

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

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

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

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

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 A challenge of the nationality of the claim has been withdrawn during the oral hearing of the case.

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

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

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

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

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

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

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

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

Decision

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

Separate opinion

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

Fred. K. NIELSEN,
Commissioner.
