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**Mexico City Bombardment Claims (Great Britain) v. United Mexican States**

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MEXICO CITY BOMBARDMENT CLAIMS (GREAT BRITAIN)  
v. UNITED MEXICAN STATES

(*Decision No. 12, February 15, 1930, dissenting opinion (dissenting in part) by British Commissioner, undated, dissenting opinion (dissenting in part) by Mexican Commissioner, February, 1930. Pages 100-118.*)

**AFFIDAVITS AS EVIDENCE.—DAMAGES, PROOF OF.** Only in rare instances will unsupported affidavits of a claimant be accepted as sufficient evidence. Affidavits of claimants made shortly after their losses, corroborating one another in their recitation of the facts, and supported by affidavits of other witnesses as well as certain historical facts, *held* sufficient proof of circumstances of loss. Affidavits of claimants as to amount of loss *held* not sufficient to establish damages to be allowed, damages instead allowed on basis of estimate of the tribunal. A statement neither signed nor sworn to by claimant *held* not sufficient evidence. A statement of a claimant supported by an affidavit of another person, which latter affidavit was executed more than fifteen years after the event, *held* not sufficient evidence.

**PRIMA FACIE CASE.—BURDEN OF PROOF.—EFFECT OF NON-PRODUCTION OF EVIDENCE BY RESPONDENT GOVERNMENT.—RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH.** A *prima facie* case of liability will exist upon proof by the claimant Government that the existence of the insurrection, for acts of the forces of which claim was made, was known to the public authorities, when the respondent Government has failed to produce any evidence as to action taken by the authorities.

*Cross-references:* Am. J. Int. Law, Vol. 25, 1931, p. 765; Annual Digest, 1929-1930, pp. 166, 454.

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

1. The British Government have joined in a single Memorial, under the title "Mexico City Bombardment Claims," one group of similar claims and two individual claims, all of which originate in the events which took place in Mexico City in February 1913, during a period known as "the tragic ten days." They are the following:

- A. The claims of Walter Ralph Baker, Archibald William Webb, Herbert John Woodfin and George J. W. Poxon, all residents in the Hostel of the Young Men's Christian Association, for having lost property when the Hostel was occupied by troops.
- B. The claim on behalf of Daniel John Tynan for losses suffered when, as a result of a bombardment, a fire was started in his house and his property destroyed.
- C. The claim of James Kelly for losses suffered through the killing of twelve of his cows by a shell.

The Commission has considered and decided the three parts of the Memorial separately.

## A

*The Claims of Messrs. Baker, Webb, Woodfin and Poxon*

2. Their losses are alleged to have been due to the occupation of the Y.M.C.A. Hostel, where they resided in February 1913, by revolutionary troops belonging to the forces of General Felix Díaz, then in arms against the Administration of President Madero. Claimants were ordered to leave the building without delay, and when they returned to their rooms after hostilities had ceased, they found that their personal property had been either destroyed or looted by the revolutionaries. The building was, and is still, situated at the corner of Calle Dalderas and Avenida Morelos, close to the so-called "Ciudadela," being the Arsenal, then occupied by the Felicistas (troops under command of General Felix Díaz).

The documents on which the British Agent relies are: (1) An affidavit sworn by Mr. Baker before the British Consul-General at Mexico City on the 2nd April, 1913; (2) a statement made by Mr. Webb on the 1st March, 1913, registered on the 27th March, 1913, at the British Consulate-General at Mexico City, and affirmed by his affidavit sworn before the British Vice-Consul at Guadalajara on the 15th April, 1928; (3) a statement made by Mr. Woodfin on the 3rd April, 1913, and affirmed by his affidavit sworn before the British Consul at San Jose, Costa Rica, on the 1st March, 1928; (4) an affidavit sworn by Mr. Poxon before a notary public at Los Angeles (California) on the 28th November, 1927; (5) several certificates of the Secretary of the Young Men's Christian Association, to the effect that Messrs. Baker, Webb and Woodfin occupied rooms in the Hostel when the building was invested by revolutionary troops on the 11th February, 1913.

In the course of his argument the British Agent has filed an affidavit sworn before the Vice-Consul of the United States of America at Mexico City by Mr. Richard Williamson, now National Secretary, and, in February 1913, Associate General Secretary of the Young Men's Christian Association. In this affidavit Mr. Williamson deposes that during the "tragic ten days" the Hostel of the Association was occupied by one hundred soldiers under the general command of Felix Díaz; that he (Williamson) was on hand at the same building immediately after the hostilities ceased, and that he found the majority of the rooms had been sacked and robbed. He further states that none of the occupants of the rooms had an opportunity to remove their personal belongings because of the suddenness of the occupation of the building and the impossibility of getting access to it after the troops had occupied it, and that, during the time the robbing and sacking was done, no troops, forces or individuals had access to the building.

The British Government claims, on behalf of Mr. Baker, 997.00 pesos Mexican gold; on behalf of Mr. Webb, 275.50 pesos Mexican; on behalf of Mr. Woodfin, 621.10 pesos Mexican silver or £ 62 3s.; and on behalf of Mr. Poxon, 631.00 pesos Mexican gold.

