another, which he may have received in virtue of any of the contracts of pledge, agency, deposit, lease, *commodatum*, or any other contract which does not transfer title, will suffer the same penalty that, taking into account the circumstances of the case and the delinquent, would be imposed on him, had he committed larceny of such things."

Taking advantage of his position Chattin had appropriated to himself the four pesos that had been delivered to him, which is sufficient to justify the penalty of two years that was imposed on him, conformably with Article 384 of the Criminal Code. Such penalty does not reveal severity on the part of the Judge, for it is the pure and simple application of Mexican law. The latter provides that the medium penalty be imposed whenever there are no extenuating or aggravating circumstances, and such penalty is, in this case, two years.

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<sup>1</sup> See page 60.

12. In the procedure under examination, the requisites established by international law in matters of this kind were observed in the principal features; the accused were arrested for probable cause; they had the opportunity to know all the charges pressed against them; they were permitted to defend themselves, there being no indication of the defense having been hampered; all the defenses which they pleaded were considered; they were confronted with the witnesses who testified against them; they were given the opportunity to be heard in open trial; they were convicted on evidence which, although not abundant, nevertheless met the requisites of Mexican law necessary to convict them; finally, the penalty fixed also by Mexican law was imposed on them. Hence, if the essential rights granted by the law of nations were respected, it matters not that certain precepts of the domestic adjective law may have been violated or that the Judge may have shown a certain degree of negligence and carelessness. This opinion is supported by the decision rendered in the *Cotesworth and Powell* case, which is celebrated in this matter and which summarizes what is established in international law on the question of denial of justice and on maladministration of justice. I quote the following passages:

"The judiciary of a nation should be respected as well by other nations as by foreigners resident or doing business in the country. Therefore, every definite sentence of a tribunal, regularly pronounced, should be esteemed just and executed as such. As a rule, when a cause in which foreigners are interested has been decided in due form, the nation of the defendants can not hear their complaints. It is only in cases where justice is refused, or palpable or evident injustice is committed, or when rules and forms have been openly violated, or when odious distinctions have been made against its subjects that the government of the foreigner can interfere \* \* \*."

"No demand can be founded, as a rule, upon more objectionable *forms* of procedure or the *mode* of administering justice in the courts of a country; because strangers are presumed to consider these before entering into transactions therein. Still, a plain violation of the substance of natural justice, as, for example, refusing to hear the party interested, or to allow him opportunity to produce proofs, amounts to the same thing as an absolute denial of justice \* \* \*."

"Nations are responsible to those of strangers, under the conditions above enumerated, *first*, for denials of justice, and, *second*, for acts of notorious injustice. The first occurs when the tribunals refuse to hear the complaint, or to decide upon petitions of the complainant, made according to the established forms of procedure, or when undue and inexcusable delays occur in rendering judgment. The second takes place when sentences are pronounced and executed in open violation of law, or which are manifestly iniquitous." (*Cotesworth & Powell*; Moore's *International Arbitrations*, pages 2050, *et seq.*)

13. To appraise the defective administration of justice which the United States alleges in this case (the American Agent calls it denial of justice in his Memorial and Brief), the Presiding Commissioner has entered into a study of the differences which exist between wrongful acts when the latter are caused by the judicial department of a nation, on one hand, and the same acts when caused by either the executive or the legislative department. I believe that the grouping of things in categories is very beneficial, provided these arise from or show essential differences. Establishing purely formal categories, if useful for certain determined purposes of economy of thought, carry the danger of inducing one to commit transcendental errors. There is no doubt but that there is a slight difference between a judicial act which involves refusal to repair a previous wrongful act and a judicial act which, without a previous injury, causes the damage of itself.

