

**REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS**

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**RECUEIL DES SENTENCES  
ARBITRALES**

**El Oro Mining and Railway Company (Ltd.) (Great Britain) v. United Mexican  
States**

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THE DEBENTURE HOLDERS OF THE SAN MARCOS AND PINOS COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 54, June 23, 1931. Pages 135-141.)

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**CREDITORS' CLAIMS.** Claim of holders of debentures of a British corporation, whose real property in Mexico had been sold to another, subject to a mortgage held by such corporation, based on acts of forces occurring while such property was owned by the purchaser, *dismissed*.

*Comments:* G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 233.

(Text of decision omitted.)

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EL ORO MINING AND RAILWAY COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 55, June 18, 1931, dissenting opinion by Mexican Commissioner, June 18, 1931. Pages 141-152.)

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**CALVO CLAUSE.—EXHAUSTION OF LOCAL REMEDIES.** Claim for compensation for transport of troops and goods on behalf of revolutionary and federal forces, for services and material furnished such forces, and for losses and damages resulting from the acts of such forces. Claimant was the holder of a railroad concession in connexion with which it had agreed to a Calvo Clause. Claimant had previously exhausted the only available local remedy and the domestic tribunal before which such claim was pending had taken no action thereon and made no indication as to when action might be taken. Motion to dismiss *disallowed*.

**DENIAL OF JUSTICE.—UNDUE DELAY IN JUDICIAL PROCEEDINGS.** While tribunal will not attempt to define with precision what will amount to an undue delay of justice, the holding of a case for nine years without any action whatever *held* undue delay. If such delay were due to volume of litigation, the judicial machinery itself must be deemed defective.

*Cross-reference:* Annual Digest, 1931-1932, p. 201.

*Comments:* G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 237; Lionel Summers, "*La clause Calvo: tendances nouvelles*", Rev. de Droit Int., Vol. 12, 1933, p. 229 at 232.

1. The claim is for compensation for the transport of troops and goods on behalf of revolutionary and federal forces, for work done and material supplied to revolutionary and federal forces, and for losses and damages suffered at the hands of revolutionary and federal forces during the period from the 20th November, 1910, to the 31st May, 1920.

The claimant Company was incorporated as a British Limited Company under the Companies' Acts, 1862 to 1898, on the 27th July, 1899.

The El Oro Mining and Railway Company, Limited, was, according to the Memorial, at the time of the losses and still is, engaged in mining and railway business in the State of Mexico. During the period from the 20th November, 1910, to the 31st May, 1920, inclusive, the Company suffered considerable losses on account of revolutionary or counter-revolutionary acts. The claim has been formulated in seven sub-claims.

#### CLAIM "A"

##### *First Part*

This claim is in two parts. The first is for compensation for the transport of troops by special and ordinary trains, for freight of materials and horses, and for repair to damage done to telegraph wire; and the second for compensation for material commandeered by the Libertador, Constitucionalista and Convencionista armies, and by the Secretary of War and Marine.

During November 1913 and the period from April to September 1914, troops and horses were transported over the railway belonging to the El Oro Mining and Railway Company, Limited, at the orders of Colonel J. C. Gamboa. Accounts 515-17, 521 and 524 are for services rendered at the orders of Colonel Gamboa.

During November and December 1914, January and February 1915, and November and December 1915, troops were transported for the Constitucionalista army, and a large number of special trains were used by that army. Fuel was supplied to, and some telegraphic lines were damaged by, this army. The names of the chief officers responsible for requisitions are: J. Gloriat. Arnulfo Gonzalez and F. Maguia.

During the period from February to September 1915 the Libertador army made use of the railway for the transport of troops, and requisitioned quantities of fuel.

##### *Second Part*

During the period from September to December 1915, material was supplied to, and work done for, the Constitucionalista army at the orders of Captain Juan Ramirez and Colonel Rivera.

During the period from February to September 1915 a considerable amount of work was done and material supplied to the Libertador army at the request of the same officers as detailed in group 3 of part I of this claim.

In August and September work was done for the Convencionista army at the orders of General Bonilla and General M. S. Pavon.