3. The Mexican Agent has denied any value whatever to the affidavits of the claimants, because they have not been sworn publicly before a court, because there has been no cross-examination of the affiants, and because, in case of perjury, the affiants cannot be prosecuted.

In his opinion, the unsupported affidavits of claimants cannot be considered as evidence, and certainly not as evidence in their favour. He pointed out that articles 10, 28, 29 and 30 of the Rules of Procedure make a clear distinction between the parties and the witnesses, and that documents emanating from the former are not equivalent to documents emanating from the latter. The

fact on which the claims are based, i. e., the looting of the room in each individual case, has not been proved, neither have the pre-existence or the value been established of the objects, for the loss of which compensation is claimed. Even if the occupation of the building were ascertained, the losses of the claimants individually would not have been proved by their uncorroborated affidavits. In the view of the Mexican Agent, the claimants have omitted to collect the necessary outside evidence, which, if they had made an effort, would have been available, and this makes their statements still more objectionable to him.

Although the Mexican Agent did not deny that the Felicistas are included in the forces enumerated in Article 3 of the Convention, he contested that there was any proof that they were responsible for the losses on which the claims rest. But even if this had been shown, they could, as being rebels, only fall within subdivision 5 of Article 3, and the British Agent ought to establish that the competent authorities had been blamable in some way.

4. The British Agent held that to unsupported affidavits of claimants more weight is to be attached than his colleague was inclined to admit. According to the British law, affiants can be prosecuted and punished for perjury even if they swore and signed outside England. In this case, however, the affidavits cannot be considered as lacking support, because they corroborate each other, having been sworn by different persons, who all suffered similar losses at the same time and owing to the same occurrences.

He further argued that, whereas it is impossible to obtain corroborated evidence as to the objects robbed from a room, the statement of the owner has the value of *prima facie* evidence.

That those who occupied the building and looted the rooms were Felicistas was, according to the Agent, of public notoriety, and is, moreover, proved by the certificates of the Secretary of the Y.M.C.A. and by the affidavit of Mr. Richard Williamson.

In his view, the Felicistas were included in subdivision 2 of Article 3 of the Convention, because they aimed at the overthrowing of President Madero, an aim which at the end of the "tragic ten days" was reached by General Victoriano Huerta. As, in the conception of the British Agent, Huerta established a Government *de facto*, the cause, which was common to him and to General Felix Díaz triumphed and the Mexican Government is responsible for the damages caused by the forces of the one as well as of the other. If, according to the opinion of his Mexican colleague, subdivision 5 of Article 3 were to be applied, the British Agent maintained that it was well known that neither General Felix Díaz nor his soldiers were punished.

5. In its decision on the demurrer, filed by the Mexican Agent in the claim of Mrs. V. C. Cameron, the Commission has made known its attitude as to affidavits in general. The unanimous view of the Commissioners was expressed as follows:

"It is true, no doubt, that affidavits contain evidence which can be described as secondary evidence and is often of a very defective character. In many cases, it may be, affidavit evidence may possess little value, but the weight to be attached to that evidence is a matter for the Commissioners to decide according to the circumstances of a particular case. Affidavits must and will be weighed with the greatest caution and circumspection, but it would be utterly unreasonable to reject them altogether."

Acting on the principle laid down in this sentence, the Commission has considered the weight to be attached, *first* to unsupported affidavits of claimants in general, and *second* to the affidavits produced in this case.

It may be useful for the further guidance of the Agents, that the Commission announces that its majority has come to the conclusion, in general, that unsupported affidavits of claimants possess the very defective character of which the quotation speaks, and that only in cases of the rarest exception, they can be accepted as sufficient evidence. Such documents are sworn without the guarantee of cross-examination by the other party; in nearly all cases a false statement will remain without penalty, and, as they are signed by the party most interested in the judgment, they can not have the value of unbiased and impartial outside evidence.

As regards, however, the affidavits, on which the British Agent relies in this case, an otherwise composed majority of the Commission does not consider them as being unsupported, at least not as regards the affidavits of Messrs. Baker, Webb and Woodfin. Their statements have been made at nearly the same time and very shortly after the events. Their depositions are identical. Their falseness would be equal to a perjury of such a premeditated and concerted character as seems difficult to admit. Moreover, their declarations are strengthened by the certificates of the Secretary of the Y.M.C.A., who attests that the Hostel was occupied by revolutionaries, and by the affidavit of Mr. Richard Williamson, who, as an eye witness, swears that he knew that the soldiers, who invested the building, were Felicistas and that the majority of the rooms have been sacked and robbed. As moreover, the Hostel was situated in the immediate neighbourhood of the place where, as is widely known, General Felix Díaz had his quarters, there is every reason to admit that, by corroboration, the various affidavits and statements prove sufficiently the occupation of the building by Felicistas and the looting by them of the rooms of Messrs. Baker, Webb and Woodfin.

It is the unanimous opinion of the Commissioners that these considerations do not hold good for the claim of Mr. Poxon for the reasons *first* that his affidavit, having been sworn on the 28th November, 1927, can not be regarded as being corroborated by the simultaneous and contemporary statements drawn up a few days or weeks after the events; and *second* that there has not been shown any evidence as to his residing in the Hostel during the "tragic ten days."