But this is not important in fixing the liability of the State. The latter exists only when the judicial act causes damage in violation of a principle of international law, and as much in the case of a previous wrongful act as in the case where the latter is lacking the State is only liable for its own act; in the first case, for the damage which is caused by its failure to repair a previous injury, and in the second, for the damage caused by its act violating the substantive or adjective law. In both cases the liability is direct, in international questions, as recognized by the Presiding Commissioner himself, when he says, in referring to so-called indirect liability: "*Though, considered in connection with the alleged delinquency of the government itself, it is quite as direct as its liability for any other act of its officials. The liability of the government may be called remote or secondary only when compared with the liability of the person who committed the wrongful act (for instance, the murder) \* \* \*.*" And I believe that the liability of this person, if a private person, is not an international question.

14. If this is so, if the liability arising out of judicial acts of any kind is direct, then it is the same as the liability arising out of wrongful acts of the executive and legislative departments, it resulting therefrom that the three classes must be governed by identical principles, inasmuch as they do not differ essentially. The liability for executive or legislative acts of a government is not, then, stricter or greater than the liability arising out of judicial acts. It does not matter that some decisions may have established that acts of the executive or legislative departments give rise to liability even when they may not contain the element of bad intention. The intention has nothing to do in international law. What is to be determined, as already stated (and this agrees with the definitions which have been given as to what is an international claim), *is whether there exists an injury*, and whether the act which causes it violates *any rule of international law*, regardless of whether the act is intentional or not.

15. However, it seems that Anglo-Saxon practice has tried to establish this difference between judicial and executive acts; with regard to the latter, it has been said that once there exist the two elements, damage to a citizen of another country and violation of international law, the indemnization accrues at once, without any further steps, whereas such is not the case when dealing with judicial acts, for it is then necessary that the remedies furnished by the local law be exhausted, and, further, that the act involved bad faith, willful neglect of duty, or very defective administration of justice.

16. In my opinion, different things are confused and tests are applied which should serve for widely different classes of ideas. With respect to exhausting local remedies, I maintain, together with many publicists, that it should always be required with regard to any class of acts. An international claim should not accrue except as a last resort and not immediately as desired by the practice of Anglo-Saxon countries, which establish such principle because in them the State can not be sued. I consider that it is more dangerous to admit the right to an immediate claim when referring to wrongful acts of the executive or legislative, as a nation will resent more this procedure if it is a question of acts of the organs in which apparently sovereignty rests conspicuously, than if it is a question of violations made by its tribunals. The most important thing in the world is the preservation of peace among nations, and this is attained only through the most constant respect for sovereignty. If a nation inflicts damage on a citizen of another,

the one who causes the injury should be given the opportunity to repair it *through her own means*, and these are generally represented by judicial remedies. In this sense, it can be said that all claims accrue from a denial of justice. Hence, in this respect there is no difference between claims arising out of acts of the different agencies of a State.

17. With respect to the test that is applied to judicial acts, to wit, that in order to give rise to an international claim they must show bad faith, willful neglect of duty, or such a deviation from the practices of civilized nations as to be recognized at first sight by any honest man, it only serves to determine when judicial acts violate a principle of international law, it being unnecessary to apply this test to executive and judicial acts, as they, due to being more direct and simple, are more easily discerned when they deviate from a certain international rule. The important thing, it is insisted, is that the act which gives rise to the claim *causes damage in violation of a rule of international law*, and this is very difficult to determine when it is a question of judicial acts. There are many acts of this nature which, although involving a violation of domestic law, either do not cause measurable damages or do not violate any specific international principle, and, in both cases, lacking one of the elements of the claim, the latter does not accrue. I believe, in view of the foregoing, that to admit the classification of liability arising out of judicial acts into direct and indirect results in the confusion of the first class with the liability arising out of acts of the executive and the legislative; and as it is attempted to apply to the latter a stricter test (the Presiding Commissioner holds that the liability for these acts is unlimited and immediate), this test would seem applicable also, by analogy, to the so-called direct liability for judicial acts, to the detriment of the respectability of decisions, so much proclaimed by publicists and by arbitral tribunals.

18. Returning to the particular case on which I am commenting, I must say that, although the Presiding Commissioner makes clear the exception that, when dealing with decisions of courts, in regard to direct as well as indirect liability, the principle of respect for the judiciary prevails, nevertheless it appears to me that his clear and righteous spirit could not remove itself from the influence of the idea that, as the acts of the District Judge of Mazatlán do not amount to a denial of justice, but to a defective administration of it, or in other words, inasmuch as they involve *direct liability*, such acts must be judged with a severity which, although it does honor to his sense of abstract justice, is not based on international law.