The amount of the claim is \$13,810.64 United States gold.

#### CLAIM "B"

It is alleged that on the 26th October, 1917, a train No. 480, left Empalme Gonzalez, a station on the National Railroads, with a freight of dynamite, motor cars, glass, machinery and other goods. At kilometre post 293, on the same day, an armed band of some 300 men under the command of General Gutierrez attacked the train by placing a bomb on the track, the explosion of which made it impossible for the train to proceed. After the band had stolen all they could, they set fire to the train, and the explosion which occurred when the flames reached the dynamite truck totally destroyed the train. In this train was a quantity of goods belonging to the El Oro Mining and Railway Company, Limited. Particulars of the goods are given in (j) of Exhibit B.

The amount of the claim is \$13,353.11 United States gold, or pesos 26,706.22 Mexican gold.

## CLAIM "C"

This claim is for compensation for material taken by military forces and lost at Ciudad Juarez in 1915 and 1917. The claim is in two parts: the first is for some dynamite and fuse which was confiscated by military forces in 1916, and the second is for a shipment of ten kegs of litharge which was lost on the railways.

The Memorial sets out that on the 12th January, 1915, Messrs. T. J. Woodside and Company imported, on behalf of the El Oro Mining and Railway Company Limited, a car of dynamite and fuse. This car was No. 11205, and left Juarez City in a special train made up for Guanajuato. *En route* the car was cut out of the train as it was in bad order. On inquiry being made, it was found that the car had been taken to Dynamite Station and unloaded there by the order of the military authorities. Messrs. Woodside and Company wrote to the Constitutional Railways of Mexico and, in reply, were informed that this dynamite was unloaded by military command. This dynamite was never recovered by, or on behalf of, the claimant company. Part of this dynamite belonged to the El Oro Company.

In January 1915 ten cases of litharge were shipped to the El Oro Mining and Railway Company by J. A. Wright, customs broker of El Paso, Texas. This consignment of litharge was never received by the Company.

The amount of the claim is \$4,934.20 United States gold, or \$9,868.40 pesos Mexican gold. This total includes the cost of transport which had to be paid in advance.

## CLAIM "D"

It is alleged in the Memorial that on the 7th August, 1914, revolutionary forces entered the mining property of the El Oro Mining and Railway Company and took possession of rolling-stock belonging to the Company. In October 1915 Colonel L. Rivera returned to the Company locomotive No. 2 and twelve trucks. The locomotive and trucks were in a very much damaged condition, and considerable repair was necessary before they were fit for further use. At the request of José P. Romo, the Judge of First Instance at El Oro ordered an investigation by experts of the damage and an estimate from these experts of the cost of repair. The report of these experts is attached to the voluntary proceedings (*b*) of Exhibit D.

On the 24th June, 1915, General Agustin G. Ceballos took, among other rolling-stock belonging to the Company, engine No. 5, and since that date the engine and almost all the rolling-stock was returned. On the 26th and 27th October, 1915, Colonel L. Rivera took an engine and twelve trucks belonging to the Company. In December 1915 engine No. 5, referred to above, and two trucks were returned to the Company. In an investigation made by experts at the request of the Judge of First Instance at El Oro, it was discovered that the trucks had not been badly used and were fit for further service. The engine, however, had received very bad treatment, and it was found necessary to expend a considerable sum of money on repairs.

The amount of the claim is 943.02 pesos Mexican gold, being 305.46 pesos Mexican gold the cost of repairs to locomotive No. 2 and twelve cars, and 637.38 pesos Mexican gold being the cost of repairs to locomotive No. 5.

## CLAIM "E"

According to the Memorial, on the 11th December, 1918, wagon No. 115 left El Oro, and on the 13th it left Tultenango for Pateo. After the wagon had

been unloaded and entered for the return journey, it was set on fire by a party of rebels numbering between 200 and 300 men. The wagon was so badly damaged that it was necessary to reconstruct it.

The amount of the claim is \$426.70 United States gold, or pesos 853.40 Mexican gold.