6. The majority of the Commission being satisfied that the Hostel was occupied by soldiers of the Felix Díaz forces, and that the rooms of Messrs. Baker, Webb and Woodfin were looted by them, the next question which arises is whether the Mexican Government can, under Article 3 of the Convention, be held responsible for these acts, in other words, whether the Felicistas fall within any of the subdivisions of Article 3, and if so, within which of them.

It is again a majority of the Commission who answer this question in the affirmative and hold that subdivision 5 of article 3 applies to the case under consideration.

The Commissioners, whose views are here exposed, do not admit such a close co-operation and community of aim between General Felix Díaz and General Victoriano Huerta as to identify them both together as one revolutionary force, which, after the overthrow of President Madero, set up a Government *de facto*. In their opinion, the Felicista forces must be considered as separate forces and merely as troops having risen in arms against the then Government *de jure*, i.e., as rebels.

For their acts the Republic of the United Mexican States owes compensation, in case, to quote the last part of subdivision 5: "It be established that the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question or to punish those

responsible for the same; or that it be established in like manner that the authorities were blamable in any other way."

In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realizes that the evidence of negative facts can hardly ever be given in an absolutely convincing manner. But a strong *prima facie* evidence can be assumed to exist in these cases in which *first* the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and *second* the Mexican Agent does not show any evidence as to action taken by the authorities.

In the claims here dealt with both conditions seem to be fulfilled. The occupying and the looting of the building must have been known to the authorities obliged to watch over and to protect life and property; and, furthermore, the British Agent showed notes of sufficient authenticity, written in the British Legation in margin of the affidavits of the claimants, which notes satisfy the majority of the Commission that the events have been duly and without delay intimated to the public authorities.

On the other hand there is no evidence at all that the soldiers, who looted the Hostel, have been prosecuted.

7. It remains to be examined if any proof has been shown of the amount of the loss for which compensation is claimed, and which decision is to be taken in case such proof is lacking.

The Commissioners join in the view that the corroboration of the three affidavits, adopted in section 5 of this judgment, does not go further than the mere facts of the occupying of the building and the looting of the rooms, and that neither in the other documents, on which the majority relies, is to be found anything which can throw light on the figures of the loss. But the majority cannot concede that this constitutes a reason why no award at all should be granted.

The majority of the Commissioners are convinced that losses have been suffered and that, according to the Convention, they are to be compensated by the United Mexican States, and the mere fact that their amount has not been established cannot deprive the claimants of their right. Another view might be taken if the claimants could be blamed for having omitted to take such steps as could lead to showing what the damages were. But there can be no reasonable doubt that such steps were not within their power. After the soldiers invested the Hostel, the residents had no choice but to evacuate their rooms at once. There was no one inside or outside the building who could be expected to know which objects had to be left in the rooms. A comparison between the inventory before and after the occupation was therefore impossible. It would be in conformity neither with justice nor equity if for this reason all compensation was disallowed.

But it seems equally wrong to accept, in the absence of convincing evidence, the figures calculated by each of the claimants. The Commission cannot believe that it would act in accordance with the principles laid down in Article 2 of the Convention if it decided that the Mexican Government must pay the uncorroborated and perhaps exaggerated amounts which appear in the affidavit of the interested parties.

To this dilemma the Commission sees only one solution, i.e., to lay down its own rule for the adjudging of the award. This rule must be established independently of the individual claims. It cannot grant to the one more than to the other because it rejects the figures which each of the claimants puts forward.

It must constitute the nearest approach to justice and equity which the case admits.

This rule, adopted by the majority of the Commissioners, is that the Mexican Government, in the absence of clear evidence, cannot be obliged to pay more to each claimant than the amount representing the value of such objects as may be safely supposed to constitute the average portable property of young, unmarried men of the social class for which the Hostels of the Y.M.C.A. are particularly destined. Arbitrary as this amount may seem, it is more in conformity with the spirit of the Convention than either the denial of all award whatever or the granting of sums for which no reliable evidence exists.

8. The Commission decides that the Government of the United Mexican States shall pay to the British Government, on behalf of Messrs. W. R. Baker, A. W. Webb and H. J. Woodfin, each the sum of 275.00 (two hundred and seventy-five) pesos Mexican gold.

The Commission decides that the claim of Mr. G. J. W. Poxon is disallowed.

## B

### *The Claim of Mr. Daniel John Tynan*

9. The Memorial states that in February 1913 Mr. Tynan was residing at 5a. Balderas No. 74. On the 17th and 18th of that month, as a result of a bombardment between Felicistas and Federal troops, a fire was started in the house and Mr. Tynan's personal property was destroyed.

On behalf of Mr. Tynan the sum of 2,743.00 pesos, Mexican currency, is claimed.