19. I consider that this is one of the most delicate cases that has come before the Commission and that its nature is such that it puts to a test the application of principles of international law. It is hardly of any use to proclaim in theory respect for the judiciary of a nation, if, in practice, it is attempted to call the judiciary to account for its minor acts. It is true that sometimes it is difficult to determine when a judicial act is internationally improper and when it is so from a domestic standpoint only. In my opinion the test which consists in ascertaining if the act implies damage, wilful neglect, or palpable deviation from the established customs becomes clearer by having in mind the damage which the claimant could have suffered. There are certain defects in procedure that can never cause damage which may be estimated separately, and that are blotted out or disappear, to put it thus, if the final decision is just. There are other defects which make it impossible for such decision to be just. The former, as a rule, do not

engender international liability; the latter do so, since such liability arises from the decision which is iniquitous because of such defects. To prevent an accused from defending himself, either by refusing to inform him as to the facts imputed to him or by denying him a hearing and the use of remedies; to sentence him without evidence, or to impose on him disproportionate or unusual penalties, to treat him with cruelty and discrimination; are all acts which *per se* cause damage due to their rendering a just decision impossible. But to delay the proceedings somewhat, to lay aside some evidence, there existing other clear proofs, to fail to comply with the adjective law in its secondary provisions and other deficiencies of this kind, do not cause damage nor violate international law. Counsel for Mexico justly stated that to submit the decisions of a nation to revision in this respect was tantamount to submitting her to a régime of capitulations. All the criticism which has been made of these proceedings, I regret to say, appears to arise from lack of knowledge of the judicial system and practice of Mexico, and, what is more dangerous, from the application thereto of tests belonging to foreign systems of law. For example, in some of the latter the investigation of a crime is made only by the police magistrates and the trial proper is conducted by the Judge. Hence the reluctance in accepting that one same judge may have the two functions and that, therefore, he may have to receive in the preliminary investigation (*instrucción*) of the case all kinds of data, with the obligation, of course, of not taking them into account at the time of judgment, if they have no probative weight. It is certain that the secret report, so much discussed in this case, would have been received by the police of the countries which place the investigation exclusively in the hands of such branch. This same police would have been free to follow all the clues or to abandon them at its discretion; but the Judge is criticized here because he did not follow up completely the clue given by Ramírez with respect to Chatten. The same domestic test—to call it such—is used to understand what is a trial or open trial imagining at the same time that it must have the sacred forms of common-law and without remembering that the same goal is reached by many roads. And the same can be said when speaking of the manner of taking testimony of witnesses, of cross-examination, of holding confrontations, etc.

20. In view of the above considerations, I am of the opinion that this claim should be disallowed.

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JOHN W. HALEY (U.S.A.) *v.* UNITED MEXICAN STATES.

(July 23, 1927, concurring opinion by American Commissioner, July 23, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 465-471.)

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EFFECT OF ESCAPE OF CLAIMANT FROM PRISON UPON CLAIM.—ILLEGAL ARREST.—INFLUENCING OF TRIAL BY GOVERNOR OF STATE.—CONSOLIDATION OF CRIMINAL CASES WITHOUT REASON.—UNDUE DELAY IN JUDICIAL PROCEEDINGS.—FAILURE TO INFORM ACCUSED OF CHARGES AGAINST HIM.—EXORBITANT BAIL.—FAILURE TO PROVIDE COUNSEL OR INTERPRETER TO ACCUSED.—FAILURE TO SWEAR WITNESSES.—FAILURE TO CONFRONT ACCUSED WITH WITNESSES.—INSUFFICIENT HEARING OR TRIAL.—FAILURE TO MEET ORDINARY JUDICIAL STANDARDS.—CONVICTION ON INSUFFICIENT EVIDENCE.—UNDUE SEVERITY OF PENALTY IMPOSED.—CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Rulings in *B. E. Chattin* claim *supra* followed.