#### CLAIM "F"

The Memorial states that on the 10th August, 1914, a loan of pesos 20,000 paper was made to General Ramon V. Sosa, of the Constitutionalist army. The El Oro Mining and Railway Company wrote on the 15th October, 1914, requesting the return of this money. No reply was returned to this letter. On the 10th January, 1915, General Luis Colín, of the Constitutionalist Army, took pesos 1,500 paper. On the 10th February, 1915, The Administrator of the State Revenue at El Oro, by the order of General Luis Colín, took pesos 7,000 paper. On the 9th January, 1915, Colonel Alfonso León took pesos 500 paper. On the 16th February, 1914, Colonel J. Jesús Ayala took pesos 500 paper. On the 22nd February, 1913, the same officer took pesos 750 paper. On the 20th February, 1915, General Inocencio Quintanilla took pesos 500 paper, and on the 30th April, 1915, General Juan Mejía F. took pesos 500 paper. This money has never been refunded to the Company.

The amount of the claim is \$4,298.88 United States gold, or pesos 8,597.76 Mexican gold, being the equivalent of the paper money taken by these officers at the rates of exchange ruling at the time.

#### CLAIM "G"

This is a claim for work done and for transport of troops and carriage of freight on various dates in 1914.

The accounts for this work were presented to the Secretariat of War and Navy for payment. This Department refused to pay the accounts on the grounds that, in view of the Decree of the 19th February, 1912, the acts of Victoriano Huerta could not be recognized.

The amount of the claim is pesos 140.20 Mexican gold.

The total amount of the seven sub-claims is \$36,823.53 United States gold currency and pesos 1,083.22 Mexican gold.

A claim has also been filed with the Mexican National Claims Commission, but no award has been made by that Commission in respect of that claim.

The British Government claim on behalf of the El Oro Mining and Railway Company the sum of \$36,823.53 United States gold and pesos 1,083.22 Mexican gold.

2. The claim is before the Commission on a motion to dismiss filed by the Mexican Agent.

The contention on which the motion is based is that the original concession granted in 1897 by the Mexican Government for the construction of this railway contains a so-called Calvo Clause, reading as follows:

"La empresa será siempre mexicana aún cuando todos o algunos de sus miembros fueren extranjeros y estará sujeta exclusivamente a la jurisdicción de los Tribunales de la República Mexicana en todos los negocios cuya causa y acción tengan lugar dentro de su territorio. Ella misma y todos los extranjeros y los sucesores de éstos que tomaren parte en sus negocios, sea como accionistas, empleados o con cualquier otro carácter, serán considerados como mexicanos en todo cuanto a ella se refiere. Nunca podrán alegar respecto de los títulos y negocios relacionados con la empresa, derechos de extranjería bajo cualquier pretexto que sea. Solo tendrán los derechos y medios de hacerlos valer que las

leyes de la República conceden a los mexicanos, y por consiguiente no podrán tener ingerencia alguna los Agentes Diplomáticos extranjeros.”<sup>1</sup>

As the claimant Company has taken over this contract, they must, according to the view taken by the Mexican Agent, be regarded as bound by its provisions, including the Calvo Clause.

3. The Mexican Agent pointed out that in this case the Calvo Clause was in tenor and wording exactly similar to article 11 of the concession of the Mexican Union Railway, with which the Decision No. 21 of the Commission had dealt. In his submission, the Commission should declare themselves incompetent, for the same reasons as in the other case.

4. The British Agent declared that he did not intend to argue against a decision taken by the Commission in a previous session, but that he did see a marked difference between the two cases. His contention was that the Commission were not only at liberty to come to another conclusion in the claim now under consideration, but he even found in the Decision quoted a strong argument in favour of overruling the motion filed by his Mexican colleague.

To this end he relied more particularly upon No. 12 of Decision No. 21, reading:

“The question may arise whether the view expressed in this judgment does not lead to the ultimate conclusion that the Mexican Union Railway has, by signing article 11 of the concession, divested itself of its British nationality and all that it implies, to such a degree as to waive the right to appeal to its Government even in cases of violation of the rules and principles of International law.