10. Contrary to article 10 of the Rules of Procedure, the Memorial is not signed by the claimant nor is there a signed statement of the claim by the claimant included in the Memorial. The only document on which the British Agent relies is a "*statement of losses suffered by D. J. Tynan,*" at the foot of which appear several signatures. This statement has not been sworn, nor has any information been given as to the identity of the signatories or as to how they came to the knowledge which they profess.

The Commission cannot regard this paper as sufficient evidence of the facts alleged in the Memorial.

11. The Commission decides that the claim is disallowed.

## C

### *The Claim of Mr. James Kelly*

12. In the Memorial the following facts are alleged:

In February 1913 Mr. James Kelly was engaged in a milk business at No. 45, Calzada de Cuitlahuac, in the City of Mexico. He had approximately 150 Holstein cows on the premises. On the 12th of that month, during a battle which took place in Mexico City, a shell burst in the archway of the cowshed, killing twelve cows. As the cows were in a perfect state of health before they were killed, Mr. Kelly, with the permission of the police authorities of the Second Commissariat of Mexico City, sold the flesh to Señor Ruben Carrillo, who was at that time engaged in the cattle trade. The value of the cows alive was 275.00 pesos Mexican each, but Mr. Kelly was only able to secure the price of 50.00 pesos each for the flesh.

The amount of the claim is for 2,800.00 pesos, being the difference between the value of the twelve cows and the proceeds of the sale of the meat.

Mr. Kelly's estimate of his loss is confirmed by Señor Ruben Carrillo in an affidavit of the 8th May, 1928.

13. The Mexican Agent did not accept the affidavit of Señor Carrillo, who, being a Mexican subject, ought not to have made his deposition before the British Consul, but before the authorities of his own country. Moreover, the witness has not been cross-questioned and he does not explain how he came to know the facts.

Apart from that, the Mexican Agent held that the bombardment to which the Memorial refers was part of the defence of the lawful Mexican Government against forces who had risen against them. The Government acted according to their most essential duty, in order to uphold the constitutional régime. The bombardment, therefore, was an act of lawful warfare and not a revolutionary act. The Agent made a distinction between *damnum cum injuria* and *damnum sine injuria*. In this case, according to his view, the Commission had to deal with damage resulting from legitimate self-defence, i.e., from acts which did not constitute any injustice. The Convention did not make Mexico responsible for damage of this nature.

14. The British Agent has replied that Señor Carrillo's affidavit is a strong corroboration of the statement of Mr. Kelly, and that it is only natural that as the claims are prepared by British authorities, the affidavit is sworn before a British Consul.

He could not agree that the events of the "tragic ten days" were to be classified as lawful warfare. At that stage there was a revolt of insurgents against President Francisco Madero and no civil war. But even if the action which the Government took were identical with warfare, there was nothing in the Convention that justified his colleague's view that hereby the obligation of the Government to give compensation was eliminated. The second article of the Convention says that "it is sufficient that it be established that the alleged damage actually took place, and was due to any of the causes enumerated in Article 3 for Mexico to feel moved *ex gratia* to afford such compensation."

Those words did clearly show that even in cases where according to international law responsibility could not be admitted, still compensation would be given to the injured parties, when it could be established that they suffered losses or damages as a result of revolutionary acts.

15. The first question with which the Commission is faced is whether the facts, upon which the claim is based, are sufficiently proved by the affidavits of Mr. Kelly and of Señor Ruben Carrillo.

As regards the affidavit of the former, the majority of the Commissioners refers to section 5 of this judgment and can only repeat that this document could only be accepted as evidence if it were corroborated by reliable outside statements of one or more other persons not interested in the claim.

As such nothing has been presented but the affidavit of Señor Carrillo, who is said to have bought the flesh of the killed cows. The majority of the Commission cannot regard this document as possessing such a force as to support in a convincing manner the claimant's deposition. The affidavit of Señor Carrillo has been drawn up more than fifteen years after the events; the declarations have been made without interrogation by the other party, and he does not say how the many minute details, about which the affiant gives evidence, came to his knowledge.

This document seems the less acceptable as sufficient evidence, because an effort ought and could have been made to obtain proof of a better quality.

Mr. Kelly relates in his affidavit that, on the very day of the event, he reported to the Police Office of the Second Ward, from which a police officer and other persons were at once sent, and prepared a written report of the facts, which report was forwarded to the Office of the Public Prosecutor under No. 2250. The producing of this document would probably have assisted the Commission very effectively to establish the truth, but no endeavour has been made to procure it. In these circumstances the majority of the Commissioners object to rely on Señor Carrillo's affidavit as a sufficient support of the deposition of claimant.

16. The Commission decides that the claim is disallowed.

*Dissenting opinion of Sir John Percival, British Commissioner*

1. In regard to these claims so many different points have been raised that, although I am in agreement with both my colleagues on certain points, and with the President of the Commission on certain others, it is impossible to explain the points of agreement and disagreement except in a complete separate opinion.

2. In the first place, I am unable to assent to the general proposition laid down in paragraph 5 of the President's opinion, and concurred in by my Mexican colleague, with regard to the unsupported evidence of the claimants. As the question has not only been raised in this case, but will inevitably arise not infrequently in the circumstances in which claims have had their origin and have been presented to this Commission, I deem it essential to set out what appear to me to be the rules which should guide the Commission in dealing with such evidence.