Cross-reference: British Yearbook, Vol. 9, 1928, p. 158.

(Text of decision omitted.)

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G. A. ENGLEHART (U.S.A.) *v.* UNITED MEXICAN STATES.

(July 23, 1927, concurring opinion by American Commissioner, July 23, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 471-473.)

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EFFECT OF ESCAPE OF CLAIMANT FROM PRISON UPON CLAIM.—ILLEGAL ARREST.—INFLUENCING OF TRIAL BY GOVERNOR OF STATE.—CONSOLIDATION OF CRIMINAL CASES WITHOUT REASON.—UNDUE DELAY IN JUDICIAL PROCEEDINGS.—FAILURE TO INFORM ACCUSED OF CHARGES AGAINST HIM.—EXORBITANT BAIL.—FAILURE TO PROVIDE COUNSEL OR INTERPRETER TO ACCUSED.—FAILURE TO SWEAR WITNESSES.—FAILURE TO CONFRONT ACCUSED WITH WITNESSES.—INSUFFICIENT HEARING OR TRIAL.—FAILURE TO MEET ORDINARY JUDICIAL STANDARDS.—CONVICTION ON INSUFFICIENT EVIDENCE.—UNDUE SEVERITY OF PENALTY IMPOSED.—CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Rulings in *B. E. Chattin* claim *supra* followed.

(Text of decision omitted.)

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C. W. PARRISH (U.S.A.) *v.* UNITED MEXICAN STATES.

(*July 23, 1927, concurring opinion by American Commissioner, July 23, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 473-482.*)

EFFECT OF ESCAPE OF CLAIMANT FROM PRISON UPON CLAIM.—ILLEGAL ARREST.—INFLUENCING OF TRIAL BY GOVERNOR OF STATE.—CONSOLIDATION OF CRIMINAL CASES WITHOUT REASON.—UNDUE DELAY IN JUDICIAL PROCEEDINGS.—FAILURE TO INFORM ACCUSED OF CHARGES AGAINST HIM.—EXORBITANT BAIL.—FAILURE TO PROVIDE COUNSEL OR INTERPRETER TO ACCUSED.—FAILURE TO SWEAR WITNESSES.—FAILURE TO CONFRONT ACCUSED WITH WITNESSES.—INSUFFICIENT HEARING OR TRIAL.—FAILURE TO MEET ORDINARY JUDICIAL STANDARDS.—CONVICTION ON INSUFFICIENT EVIDENCE.—UNDUE SEVERITY OF PENALTY IMPOSED.—CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Ruling in the *B. E. Chattin* claim *supra* followed, tribunal noting that in the instant claim there was no reason whatever shown for consolidating the criminal case against claimant with others and that during the greater part of the proceedings he was without counsel.

*Van Vollenhoven, Presiding Commissioner :*

1. This claim is made by the United States of America against the United Mexican States on behalf of C. W. Parrish, an American national. Parrish, who was an employee (passenger conductor) of the Ferrocarril Sud-Pacífico de México (Southern Pacific Railroad of Mexico) and who in the Summer of 1910 performed his duties in the State of Sonora, was on July 24, 1910, arrested at Guaymas, Sonora, on a charge of swindling and embezzlement, and sent to Mazatlán, Sinaloa; was tried there in January, 1911, convicted on February 6, 1911, and sentenced to an imprisonment of two years and eight months; but was released from the jail at Mazatlán in May or June, 1911, as a consequence of disturbances caused by the Madero revolution. He then returned to the United States. It is alleged that the arrest, the trial and the sentence were illegal, that the treatment in jail was inhuman, and that Parrish was damaged to the extent of \$50,000.00, which amount Mexico should pay.

