

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
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**Santa Gertrudis Jute Mill Company (Ltd.) (Great Britain) v. United Mexican
States**

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3. The Mexican Commissioner is also of the opinion that this claim should be dismissed, because:

(a) The claimant company could not have obtained the right to claim, which is granted by the Convention only to those sustaining the damage or to their successors in interest by universal succession, but never to a third party through contract, if, when same was entered into, the predecessor in interest had not acquired the right to claim; and, in the present case it so happens that Thomas Burberry, Thomas Newman Burberry, Arthur Michael Burberry and Ralph Benjamin Rools, who were originally the injured parties, transferred all their rights to Burberry's (Limited) in 1920, that is, prior to the date of the Convention between Mexico and Great Britain, which is the only title conferring the right to claim for the acts in question, when heirs are not concerned, i.e., the *partnership* signed by those gentlemen could not transfer to Burberry's (Limited), in 1920, what it only acquired in 1926, when the Convention between Mexico and Great Britain was signed.

(b) The Mexican Commissioner is also of opinion that, even supposing it were declared that the claimant company is the one entitled to claim, and not Messrs. Thomas Burberry, Thomas Newman Burberry, Arthur Michael Burberry and Ralph Benjamin Rools, as maintained by the Mexican Commissioner, as it has not been shown that these last-mentioned gentlemen were British subjects, the claim would not be sustainable without proof of this last requirement, both because the Rules of Procedure (article X, Frac. (a)) so provide, and because this Commission has so laid it down in conformity with the jurisprudence generally established by the International Claims Commission in compliance with the principle that the claim must have the nationality of the claimant Government, from the beginning and until decided by the Commission.

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SANTA GERTRUDIS JUTE MILL COMPANY (LIMITED) (GREAT
BRITAIN) *v.* UNITED MEXICAN STATES

(*Decision No. 19, February 15, 1930, dissenting opinion (dissenting in part) by Mexican Commissioner, February 11, 1930. Pages 147-154.*)

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RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH.—
EFFECT OF NON-PRODUCTION OF EVIDENCE BY RESPONDENT GOVERNMENT.—
NECESSITY OF NOTICE TO AUTHORITIES. Forces constantly in opposition to any established Government *held* not to be considered revolutionary forces for whose acts direct responsibility under the *compromis* existed. An attack by them upon an important station on the railroad between Mexico City and Veracruz and the destruction of several railroad cars *held* an act of such public notoriety as to impute notice to the public authorities and accordingly to entrain responsibility on the part of the respondent Government when it failed to show that any action was taken against such forces. Absent circumstances of public notoriety, *held* claim must be disallowed when there was no proof that claimant advised competent authorities in due time of attack by rebels resulting in damage.

MEASURE OF DAMAGES.—EXPENSES INCURRED IN PREPARATION OF CLAIM.
Expenses of public duties or charges incurred in preparation of claim *held* compensable.

INSURANCE, EFFECT OF UPON RIGHT TO DAMAGES. Opposition of Agent for respondent Government to payment of claim when it appeared that losses claimed may have been compensable in insurance *overruled* upon production of proof that efforts of claimant to obtain such compensation were unsuccessful.

Cross-reference: Am. J. Int. Law, Vol. 25, 1931, p. 782.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 238.

1. On behalf of the Santa Gertrudis Jute Mill Company (Limited), the British Government have filed in one memorial two claims. The first is for compensation for the loss of three cars of jute which were burnt at the Paso del Macho station on the 1st February, 1917, and the second is for compensation for damages done to the company's electric plant on the 30th March, 1919.

The facts are set out in the Memorial as follows:

First Claim

In November and December 1916 the Santa Gertrudis Jute Mill Company (Limited) shipped, under three bills of lading from London via New York by the steamship *Lancastrian*, steamship *Michigan* and steamship *Mongolia*, a consignment of 1,851 bales of jute. The whole consignment was shipped from New York to Veracruz by steamers of the Ward Line during the month of January 1917, and was sent on from there, under the supervision of the company's agent, by the Terminal Company of Veracruz (Limited) via the Mexican Railway. Only 1,477 bales arrived at various dates during the first fortnight of February, resulting in a shortage of 374 bales. From the markings of the bales received it was easily established that the missing bales were:

From steamship *Lancastrian*

7 bales Narayangang mixings.
69 bales Chittagong mixings.
81 bales Substitute M.D.E.