3. The view propounded by the Mexican Agent is that the statements made by the claimant are merely claims, and not evidence of fact at all, and he relied on the maxim recognized in the domestic law of many countries that no one is witness in his own action. On the other hand, the British Agent contended that such statements establish a *prima facie* case and should be accepted by the Commission unless some evidence in rebuttal is produced.

I do not find myself able to accept entirely either of these theses. On the one hand, the maxim mentioned above is not universally accepted; in England, the United States of America and elsewhere a plaintiff or a defendant is allowed, and indeed, in the case of the plaintiff, is expected to give evidence exactly like any other witness. On the other hand, it is clearly most dangerous to rely on the uncorroborated statements of a single person, even though they are not rebutted, and this danger is, of course, greater when such person is the claimant himself.

Under the rules governing the procedure of the Commission we are not bound by the laws of evidence prevailing in Mexico or in England or in any other country. But it is our duty to apply general principles of justice and equity and to give to any oral evidence or document produced before us such evidential value as we consider in all the circumstances of the case it ought to carry.

Thus, in the case of a contract, there is a principle which is almost universally admitted and with which I am in entire agreement, that, in general, both the existence and the terms of the contract must be established by a written document signed by the parties, for in making a contract it should always be possible to reduce it to writing, and this, moreover, is the common practice of civilized mankind.

But in the case of a tort or a criminal matter it is obviously almost always impossible to have any document attesting the facts, and the victim of the

wrong himself is clearly the best-informed and often the only person who has a direct knowledge of what occurred, together with all its details. In these cases, therefore, in my opinion, the Commission should not reject, as unproved, an allegation of the plaintiff merely because its truth depends on his statement alone, even although it considers that it might have been possible for him to have obtained some sort of corroboration. In arriving at its decision, it should take into consideration all the circumstances of the affair, the inherent probability or otherwise of the alleged facts and the likelihood of, and opportunity for, fraud or exaggeration.

If, after giving due weight to all these considerations, it feels a reasonable doubt as to the truth of any alleged fact, that fact cannot be said to be proved. But if the Commissioners, acting as reasonable men of the world and bearing in mind the facts of human nature, do feel convinced that a particular event occurred or state of affairs existed, they should accept such things as established, regardless of the method of proof presented.

In this matter I am in agreement with the principles laid down by the General Commission of the United States and Mexico in the unanimous decision in the Parker case, *Report*, Vol. 1, pages 37, 39 and 40, and more particularly set out in the opinion of Mr. Commissioner Nielsen when concurring in the decision of the Dillon case, *Report*, Vol. 2, page 65, as follows:

“An arbitral tribunal cannot, in my opinion, refuse to consider sworn statements of a claimant, even when contentions are supported solely by his own testimony. It must give such testimony its proper value for or against such contentions. Unimpeached testimony of a person who may be the best-informed person regarding transactions and occurrences under consideration cannot properly be disregarded because such a person is interested in a case. No principle of domestic or international law would sanction such an arbitrary disregard of evidence. It seems to me that, whatever may be said with regard to the desirability or necessity of having testimony to corroborate the testimony of a claimant, a statement need not be regarded in the legal sense as unsupported even though it is unaccompanied by other statements.”

## A

### *Claims of Messrs. Baker, Webb and Woodfin*

4. Apart from these general considerations, I concur with the President for the reasons set out in paragraph 5 of his opinion, that there is ample corroboration to satisfy the Commission that the rooms of Messrs. Baker, Webb and Woodfin were looted by Felicistas.

### *Claim of Mr. Poxon*

5. The case of Mr. Poxon is rather different. The Commission was informed that he also presented a claim in 1913 and made an affidavit at that time. But these documents were not put in, and it was admitted by the British Agent that they differed in certain particulars from those in the present claim. These facts cannot but cast some doubt on Mr. Poxon's statements; and for this reason, as well as for those set out in paragraph 5 of the President's opinion, I concur—though with some hesitation—in the view held by both my colleagues, that this claim is not sufficiently established.

6. The next point to be examined is under which, if any, provision of the Convention are the Felicista forces to be regarded as falling in order to render the Mexican Government liable for robberies committed by them. I am inclined

to think that they should be included in Article 3, subsection 2, as General Díaz undoubtedly revolted against the established Government of President Madero, and the result of his action was the fall of the Government and the death of Madero; though it is true that this result was not due solely or even chiefly to his efforts, but to the fact that General Huerta, commanding the Maderista forces, turned traitor, caused the death of Madero and eventually set up a *de facto* Government of which he was virtually the head. Now this probably was not at all what Felix Díaz intended. But he accepted the situation, as is shown by the fact that he did not continue hostilities and that General Huerta took no steps to punish him or his adherents. In these circumstances, although it cannot be said that his forces, after the triumph of their cause, established a *de jure* or *de facto* Government, it seems to me that, in interpreting the Convention, the Felicistas should be included in Article 3, subsection 2; in which case there would be no question as to the responsibility of the Mexican Government.