“It is obvious that there could only be grounds for this question if the Calvo Clause in this case were construed as intended to prevent the other party from applying for the diplomatic support of his Government in any circumstances whatsoever. Had that been the scope of the provision, the Commissioners would unanimously have been of opinion that the clause was to be considered as null and void. Redress of internationally illegal acts and protection against breaches of international law are regarded by the Commission as being of such high importance to the community of civilized States that their preclusion would invalidate the stipulation. But the majority of the Commission cannot see that article 11 of the concession aims so far. The claimant has not, by subscribing to it, waived its undoubted right as a British Corporation to apply to its Government for protection against international delinquency; what it did waive was the right to conduct itself as if not subjected and as possessing no other remedies than international remedies. What the claimant promised was to apply to the courts and to resort to those means of redress which are, according to the Mexican constitution and laws, open to Mexican citizens. The contract did not take from claimant the right to apply to its Government if its resort to the Mexican tribunals or other authorities available resulted

<sup>1</sup> *English translation from the original report.*—“The Company shall always be a Mexican Company, even though any or all its members should be aliens, and it shall be subject exclusively to the jurisdiction of the Courts of the Republic of Mexico in all matters whose cause and right of action shall arise within the territory of said Republic. The said Company and all aliens and the successors of such aliens having any interest in its business, whether as shareholders, employees or in any other capacity, shall be considered as Mexican in everything relating to said Company. They shall never be entitled to assert, in regard to any titles and business connected with the Company, any rights of alienage under any pretext whatsoever. They shall only have such rights and means of asserting them as the laws of the Republic grant to Mexicans, and Foreign Diplomatic Agents may, consequently, not intervene in any manner whatsoever.”

in a denial or undue delay of justice. It only took away the right to ignore them.

"This was, however, just what the claimant did. It behaved as if article 11 of the concession did not exist. Although the most recent of the events upon which the claim is based occurred in 1920, and the Convention was signed in 1926, it took no action at all. The claimant never sought redress by application to the local courts or to the National Claims Commission, which was created to adjudicate upon claims similar to that now submitted, which has been in operation since the 17th June, 1911, and whose functions have subsequently been transferred to the Comisión Ajustadora de la Deuda Pública Interior.

"If by taking the course agreed upon by both parties, the claimant would have been unable to obtain justice, no international tribunal would have denied it access, on the ground of the engagement subscribed to by it. But the claimant omitted to pursue its right by taking that course, and acted as if said course had never been indicated by the State and accepted by it, and as there can be no question of denial of justice or delay of justice as long as justice had not been appealed to, the majority cannot regard the claimant as a victim of international delinquency."

5. It was in the eyes of the British Agent clear that the Commission had, in the claim of the Mexican Union Railway, accepted the Calvo Clause, *inter alia*, because the claimant, so long as he had not had recourse to the Mexican courts, could not be said to have been a victim of internationally illegal acts or breaches of international law, such as a denial of justice or an undue delay of justice. But the position of the El Oro Mining and Railway Company was quite different. It had not acted as if it had not signed the Calvo Clause. It had not disregarded local means of redress and had not omitted to follow the course agreed upon in the concession.

In order to prove this, the Agent drew the attention of the Commission to the Ley de Reclamaciones of the 30th August, 1919. This law created a special Court—called "La Comisión de Reclamaciones"—to which all claims should be submitted, arising out of damage—either to persons or to property—sustained through the revolutionary movements which had occurred since the 20th November, 1910. To this Tribunal aliens as well as Mexican citizens were to have access.

The Agent also quoted article 145, sections X and XI of the "Ley sobre Ferrocarriles" (the 29th April, 1899), reading:

"X. La autoridad federal tiene el derecho de requerir, en caso de que a su juicio lo exija la defensa del país, los ferrocarriles, su personal y todo su material de explotación y de disponer de ellos como lo juzgue conveniente.

"En este caso la Nación indemnizará a las compañías de camino de fierro. Si no hubiere avenimiento sobre el monto de la indemnización, se tomará como base el término medio de los productos brutos en los últimos cinco años, aumentado en un diez por ciento y siendo por cuenta de la empresa todos los gastos.

"Si sólo requiriere una parte del material, se observará lo dispuesto en el párrafo IV de este artículo.