2. To the challenge of the claimant's citizenship and to his forfeiture of the right to protection applies what is said in paragraphs 2 and 4 of the opinion in the *Chattin* case (Docket No. 41).<sup>1</sup>

3. The circumstances of Parrish's arrest, trial and sentence were as follows. In the year 1910 there had arisen a serious apprehension on the part of several railroad companies operating in Mexico as to whether the full proceeds of passenger fares were accounted for to these companies. The Southern Pacific Railroad of Mexico applied on June 15, 1910, to the Governor of the State of Sinaloa, in his capacity as chief of police of the State, co-operating with the federal police, in order to have investigations made of the existence and extent of said defrauding of their lines within the territory of his State. The Governor on June 17, 1910, delegated a police inspector, a police officer, and two persons they selected (a young

<sup>1</sup> See page 282.

laborer and a very young woman) to secure evidence to establish crimes of this type; the four persons, however, did not confine their investigations to the State of Sinaloa, but went as far as Guaymas, Sonora. Parrish was serving at the time on the track between Navojoa, Sonora, and Guaymas, Sonora. The group of four succeeded in provoking delinquencies of the brakeman Domingo Juárez, who served on the same line and the same trains where Parrish acted as passenger conductor. They reported to the Governor on July 9, 1910; the Governor, after consulting the Attorney General of his State, had the report forwarded to the Judge at Mazatlán, on July 18, 1910. The Judge, by telegram of July 22, and rogatory letters of July 23, 1910, requested his colleague at Nogales, Sonora, to have Parrish arrested, which he was on July 24, 1910, at Guaymas. On July 25, 1910, the Judge at Nogales notified his colleague by telegram that Parrish was held at his disposal, whereupon the Judge at Mazatlán requested the Court at Nogales by telegram and letter of July 25 and again on July 27 to issue a decree of formal imprisonment against Parrish. From July 25 on the Judge at Nogales (two successive judges) did all he could to avoid illegalities and delays in Parrish's case; he three times explained to his colleague at Mazatlán why his request did not fulfil the legal requisites necessary for a decree of formal imprisonment and therefore could not be complied with, particularly as the Nogales Court was not even entitled to submit Parrish to the hearing which must precede any formal imprisonment. Moreover he notified him on July 27, that the seventy-two hours allowed for solitary detention were about to expire. Probably because of this last message, the Judge at Mazatlán on July 28 requested by telegram the Federal Government to order Parrish transferred from Guaymas to Mazatlán; a telegram which, according to the Secretary of Justice, did not reach him until August 1. The Federal Government's measures for Parrish's transfer were not completed until August 10, 1910, whereupon Parrish was conveyed to Mazatlán. He arrived there on August 12, 1910, was given a hearing on August 13, and was declared formally imprisoned on the same day. From July 24 to August 13, 1910, he had been in jail without any information as to the grounds for his detention and without any hearing. In the meantime, on August 3, 1910, his case had been consolidated by the Court at Mazatlán with those of Chattin, Haley, Englehart and five Mexicans. On August 15 and 16, 1910, Parrish was confronted with the two police officers and their assistants who had been delegated by the Governor of Sinaloa. No subsequent investigations of any kind to obtain proof of Parrish's guilt appear to have ever been made. Parrish was kept under arrest until the end of January, 1911, at which time the case against another conductor, Chattin (Docket No. 41), was mature for trial. After all these months of preparation and a trial at Mazatlán, during both of which Parrish, it is alleged, lacked proper information, legal assistance, assistance of an interpreter and confrontation with the witnesses, he was convicted on February 6, 1911, by the said District Court of Mazatlán as stated above. The amount involved in Parrish's case was eighteen Mexican pesos. The case was carried on appeal to the Third Circuit Court at Mexico City, which court on July 3, 1911, affirmed the sentence. In the meantime (May or June, 1911) Parrish had been released by the population of Mazatlán which threw open the doors of the jail in the time elapsing between the departure of the representatives of the Díaz regime and the arrival of the Madero forces.