From steamship *Michigan*

48 bales H. 2.
77 bales H. 3.

From steamship *Mongolia*

57 bales D. T. D/E.
24 bales L. B 2.
11 bales L. B 3.

On the 12th February, 1917, the Mexican Railway Company officially informed the Santa Gertrudis Jute Mill Company (Limited) that on the 1st February, 1917, the station at Paso del Macho was attacked and taken by rebel forces, who set fire to all the wagons which were in the yard of that station, including three containing 372 bales of jute belonging to the company, and that the railway company declined to accept any responsibility. The two missing bales are accounted for in a letter from the railway company stating that one wagon contained 126 bales instead of 124 bales as stated on the waybill.

The amount of the claim is 27,921.42 Mexican pesos.

Second Claim

On the morning of the 30th March, 1919, a party of rebels entered the electric plant belonging to the Santa Gertrudis Jute Mill Company (Limited) at Orizaba and partially destroyed the generating pipe by exploding a dynamite bomb which they had placed there. As a result of the damage effected, the factory which took its power from this generating plant was paralysed and unable to function until the 14th April, when the work of repair had been completed.

The amount of the claim is 1,709.81 Mexican pesos, being the cost of the repair of the damage to the generating pipe.

2. The Mexican Agent has made a motion to reject the claim and at the same time has filed an answer to the Memorial in the event that his motion should not be sustained.

The Motion to Reject

3. The Mexican Agent held that the Memorial did not comply with article 10 of the Rules of Procedure, pursuant to which the Memorial should be signed by the claimant and by the British Agent, or by the latter only, but in that case a statement of the facts giving rise to the claim should be included in the Memorial.

In his oral argument the Agent pointed out that there is no document inserted in the Memorial showing that Mr. C. M. Hunter, the General Manager of the Company, was duly authorized to present the claim, and he, furthermore, raised doubt as to the British nationality of the company, which in some of the documents is styled as Santa Gertrudis Compañía Manufacturera de Yute and which, in his opinion, might well be a Mexican Company, to be distinguished from the British Company in London.

4. The British Agent drew the attention of the Commission to Annex 11 of the Memorial, which in his view left no doubt as to whether Mr. Hunter, when making his declaration before a notary public at Orizaba, had produced a deed showing that he was the legitimate representative of the company and authorized by the terms of his Commission to collect and receive all and whatsoever sums of money that may be owing to the company from whatever cause or pretence.

He further asserted that the Spanish name of the company was nothing but a translation of the name under which the Company is incorporated in England and indicated one and the same British Company.

5. The Commission is satisfied that the document, of which the Notary Public makes mention and which was shown to him, establishes that Mr. Hunter was duly authorized to present the claim.

The Commission is equally satisfied that the Mexican branch of the company does not constitute a separate concern but is part of the company at London, the British nationality of which is proved by the certificate of the incorporation, printed as annex 12 of the Memorial.

6. The Commission decides that the Motion to reject is overruled and that the claim must be decided on their merits.

The First Claim

7. The Mexican Agent said that it was common ground between his colleague and himself that the facts had been committed on the day and under the

circumstances as described in the Memorial. The witnesses whom he had caused to be heard at Orizaba all declared that they knew that the station of Paso del Macho had been attacked by armed forces on the 1st February, 1917, and that the railway wagons had been destroyed. It was also of public knowledge that the forces in question belonged to those commanded by General Higinio Aguilar, a man whom the Agent described as a permanent rebel, having been in arms against nearly every Government since 1910 and during the whole time of the *de facto*, and afterwards the *de jure*, Government of President Carranza. But the Agent differed from his colleague in the classification of the said forces into one of the subdivisions of Article 3 of the Convention.