7. But if I am mistaken in this view and my Mexican colleague considers that its adoption would constitute an historical error, there is no doubt that the Felicistas must be included in Article 3, subsection 5; and I agree with the President, for the reasons set out in paragraph 6 of his opinion, that the robberies were brought to the attention of the authorities acting under the Government set up by General Huerta; that no steps were taken to discover or punish the authors; and that, therefore, the Mexican Government is responsible for the losses.

8. It only remains to consider what sum should be allotted to Messrs. Baker, Woodfin and Webb, and here I regret to find myself in disagreement with my colleagues as to the basis upon which these damages should be assessed. It is true that, as stated by the President in his opinion in paragraph 7, the Commission is not bound to accept the figures calculated by the claimants. Values are matters of opinion and can, moreover, be checked by other evidence or even by the personal experience of the Commissioners. But the identity of the article said to have been lost is a matter within the personal knowledge of the claimant and probably of the claimant alone. The President, in his opinion in paragraph 7, rightly points out that in this case it was impossible for the claimants to obtain corroboration with regard to the objects lost. It seems to me, therefore, that the principles I have laid down above in paragraph 3 should here be applied.

Adopting them as my basis, I am of opinion that it has been sufficiently established that these three gentlemen lost the articles specified in their respective lists. These lists were made out by the claimants immediately after they discovered their loss. There is nothing in the case or in their affidavits casting doubt on their *bona fides* or accuracy and, in the case of Mr. Woodfin, he withdrew an item from his list as soon as he recovered it.

I agree that in scrutinizing the accounts of the claimants we should take into consideration the probable value of the portable property of a young unmarried man of the class likely to reside at a Y.M.C.A. hostel. But all such young men do not have identical wardrobes, and I confess that the method adopted by my colleagues of awarding to each claimant the amount asked for by the one who appears to have suffered the least loss strikes me as more arbitrary than the one I should propose to follow, namely, to examine each list, to ignore any items which seem obviously unreasonable or exaggerated, and to value the remainder as far as may be possible at the prices at the time of the loss; bearing in mind that the actual and not the replacement value of the articles should alone be awarded.

Following this method I agree with my colleagues in awarding \$275.00 Mexican gold to Mr. Webb. To Mr. Woodfin, whose objects and values appear to be very reasonable, I should award \$600.00, and to Mr. Baker, some of whose items seem exaggerated and whose values are also rather high, the same sum of \$600.00.

*Claim of Mr. Daniel J. Tynan*

9. I agree that this claim should be disallowed for the reasons set out in the President's opinion.

*Claim of Mr. James Kelly*

10. In this case I find myself obliged to dissent from the opinion of the majority of the Commission, for it appears to me that the facts upon which this claim is based are quite adequately established.

The difference of opinion is, no doubt, primarily based on the conflicting views as to the value in general of a claimant's own affidavit which are set out in paragraph 3 above and in paragraph 5 of the President's opinion. But in this particular case there is much more than the bare allegation of the claimant. In the first place, he at once reported the facts to the Police Office of the Second Ward of the City of Mexico, and it was with the express consent of the said Police Office that he sold the flesh of the cows. The documents relating to these proceedings have not been produced, but it has not been denied that they took place. In the second place, the chief points of Mr. Kelly's affidavit are directly confirmed by the affidavit of an independent witness, Mr. Ruben Carrillo.

11. The majority of the Commission reject Mr. Carrillo's affidavit on three grounds:

- (a) That it was made fifteen years after the events;
  - (b) That the declaration was made without interrogation by the other party;
- and
- (c) That he does not explain how certain statements that he makes came to his knowledge.

As to (a), this objection is inherent in the work of the Commission. When the claims were originally made, it was not known how they would be dealt with. If any tribunal competent to deal with them had been set up at the time, no doubt witnesses would have been forthcoming with memory of the events sufficiently fresh in their minds. But the Convention under which the Commission is working was not signed until November 1926, and it was not till then that the British Government realized that evidence in corroboration of the claimants' original claims should be obtained. It is clear, therefore that the evidence, whether oral or in the form of an affidavit, which will now be presented to the Commission, must depend on the witnesses' recollection of events long past, and, consequently, it seems to me that the Commission should not attach too much importance to the discrepancies in detail which must inevitably exist.

With regard to (b), the Commission, in its unanimous decision on the demurrer in the Cameron case, admitted affidavit evidence, and must, therefore, have held that this defect, which is inherent in such evidence, cannot be considered as destructive of the evidential value of an affidavit, at any rate in the case of a person other than the claimant.

As regards (c), it is a fact that Mr. Carrillo includes in paragraphs 1 to 5 of his affidavit statements, as if they were within his personal knowledge, of which he can only have been aware by hearsay. But this is a very natural error in the case of an ignorant person. If the affidavit had been drawn up for him by a

lawyer he would have distinguished between the facts of which he had been informed and believed to be true and those which he stated to be the case of his own personal knowledge.

In any case, the facts related in paragraphs 6 and 7 of this affidavit were undoubtedly within the knowledge of Mr. Carrillo, and the events were of so exceptional a character that he might well recollect them after fifteen years' interval.