4. It has been alleged, in the first place, that Parrish was illegally deprived of his liberty. The irregularity established consists in this, that the Judge at



Mazatlán requested his transfer ordered on July 28 (or August 1) instead of on July 25. The deplorable circumstance of Parrish's detention during twenty days without any information or hearing would seem due to the fact that it took the Federal Government ten days of circuitous action before so simple a thing as the transfer of an arrested man from one State to another could be decreed. Against the decree of Parrish's formal imprisonment no appeal was instituted. Only in case the Judge at Mazatlán illegally took cognizance of Parrish's alleged felony and illegally requested his arrest, and in doing so was guilty of an outrage, bad faith, wilful neglect of duty, or apparent insufficiency of action. Mexico could be held liable on account of Parrish's arrest.

5. It has been alleged that Parrish was illegally turned over to the Judge of a neighboring state. Sinaloa, where the alleged felony had not been committed and where therefore the Court had no authority to try the case. On September 3, 1910, Parrish's lawyer protested against what he alleged to be wrongfully assumed jurisdiction; but he apparently did not do so in the forms required by Mexican law, and the question had to be considered as not having been raised before the Court. The sentence rendered February 6, 1911, though liberal in quoting articles of statutes applied by the Court, is silent on this matter of jurisdiction, and so is the decision on appeal of July 3, 1911. Quotations from Mexican law have been submitted by the Mexican Agency, establishing that the District Court at Mazatlán could legally take cognizance of Parrish's alleged felony committed in Sonora, quotations controverted by the United States. Nothing in the record of the court proceedings shows that the Judge paid any attention to this point of law. Neither did the appellate tribunal in its decision say one word to dispel the doubt, though both from the Mazatlán court record and from its own knowledge it must have seen the problem. However unsatisfactory this appears, it is not for this Commission to assume that a technical point of Mexican law has been misinterpreted by two courts. There would seem to be convincing evidence, however, that, if the transfer was illegal, this illegality has caused Parrish an essential damage; for during the correspondence mentioned in paragraph 3 above, relative to Parrish's formal imprisonment, the Judge at Nogales was just as prudent, conscientious and active as the Judge at Mazatlán was careless, unconscientious and indifferent regarding a man's freedom.

6. Irregularity in the court proceedings in the case of Parrish is alleged on the ten grounds mentioned in paragraph 12 of the opinion in the *Chattin* case. Here applies all of what has been said in paragraph 6, 7, 8 and 10 of the opinion in the *Halcy* case (Docket No. 42),<sup>1</sup> except (a) that in Parrish's case there does not appear one reason for linking up his case with those of his colleagues, nor for postponing his trial until the day of *Chattin's*, and (b) that during the greater part of the court proceedings he had no counsel. It should be pointed out emphatically that in Parrish's case as well there not only was insufficiency of preparatory investigations by the Judge, but that after the undecisive and unsatisfactory confrontations held on August 15 and 16, 1910, there is no trace of any further investigation whatsoever, scanty and deficient though the evidence before the Judge was; nor is there a trace of any effort whatsoever to shed light on Parrish's case from the evidence in the cases of the other conductors, or on their cases from

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<sup>1</sup> See page 313.

Parrish's. The only light the Judge received was from dangerous hearsay reported by the general manager of the railroad company, who never was confronted with Parrish, and from the very dangerous documents submitted by the same manager to the Judge and never disclosed to the accused. Undue delay of court proceedings from August 16, 1910, to January 27, 1911, is apparent.

7. It is alleged that Parrish has been convicted on insufficient evidence. Here applies what is said in paragraph 24 of the opinion in the *Chattin* case (Docket No. 41) <sup>1</sup> and in paragraph 11 of that in the *Haley* case (Docket No. 42). <sup>2</sup>

8. Mistreatment of Parrish in jail is not proven. Here applies paragraph 28 of the opinion in the *Chattin* case. Even Mrs. Parrish did not complain of inhuman treatment of her husband, so far as the record shows. Parrish had been ill while in jail and went to the hospital for some time.