At the time of the attack on the station of Paso del Macho there existed in the Mexican Republic a constitutional Government, of which President Carranza was the Chief. A man like General Higinio Aguilar, who did not fight for any revolutionary programme but simply was in antagonism to every established system of public administration, had to be considered as a rebel and, consequently, he fell within the terms of the fifth subdivision of Article 3. This being so, the responsibility of the Mexican Government could only be considered to exist in case the British Agent established that the competent authorities were blamable in any way. As long as that was not proved, it had to be assumed that the Government had acted with normal diligence, the more so because the railroad where the attack occurred was of such vital importance, being the main connexion between the capital and Veracruz, the principal port, that it could not be supposed that proper measures of protection had been omitted.

That Higinio Aguilar had not been arrested did not prove that the authorities were to blame, because the region where the events happened was so mountainous as to afford easy means of escape.

As to the value of the jute which was burnt, the Agent saw no other evidence than the statement of the claimant himself, i.e., the invoices of the London Office, and observing that amongst the items of the claim also appeared expenses for insurance and war risk insurance, he asked whether the claimant had not already been compensated for his loss and, if not, whether he ought not to have tried.

The claim also including the expenses made in its preparation, the Agent denied that his Government could be made liable for them, the more so as Mexico could not claim from the other party restitution of costs incurred by defending itself, in case a claim was disallowed.

8. The British Agent held a different view as to the classification of the forces, who were guilty of the attack. In his opinion the Government of President Carranza was a revolutionary force which after the triumph of its cause, had established a Government *de jure* or *de facto*, falling within the terms of subdivision 2 of Article 3. To this force, the forces of Higinio Aguilar, being revolutionaries as well, were opposed. Acts committed by them, made Mexico responsible according to the treaty, even when no evidence of omission or negligence was produced. The Agent contended that at the time, when the station was attacked, the Carranza Government was still a *de facto* Government, against which the revolutionary forces under Aguilar were in arms. This General aimed at the overthrow of Carranza and he therefore joined a few years later his forces with those of General Obregón who—if the Agent's information were correct—finally granted him a pension.

But even if it were true that Aguilar was only a rebel and that his forces therefore were to be classified within subdivision 5, the Agent held that it was established that the competent authorities had omitted to take the mea-

asures which could have been expected from them. The railroad in question was of such an essential importance, from a political as well as from an economic point of view, that a permanent and very close military supervision would have been natural. Instead of that, conditions were such that the line and the stations were repeatedly attacked. The Agent did not doubt that this could have been prevented if there had been more diligence, and the fact that, a few months after the attack on the station of Paso del Macho, the railway was taken over by the Government, showed that the Government previously had not sufficient control of the situation.

In regard to the amount of the loss, the Agent relied upon annex 11 of the memorial in connexion with the invoices reproduced in the other annexes, and he presented copies of letters, written by the underwriters to the London Office, showing that endeavours to obtain compensation from the insurance companies had been made, but had remained without result.

An award for the expenses of the claim had often been granted by international tribunals in similar cases, and the Agent thought the amount which was claimed the more reasonable because many of the expenses consisted in the payment of stamp duties, &c.

9. Where the Agents agree as to the facts and their authors, the Commission has to examine in the first place under which of the forces, enumerated in Article 3 of the Convention, the men commanded by General Higinio Aguilar are to be classified. A historical exposition of the facts which occurred during this part of the revolutionary period and of the role played therein by this General, has been given to the Commissioners and leads them to the belief that Aguilar could not be considered as heading or participating in a revolutionary movement. At no time his aims have been stated or his programme made known. It was never shown that his action was based upon ideal, political or social principles. He seems to have been a man whose hand was against every organized system of government, ready to side with any force opposed to it. The Commission is satisfied that it must consider him and the armed men who followed his orders as rebels or as insurrectionaries other than those referred to under subdivisions 2, 3 and 4 of Article 3; in other words, as one of the elements which the fifth subdivision of that Article has in view, and the question that arises is, whether in this case the Mexican Government must be held responsible.

The majority of the Commission answers this question in the affirmative. They cannot but realize that the attack on an important station of one of the main railroads of the country, and the destroying by fire of several wagons, are facts, which must have been of public notoriety and were sure to come at once to the knowledge of the authorities. The railway between the capital and Veracruz is of such a vital importance to Mexico that it was to be expected that measures would have been taken to prevent acts of this kind. That they could occur is already a strong presumption of the absence of sufficient watchfulness. The witnesses, who at the instigation of the Mexican Agent were heard at Orizaba, all knew that the attack was the work of General Aguilar's men. As the authors were known at the time of the facts, a prosecution would have been possible, but there had not been produced any evidence showing that action was taken, and the fact that a few years later General Aguilar was still in command of armed men and able to place them under General Obregon's banner shows that he was not interfered with and retained complete liberty of movement.