12. The majority of the Commission also comment on the fact that no effort was made to produce the police report referred to in Mr. Kelly's affidavit. It would certainly have been better if the British Agent had given notice to the Mexican Agent to produce this document, or to allow him to inspect it, under rules 24 and 25 of the Rules of Procedure. But in my opinion the Commission should not allow this omission to prejudice Mr. Kelly when they are examining the truth of his claim. We are unaware whether this document is or is not now in existence. If it is not, the evidence which the majority of the Commission consider to be the best is not available, and the claimant is entitled to rely on the next best. If, on the other hand, the document still exists, it is in the possession of the Mexican Government, and I would refer to the unanimous opinion of the General Claims Commission of the United States and Mexico in the Parker case, *Report*, Vol. 1, pages 39 and 40, as follows:

"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. 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 honour 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 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."

I would not go so far as to say that it was the duty of the Mexican Government to produce this document when they had never been asked to do so by the other side, but I consider from the fact that they have not done so of their own initiative the Commission is entitled to draw the inference that it does not contradict, to any material extent, the allegations contained in Mr. Kelly's affidavit.

13. For the above reasons I am of opinion that the facts upon which this claim is based are sufficiently established. But the defence upon which the Mexican Agent chiefly relied was the argument relating to acts of lawful warfare referred to in paragraph 13 of the President's opinion. As the majority of the Commission rejected the claim on the facts, this point did not come up for discussion in our deliberations. I think, therefore, that all I should say is that I agree with the contention of the British Agent set out in paragraph 14 of the President's opinion, and consider that under the Convention the Mexican Government is responsible for this loss; and furthermore, that the damages claimed are not excessive.

*Dissenting opinion of the Mexican Commissioner in regard to the decision taken by a majority composed of the other two Commissioners, but only as regards question nine, propounded by the learned presiding Commissioner, which reads literally as follows: "IX. If they were to be considered as falling under subdivision (5) of Article III, i.e., as rebels, has it been established that the competent authorities were blamable in any way?"*

The Mexican Commissioner answers the question thus transcribed, in the negative, for the following reasons:

I. Article III, subdivision 5 of the Convention, Mexico and Great Britain, reads as follows:

" . . . The losses or damages mentioned in this article must have been caused during the period included between the 20th November and the 31st May, 1920, inclusive, by any one or any of the following forces: . . . 5. By mutinies or risings or by insurrectionary forces other than those referred to under subdivisions 2, 3 and 4 of this article, or by brigands, provided that in each case it be established that the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question, or to punish those responsible for the same; or that it be established in like manner that the authorities were blamable in any other way."

The three Commissioners being agreed upon the fact that the forces of Felix Diaz, which entrenched themselves in the Young Men's Christian Association building during the so-called tragic ten days, from the 9th to the 19th February, 1913, must be considered as rebel or insurrectionary forces, and as coming under subdivision 5 of Article III of the Convention, the text of which is above transcribed, it logically follows without the slightest effort, and from the terms themselves of said subdivision 5, that Mexico may only be declared liable for the losses sustained by Messrs. Baker, Webb and Woodfin, provided that it be proved that the competent authorities omitted to take reasonable measures to suppress the insurrection, or to punish the parties responsible therefore; or that it be shown, furthermore, that the authorities were to blame in some other manner.

Now, what should that proof consist of in this instance? The three Commissioners have with some difficulty, by a strong effort of goodwill, and by combining the depositions of the three claimants, reached the conclusion that the fact that the rooms respectively occupied by them in the Young Men's Christian Association were looted, can be considered as proved, although there is not a single declaration by any person other than the interested parties themselves, nor any other element of proof establishing the existence of that fact.

The fact of the looting of the rooms occupied by the claimants once established, *the obligation on the part of the British Government to demonstrate the fact of negligence on the part of the Mexican authorities in suppressing the insurrection or in punishing the guilty parties still stands.*

What proofs have the British Government submitted to establish the fact of such negligence? None whatever.

Did the claimants by any chance report the perpetration of the offence of theft, complained of by them, to the Mexican authorities? They did not do so, as admitted by the learned British Agent, when questioned upon this particular point by the Mexican Commissioner.

Have the British Government by any chance shown that the perpetration of the offence complained of by them came to the knowledge of the Mexican authorities in any other way? There is no evidence at all upon this point.

How can the Government of Mexico be accused of negligence in punishing the parties guilty of a theft, when the fact that the offence was committed has not been brought to their knowledge?

The Mexican authorities did have knowledge of the Díaz insurrection, and President Madero, and the Vice-President of the Republic in person combated that uprising, until they fell at the hands of the disloyal Huerta. What greater efficiency in suppressing that insurrection can be expected, than actually to lose life in defence of the institutions of Government?

Immediately after Huerta's defection, the Governor of the State of Coahuila, Venustiano Carranza, complying with the duty laid upon him by the Constitution, assumed the character of legal authority, by organizing a formidable army, effectively assisted by a public opinion, and he not only punished the insurrection, but Felix Díaz, the rebel, personally, having forced him to leave the country, and Huerta himself, by wresting from him the power he had usurped, and likewise forcing him to seek refuge in a foreign land. The remainder of the rebels either perished, or followed the fortunes of their leaders.