"XI. En caso de guerra o de circunstancias extraordinarias, el Ejecutivo podrá dictar las medidas necesarias, a fin de poner, en todo o en parte, fuera de estado de servicio, la vía, así como los puentes, líneas telegráficas y señales que formen parte de ella.

“Lo que haya sido destruido, será restablecido a costo de la Nación, luego que lo permita el interés de ésta.”<sup>1</sup>

The claimant Company has done everything in its power to have justice done, and had followed the course prescribed by a Mexican law. It had, in the year 1922, in strict accordance with the Ley de Reclamaciones, applied to the Comisión de Reclamaciones, but no award had until then been made. It had not received any communication on the subject of its claim, and it was obvious that it could no longer expect in this way to obtain the compensation due to it, according to article 145 of the Railway Act and the provisions of the Ley de Reclamaciones.

The Agent's conclusion was that there could be no doubt as to the claimants having exhausted all the local means of redress open to them. Those local means of redress had, however, proved inefficient. By taking the course indicated by the Mexican laws, the claimant had not been able to pursue its right. For this reason a denial of justice or undue delay of justice must be assumed to exist, in other words, that international delinquency which, according to the opinion laid down in Decision No. 21 of the Commission, entitled a claimant to apply to his own Government in spite of having subscribed to a Calvo Clause.

6. The Mexican Agent denied that the Comisión Ajustadora de la Deuda Pública Interior, to which the functions of the National Claims Commission had subsequently been transferred, could be blamed for undue delay of justice. The original total of the claims filed with the Mexican National Commission was over 10,000, of which 7,000 had already been settled. There was, in his submission, no reason to criticize the Commission for not yet having got through this huge volume of work.

7. The Commission, by a majority, adhere to the decision in the case of the Mexican Union Railway, and as it so happens that in the claim now under consideration the Calvo Clause has exactly the same wording as in the former case, the question before them is whether that clause must in this case be disregarded, because the claimant Company has been the victim of internationally illegal acts or breaches of international law, such as a denial of justice or undue delay of justice.

8. The local remedy open to the claimant was the “Comisión de Reclamaciones”, now “Comisión Ajustadora de la Deuda Pública Interior”. To this tribunal the Company had to resort according to the local law, under the Calvo Clause inserted in its concession. That there were no other means of redress open to the claimant is made clear by article 9 of the Ley de Reclamaciones, reading:

<sup>1</sup> *English translation from the original report.*—“X. The Federal authorities have the right, should it in their judgment be required by the defence of the country, to call upon the railways, their personnel and all their operating equipment, and to dispose of same as they may think fit.

“The Nation shall in that event compensate the railway companies. Should they fail to reach an agreement as to the amount of such compensation, the average gross earnings for the preceding five years, plus ten per cent, shall be taken as a basis, all expenses to be borne by the company.

“If only a part of such equipment should be requisitioned, the provisions of paragraph IV hereof shall be observed.

“XI. The Executive may, in case of war or of circumstances of an extraordinary nature, order such measures to be taken as may be necessary for putting out of service, either wholly or in part, any tracks, and also any bridges, telegraph lines and signals forming part thereof.

“Anything so destroyed shall be replaced at the expense of the Nation, as soon as the interests of the latter shall allow of its doing so.”

“Art. 9. Por el hecho de acudir a la Comisión en la forma administrativa determinada en esta ley, se entenderá que los damnificados renuncian a su derecho de entablar las mismas reclamaciones por la vía judicial.”<sup>1</sup>

By filing an action with the National Commission, the claimant has, therefore, exhausted all local means of redress.

9. Following this statement, the Commission feel obliged to make another. It is to the effect that the claimant may rightly complain that it has applied for justice in vain.

Nine years have elapsed since the Company applied to the Court to which the law directed it, and during all those years no justice has been done. There has been no hearing; there has been no award. Not the slightest indication has been given that the claimant might expect the compensation to which it considered itself entitled, or even that it might be granted the opportunity of pleading its cause before that Court.