There has been an exposition in section 6 of Decision No. 12 (*Mexico City Bombardment Claims*) of the attitude which the majority of the Commission takes

as to how the omission or the absence of suppressive or punitive measures is to be established. Acting on that line, the Commissioners, whose views are here expressed, must hold the Mexican Government responsible for the damage suffered by the claimant.

10. For the amount of this damage there is no other evidence than the invoices sent by the London office of the Company to the General Manager in Mexico and the letters from the Agents in New York to the same. They indicate the value of the jute then under way to Orizaba. All these documents are anterior to the attack on the station and the majority of the Commissioners cannot see why they are not to be accepted as *bona fide* statements.

The same Commissioners are satisfied, by the letters of which copies were shown, that the Company tried in vain to make the insurance pay the damage, and as regards the expenses for the preparation of the claim, they are of opinion that restitution of what has been paid for public duties is rightly claimed.

11. The Commission decides that the Government of the United Mexican States shall pay to the British Government for the Santa Gertrudis Jute Mill Company (Limited), the amounts of: Mexican pesos 27,726.42 (twenty-seven thousand, seven hundred and twenty-six pesos forty-two centavos) for damage, and Mexican pesos 67.55 (sixty-seven pesos fifty-five centavos) for expenses.

The Second Claim

12. The Mexican Agent produced the testimony of several witnesses who had been heard at Orizaba and who all said that they ignored the facts on which the claim is based. Apart from the evidence given by the claimant and some of his employees, to which the Agent attached no value, there was only the statement of Señor Reyes, who repaired the pipe, but while he could be regarded as a judge on the damage done, he was not in a position to give reliable information on the cause of it. For these reasons the Agent thought the evidence insufficient.

13. The British Agent maintained that the facts were sufficiently established by the statements produced in the annexes to the Memorial and that Señor Reyes' evidence was very important.

14. As to the authors of the destruction, the same controversy arose between the Agents as when they discussed the attack on which the first claim is based.

15. The Commissioners, although not doubting that the generating pipe has been destroyed, have not found convincing evidence as to the authors of this act. They therefore do not feel at liberty to declare that those responsible for the destruction have belonged to one of the forces enumerated in Article 3 of the Convention. The evidence collected on the spot shows that in the immediate neighbourhood it was not known that anything had happened, and as claimant does not show that he advised the competent authorities in due time, there is no ground on which they could be blamed.

16. The Commission decides that the claim is disallowed.

Dissenting opinion of the Mexican Commissioner when rendering the decision in this case, solely as regards the question asked by the Honourable Presiding Commissioner as to whether it was proved that the authorities were blamable in any way

I. In point of fact, the Mexican Commissioner is of the opinion that subdivision 5 of Article III of the Claims Convention, Mexico and Great Britain, should be construed as meaning that it is the demandant Government that has

to prove that the competent authorities omitted to take the necessary measures to suppress the insurrections, risings, riots, etc., or that said authorities were blamable in any other way, once it has been shown that the case falls within subdivision 5 of Article III already mentioned.

II. In the present case it has not been shown that the Mexican authorities were to blame in any way whatsoever.

The Mexican Government is not bound to prove that it acted diligently. The Law presumes that the Government has to act diligently, not only to protect other persons' interests, but also to safeguard its own existence. Both Governments being convinced of this legal presumption, the Convention imposed the burden of proof of negligence on the demandant Government. If this be difficult it only means that it is also difficult to give judgment against Mexico for mutinies or upheavals, or for acts committed by insurrectionary forces other than those referred to under subdivisions 2, 3 and 4 of Article III of the Convention, or for the acts of brigands. Said subdivision 5 of Article III of the Convention, thus construed in the light of the principles of international law, there is no reason why it should be inverted, and thus impose the burden of proof on the Government against whom claim is made, as his learned colleagues endeavour to do.