What more eloquent instance of the zeal and patriotism displayed by the Mexican authorities in suppressing the insurrection can be desired?

It is, however, asserted that Huerta should have punished the Díaz insurrection, and the parties guilty of the losses complained of by the claimants. (The Mexican Commissioner does not accept Huerta's authority as legitimate.)

That opinion is open to the objection that it involves a mistake in the construction of subdivision 5 of Article III of the Convention. The treaty does not provide that such and such authorities shall perform the duty imposed by the second part of said subdivision 5. It only mentions authorities in general, and this condition has been complied with. The authority of Carranza put an end to the insurrection and punished the parties responsible therefor. Mexico cannot then be liable for negligence in the performance of those duties.

It is necessary to draw a distinction between the insurrection of Felix Díaz and the looting of the Young Men's Christian Association, whether by the Felicista forces, or by the mob, as it certainly has not been shown just who was guilty of the said looting; but the fact of the looting cannot directly be inferred from that of the insurrection. The authorities punished the insurrection and not the looting, because the claimants did not report the latter fact, nor did it come to the knowledge of the Mexican authorities through any other channel.

Furthermore, this Commission has already, in various decisions, laid down the principle that the unsupported statement of the claimants cannot constitute proof of a claim. This has been expressly established by the learned President of this Court, and the Mexican Commissioner is in entire accord with his opinion. In this case, it has been said, and it is an absolutely true fact, that there is no evidence of negligence on the part of the Mexican Government, other than the claimants' own statement. The Commission will, if a decision is now rendered contrary to that principle, appear as acting inconsistently with their own ideas.

II. International Claims Commissions have always been very careful when it is a matter of declaring that a Government has been negligent in the performance of its international obligations, and have never done so without requiring proof conclusive of that fact. The charge is too serious a one to be founded on mere assumptions.

The General Claims Commission, Mexico and United States, dealt with the case of Charles E. Tolerton *v.* Mexico, in which the claimant sought to recover the sum of \$50,000.00, United States currency, on the ground that he had, when attacked, on the afternoon of the 19th January, 1905, by a group of Yaqui Indians, sustained damage to that amount, by reason of the failure to protect said claimant, and the lack of prosecution and punishment of his assailants.

The three Commissioners, i.e., the United States Commissioner, the Mexican Commissioner, and the Presiding Commissioner, Dr. Van Vollenhoven, unanimously decided that the said claim should be dismissed, because they did not hold that the charge of negligence brought against the Government of Mexico had been sufficiently proven by means of the unsupported statement of Tolerton, the claimant. (*Opinions of the Commissioners under the Convention concluded the 8th September, 1923, between the United States and Mexico*, page 402, Vol. I.)

The American Government, on behalf of G. L. Solis, before the General Claims Commission, Mexico and the United States, claimed from the Government of Mexico the sum of \$ 530.00, United States currency, for the theft of some cattle by revolutionary forces belonging to Huerta, having imputed to the Mexican Government lack of diligence in the pursuit and punishment of the parties responsible. The aforesaid Commission, presided over by their learned President, Kristian Sindballe, declared Mexico not liable for the said claim, by a unanimous vote, having founded their opinion on the fact that there was not, beyond the claimant's own deposition, proof sufficient of negligence on the part of the Mexican authorities. This decision is based on the opinions handed down in other International Commissions, also worthy of respect, such as those between Great Britain and the United States, and Great Britain and Venezuela. (*Opinions of the Commissioners under the Convention concluded the 8th September, 1923, between the United States of America and Mexico*, p. 48, Vol. II.)

The selfsame General Claims Commission, Mexico and the United States, reports (Vol. II, p. 56) the claim of Bond Coleman *v.* the Government of Mexico, which was espoused by the American Government, and in which the three Commissioners unanimously dismissed the claim on the ground that proper proof had not been shown of negligence on the part of the Government of Mexico.

As will thus be seen, all International Claims Commissions agree that negligence in punishing crime must be proved by the demandant Government, the alternative, in case of failure to do so, being that the claim must be dismissed.

In virtue of the whole of the foregoing, the Mexican Commissioner now expresses an opinion dissenting from that of his learned colleagues, to the effect that as no negligence on the part of the Mexican Government in punishing the parties responsible for the loss sustained by the claimants has been shown, and still less in suppressing the insurrection which gave rise to the said losses, the said claims should be dismissed.

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## NORMAN TUCKER TRACY (GREAT BRITAIN)

### *v.* UNITED MEXICAN STATES

(*Decision No. 13, February 15, 1930, separate opinion by British Commissioner, undated. Pages 118-124.*)

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AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Unsupported affidavits of claimant *held* not sufficient evidence. An affidavit of claimant supported by an affidavit of another person in a position to know the facts of loss, which was made shortly after loss, *held* sufficient evidence.

RESPONSIBILITY FOR ACTS OF FORCES.—SEIZURE OF PROPERTY. A seizure of a mine by the Constitutionalist Government held not to entrain responsibility under terms of *compromis*.