The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter. It will often be difficult to define the time limit between a careful and conscientious study and investigation, on the one hand, and procrastination, undue postponement, negligence and lack of despatch on the other. The Commission have, in their Decision No. 53 (*Interoceanic Railway*), laid down their opinion that a court with which a claim for an enormous amount had been filed in November 1929 could not be blamed for undue delay if it had not administered justice by June 1931. It is obvious that such a grave reproach can only be directed against a judicial authority upon evidence of the most convincing nature.

But it is equally obvious that a period of nine years by far exceeds the limit of the most liberal allowance that may be made. Even those cases of the very highest importance and of a most complicated character can well be decided within such an excessively long time. A claimant who has not, during so many years, received any word or sign that his claim is being dealt with is entitled to the belief that his interests are receiving no attention, and to despair of obtaining justice.

10. In the opinion of the Commission, the amount of work incumbent upon the Court, and the multitude of lawsuits with which they are confronted, may explain, but not excuse the delay. If this number is so enormous as to occasion an arrear of nine years, the conclusion can be no other than that the judicial machinery is defective, and that the organization of its jurisdiction is not in proper proportion to the task it has to fulfil. A very obvious delay of justice originating in the overburdening with work of Courts insufficient in number is in effect equivalent to that undue delay of justice which the Commission have, in their Decision No. 21, accepted as justifying claimants in applying to their own Governments, in spite of having signed a Calvo Clause.

For this reason the Commission hold that the terms of the concession do not in this case preclude the claimant from appearing before them.

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<sup>1</sup> *English translation from the original report.*—“Art. 9.—It shall be understood that the claimants, by resorting to the Commission in accordance with the administrative procedure hereby established, *ipso facto* waive their right to prefer the same claims in the Courts.”

*Dissenting opinion of the Mexican Commissioner*

The Mexican Commissioner dissents from the Decision taken by his colleagues in the present case, for the following reasons:

*Firstly.*—He does not believe that the period of nine years, which has elapsed without the Adjusting Commission having pronounced judgment in the claim presented by the claimant company, justifies the statement that there has been a denial of justice on account of delay in administering it; and he bases his disagreement upon the fact that the said Commission has had many thousand cases to decide, some of them very complicated, and that, since the Commission itself knew that the claimant company had had recourse to the Anglo-Mexican Commission for a decision in the same case, it was logical to suppose that the Adjusting Commission itself would await the opinion of the Anglo-Mexican Commission before dealing with the case.

The General and Special Claims Commissions between Mexico and the United States have been functioning for more than six years and have not pronounced more than 200 decisions, in spite of the efforts of both Governments and of the Commissions themselves to make the best use of the time. They have more than three thousand cases to deal with, and up to the present they have not been accused of lenity in their labours.

The Claims Commission between Mexico and the United States in 1868 functioned for eleven years to decide a smaller number of cases than those enumerated in the preceding paragraph.

Delay in administering justice, according to the estimation of international authorities, should be malicious. In the present case this characteristic has not been demonstrated.

*Secondly.*—The Mexican Commissioner is also of opinion that the Anglo-Mexican Commission should declare itself incompetent since, even supposing it to be thought that there was denial of justice, through delay in administering it, on the part of the Adjusting Commission, this does not mean that the Anglo-Mexican Commission is the one to recognize that claim but the competent International Tribunal established in the case of the Union Railway Company. The Convention between Mexico and Great Britain does not authorize the Commission to recognize acts of civil authorities except when they have been committed by forces, which does not arise in the present case.

He agrees with all the other points in the Decision.

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ALFRED F. HENRY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

*(Decision No. 56, June 9, 1931. Pages 153-154.)*

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**FORCED ABANDONMENT.** Though it appeared that claimant's place of employment and residence was occupied by revolutionary forces at the time of his alleged departure, in the absence of evidence of acts compelling claimant to leave hurriedly and abandon his property, as well as proof that his property was taken by revolutionary forces, claim *dismissed*.

1. In this case the claim is made on behalf of Mr. Alfred F. Henry. The claimant sets out in the Memorial that he was employed as Civil Engineer to the Huasteca Petroleum Company at Tampico, and in 1913-1914 was engaged