9. An illegal arrest of Parrish is not proven. Incompetency of the Judge who tried the case is not proven. Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court. Insufficiency of the evidence against Parrish is not convincingly proven; intentional severity of the punishment is proven, without its being shown that the explanation is to be found in unfair-mindedness of the Judge. Mistreatment in prison is not proven. Taking into consideration, on the one hand, that this is a case of direct governmental responsibility, and, on the other hand, that Parrish, because of his escape, has stayed in jail for eleven months instead of for two years and eight months, it would seem proper to allow in behalf of this claimant damages in the sum of \$5,000.00, without interest.

*Nielsen, Commissioner:*

I concur in the Presiding Commissioner's conclusion with respect to liability in this claim. My views regarding the case are stated to some extent in the opinion which I wrote in the claim of *B. F. Chattin*, Docket No. 41.

#### *Decision*

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America, on behalf of C. W. Parrish, \$5,000.00 (five thousand dollars), without interest.

#### *Dissenting opinion*

*Fernández MacGregor, Commissioner :*

1. I differ with the opinion rendered by my two colleagues in the case of conductor Claude W. Parrish, who was tried before a Mexican court for the crime of fraud and breach of trust. The general reasons for my dissent

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<sup>1</sup> See page 282.

<sup>2</sup> See page 313.

are those set forth in my separate opinion in the case of *Chattin*, Docket No. 41, and I shall only treat here the points on which the two cases differ.

2. The Presiding Commissioner concludes in paragraph 9 of his opinion in this case, that it is not proven in the Parrish case that there has been illegal arrest or incompetency of the Judge who tried the case; but he points out that the vacillations of the Judge of Mazatlán in obtaining the apprehension of Parrish by the Judge of Sonora and then in having the prisoner placed at his disposition caused a delay which was prejudicial to the claimant. This delay lasted twenty days, from July 24th to August 13, 1910. It is doubtless that the Judge of Mazatlán did not comply exactly with the requisites of Mexican law with respect to letters rogatory, but it is to be noted that whatever may have been the difficulties of the requesting Judge and the Judge who received the request the latter placed the prisoner at the disposition of the former on July 27th, that is, three days after the accused had been arrested, for which reason, on July 28th, the Judge of Mazatlán asked the Federal Government of Mexico to provide for the transfer of Parrish from Nogales to Mazatlán. The Federal Government issued the corresponding orders some time between the 1st and 12th of August, on which date Parrish was already in Mazatlán. Perhaps the prisoner's transfer might have been made more rapidly, but I do not believe, as already stated with regard to the *Chattin* case, that an arbitral commission may examine the governmental action of any State in its slightest details, as it may be supposed in the present case that the administrative machinery required certain steps which consumed the time above stated. With regard to this delay, what was said in paragraph 6 of my opinion in the *Chattin* case applies; in general, Parrish's trial was carried out within the periods fixed by Mexican law, and, therefore, the minor delays which may be pointed to between different steps in the proceedings disappear when the final result is considered, which was that the proceedings were terminated in due time.

3. The above-mentioned delay gives rise to another charge that the accused did not know the cause of his prosecution, during the twenty days that he was outside of the jurisdiction of the Judge in Mazatlán. I believe that this charge is refuted by merely reading Article 20 of the Mexican Constitution of 1857, which says: "*In all criminal causes*, the accused shall have the right to be informed of the reason for the prosecution". This means that this right, as well as the others stipulated by Article 20, accrue at the time when the accused is at the disposition of the competent Judge—the one who will conduct the proceedings—and not, for instance at the time when he is summoned to court by another Judge. This jurisprudence has been established by the Supreme Court of Mexico in the following decisions: May 30, 1881, amparo Ciriaco Vazquez, before the District Judge of Sonora; November 3, 1881, amparo Pedro García Salgado, before the First District Judge of the State of Mexico. (See the opinion of Lic. Ignacio Vallarta in this last case.)