III. In order to maintain his viewpoint as regards this claim, the Mexican Commissioner refers, in every respect, to the dissenting opinion expressed by him on the same point of law in connexion with claims 2, 40, 58, 50, 55 and 28, relating to the bombardment of Mexico City, which were decided by this Commission. In that opinion, said Commissioner states that International Claims Commissions have always been very careful whenever it is a matter of declaring that a Government has been negligent in the fulfilment of its international obligations, and they have never done so without requiring conclusive proof, because it is too serious a charge to base on mere presumption. In this connexion, the cases of *Charles E. Tollerton, vs. Mexico*, decided by the General Claims Commission, Mexico and the United States of America, p. 402, Volume I; *Boni Coleman*, page 56, volume II; *G. L. Solis*, before the same General Claims Commission, Mexico and the United States of America, page 48, volume II, were cited, and, in these three cases that Commission uniformly upheld the principle that the obligation of fully proving negligence devolves on the claimant Government and not on the Government against which claim is made, and, that, to prove that fact, mere presumption and the assertions of the claimant Government are not sufficient.

It may well be agreed, in the present case, that the attack on Paso del Macho by rebel forces under Higinio Aguilar, was a most scandalous affair; it may well be wondered, and no doubt justly, why the Mexican Government did not suppress that act with the energy that Justice demands; it may well be established, as a basis on which to arrive at the conclusion reached by the Mexican Commissioner, that the Government itself had knowledge of those acts and that there is no proof in the record that the culprits were ever prosecuted and punished with all the severity of the law. Nevertheless, the Mexican Commissioner maintains that the Mexican Government is not responsible, for no other reason than because the claimant Government has not produced any evidence either sufficient or insufficient to comply with the obligation of proving that the Mexican Government was negligent. President Carranza's Government must certainly have suppressed the act of the attack or assault on the Mexican Railway at Paso del Macho station, and, had the Mexican Government been obliged to prove this fact, it would most certainly have complied with that obligation; but, relying on the fact that the burden of

proof did not devolve upon it, according to the Convention, no proof whatever was produced to establish the fact. The bare principle contained in section V of Article III of the Convention, is this: "The British Government is obliged to prove the Mexican Government's negligence in all cases included in subdivision 5 of Article III of the Convention." In the present case the British Government has not complied with that obligation. Therefore, the Mexican Government should be held not liable for the acts committed by Higinio Aguilar.

C. E. McFADDEN (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(*Decision No. 20, February 10, 1930. Pages 155-156.*)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. A claimant whose coal had been requisitioned by the Huerta Government for public use but who had never been paid for the same by any Mexican Government, despite repeated requests for payment, settled by agreement between British and Mexican Agents, approved by the tribunal.

(*Text of decision omitted.*)

MEXICAN UNION RAILWAY (LIMITED) (GREAT BRITAIN)
v. UNITED MEXICAN STATES

(*Decision No. 21, February , 1930, dissenting opinion by British Commissioner, undated. Pages 157-175.*)

CALVO CLAUSE.—RESPONSIBILITY FOR ACTS OF FORCES. Claims by a British corporation, owner of a railroad in Mexico operated under a concession from the Mexican Government in connexion with which claimant had agreed to a Calvo Clause, for damages resulting from acts of Indian, rebel, revolutionary and State government forces, *held* not within the jurisdiction of tribunal.

EXHAUSTION OF LOCAL REMEDIES. The responsibility of a State under International Law is subordinated to the exhaustion of local remedies. Article VI of *compromis*, setting aside this rule, does not deprive Calvo Clause of its effect as long as there has been no denial or undue delay of justice or other international delinquency.

Cross-references: Am. J. Int. Law, Vol. 24, 1930, p. 388; Annual Digest, 1929-1930, p. 207.

Comments: Clyde Eagleton, "*L'épuisement des recours internes et le déni de justice, d'après certaines décisions récentes*", Rev. de Droit Int. L. C., 3d Ser., Vol. 16, 1935, p. 504 at 519; 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 103; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 236; Lionel Summers, "*La clause Calvo: tendances nouvelles*", Rev. de Droit Int., Vol. 12, 1933, p. 229 at 230.