4. Although I believe that the question of jurisdiction between the courts of a State is purely domestic (the international decisions cited by the Government of the United States all refer to international jurisdiction), I believe it pertinent to explain that, in my opinion, the District Judge of Mazatlán was competent to try Parrish. According to the information that this Judge had before him, there was probable cause to suppose that the four conductors and other employees of the railroad were defrauding the company; that

is, were committing the same crime or connected crimes. Article 330 of the Federal Code of Criminal Procedure provides that connected crimes are those committed by different persons, even if at diverse times and places, but through agreement between them; so that the Judge could order the consolidation and, therefore, consider himself competent to pass on Parrish's case, even though the latter had committed his crimes in the State of Sonora. Chapter III of the Code cited provides for the possibility of carrying out the consolidation of causes when they are in different courts and not only when they are in the same court. It must be taken into consideration, moreover, that probable cause is sufficient for the consolidation of proceedings just as for the arrest of an accused, for, as the procedure of consolidation is an economical measure to carry out certain proceedings more rapidly and to determine more easily all their circumstances, such measure is taken at the beginning of the prosecution, when there is yet no conclusive evidence of any kind, as it would be illogical to wait until the end of a prosecution before decreeing said measure of consolidation which, at this stage, would prove utterly useless. At any rate, as stated above, the question of jurisdiction can not cause damage to an accused except in very special and definite cases, as, for example, when the accused is tried by a military tribunal instead of a civil tribunal; consequently, a violation in this matter can not carry international liability.

5. With regard to the evidence which the Judge took into consideration in convicting Parrish, it must be repeated that he in no manner considered the secret documents of the Los Angeles detectives (paragraph 7 of my opinion in the Chattin case). The Judge received the testimony of four witnesses, two of them police officers, who affirmed unanimously the fact that Parrish had accepted tickets purchased illegally from a brakeman; that such tickets were different from those used on the day when the two officers and their companions made the trip; the value of the tickets was 18 pesos; conductor Parrish admitted that he worked on the railroad the day of the trip of Barraza and his associates; it is doubtless that the brakeman could not have committed any fraud against the railroad company without the knowledge of the respective conductor, who was precisely placed by the company in order to prevent fraud; consequently, the requisites fixed by the Mexican Criminal Code for the crime of fraud, defined in Article 414 of the Criminal Code of the Federal District, were fulfilled. Article 415 provides that the defrauder shall suffer the same penalty that would be imposed on him had he committed larceny; larceny by an employee, according to Article 384 of the same Code should be punished with two years' imprisonment; according to Article 406, breach of trust constitutes an aggravating circumstance, and when there are aggravating circumstances the maximum penalty may be imposed; now, then, according to Article 69, the maximum of a penalty is calculated by adding to the medium a third part of its duration, which results in a penalty of two years, eight months, fixed by the Judge of Mazatlán and affirmed by the Third Circuit Court.

6. In the opinion of the Presiding Commissioner in this case it is charged that there was no cause for the consolidation of the Parrish case with those of his three associates. It must be noted that Parrish's crime was the same as that of brakeman Domingo Juárez and that according to the investigation made by the Mexican police, Camou (another brakeman) was the one who directed them, together with said Juárez, to obtain illegal passage

from him. Camou's criminal act was connected with that of Conductor Haley and the latter with that of Chattin (according to the opinion of the Presiding Commissioner himself), so it is clear that the Judge of Mazatlán could legally decree the consolidation of all those cases.

7. It is said that the accused Parrish did not have counsel. On the reverse of folio 99 of the original record it is stated that when he gave his preliminary statement on August 13, 1910, he appointed Lic. Rosendo L. Rodriguez as his counsel. On the reverse of folio 100 it is noted that at the time that the latter was to be notified of his appointment he was temporarily absent from the city. On August 20th Counsel Rodriguez appeared before the Court to accept his appointment (reverse of folio 103). It is true that Counsel Rodriguez resigned September 6, 1910 (folio 110), and that his resignation was immediately communicated to the accused. It does not appear that the accused, who was informed of the resignation of his counsel, appointed another attorney immediately; but it does appear that the accused Parrish continued to be defended by his counsels Fortino Gómez (folio 143 and 156) and Adolfo Arias (folio 163). Besides, I do not find that the fact that an accused does not appoint counsel, being able to do so or to request it, constitutes any international violation; there would be a violation of this kind if the accused had not been permitted to have counsel.

8. The claim should be disallowed.

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