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

(April 15, 1927, concurring opinions by Presiding Commissioner and Mexican Commissioner, April 16, 1927. Pages 228-241.)

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Nielsen, Commissioner:

1. Claim is made in this case by the United States of America against the United Mexican States on behalf of Gertrude Parker Massey, individually and as guardian of William Patrick and John Kilbane Massey, minor children of herself and William B. Massey, an American citizen, who was killed by a Mexican citizen at Palo Blanco, Vera Cruz, Mexico. The claim is grounded on an assertion of denial of justice growing out of the failure of Mexican authorities to take adequate measures to punish the slayer of Massey.

2. On or about the fourth day of October, 1924, Massey, who was the terminal superintendent of the *Cia Metropolitana de Oleoductos, S. A.*, was killed in a building which is described in the record as a "bodega" (apparently some kind of a store) belonging to the petroleum company, by a Mexican citizen, named Joaquín R. Saenz, who was also employed by the company under the direction of Massey. It appears that the slayer fired six shots into Massey's body any one of which was probably sufficient to cause death. After the killing Saenz fled. He was captured and placed in jail at Tamiahua, Vera Cruz. Subsequently he was confined in prison at Túxpan, Vera Cruz, from which he escaped on December 26, 1924, and he was not apprehended. The record contains copies of correspondence from which it appears that the American Consul at Tampico and the American Ambassador at Mexico City have from time to time urged that steps be taken to apprehend and punish the slayer.

3. It is stated in the Mexican Answer that Massey attempted to commit the crime of rape on the wife of Saenz, and that this offense on the part of Massey prompted Saenz to take the life of Massey. The record contains a mass of grave accusations against the character of the deceased. I am not convinced of the truth of these charges against Massey which I consider are not supported by reliable evidence. Whatever may be the facts in relation to this point, I consider them to be entirely irrelevant with respect to the pertinent legal issues in the case. In connection with the charge of immoral and illegal conduct made against Massey, the contention is made in the Mexican brief that "International law, justice, and equity preclude a claim from being set up, on the general maxim *ex dolo malo non oritur actio*, when the alien from whose death the claim arises by his own immoral, negligent, or unlawful conduct caused or contributed to cause his own death." I am not entirely clear with regard to the argument that was made that in a case of this kind law, justice, and equity "preclude" a claim from being set up. Under Article I of the Convention of September 8, 1923, the United States has the right to present this claim to the Commission. The United States invoked the rule of international law which requires a government to take proper measures to apprehend and punish nationals who have committed wrongs against aliens. The legal issue presented to the Commission is whether or not the obligations of that rule were properly discharged with respect to the apprehension and punishment of the person who killed Massey. Neither the character nor the conduct of Massey can affect the rights of the United States to invoke that rule nor can they have any bearing on the obligations of Mexico to meet the requirements of the rule or on the question whether proper steps were taken to that end. In other words, the character and conduct of Massey have no relevancy to the merits of the instant claim under international law.

4. In the Mexican brief the contention is advanced that a State is not responsible for a denial of justice, when a private individual who is under

indictment or prosecution for the killing of an alien is allowed to escape by a minor municipal officer in violation of law and of his own duty; if the State immediately disapproves of the act by arresting and punishing the officer, and reasonable measures are taken for the apprehension of the fugitive. It is asserted that an assistant jail-keeper unlawfully permitted Saenz to walk out of jail; that this minor official was arrested and strong action was taken against him; and that therefore no responsibility attaches to the Mexican Government for his misconduct.

5. No such defense with regard to the non-responsibility for the acts of the jail-keeper, and no facts regarding his conduct or steps taken to punish him for his wrongdoing are stated in the Mexican Answer. It is therefore very questionable whether the defense could properly be advanced as it was in the Mexican brief and in oral argument in which contentions were forcefully pressed by counsel for Mexico with respect to the non-responsibility of Mexico for the acts of a minor official of this kind, and whether it is proper for the Commission to consider it. However that may be, I am of the opinion that the argument made with respect to this question of responsibility for the jail-keeper is not well taken.

6. An examination of the opinions of international tribunals dealing with the question of a nation's responsibility for minor officials reveals conflicting views and considerable uncertainty with regard to rules and principles to which application has been given in cases in which the question has arisen. To attempt by some broad classification to make a distinction between some "minor" or "petty" officials and other kinds of officials must obviously at times involve practical difficulties. Irrespective of the propriety of attempting to make any such distinction at all, it would seem that in reaching conclusions in any given case with respect to responsibility for acts of public servants, the most important considerations of which account must be taken are the character of the acts alleged to have resulted in injury to persons or to property, or the nature of functions performed whenever a question is raised as to their proper discharge. As the Commission has heretofore pointed out, it appears to be a proper construction of provisions in Article I of the Convention of September 8, 1923, that uncertainty with respect to a point of responsibility was largely eliminated by the two Governments when they stipulated that the Commission should pass upon "all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice."

7. The question which has been raised in the instant case, and not infrequently in cases coming before international tribunals, is not one that can be properly determined in the light of generalities such as are frequently found in the opinions of tribunals. That this is true may be shown by a brief reference to citations of cases appearing in the Mexican brief.

8. With respect to the broad statement in an opinion rendered by Attorney General Cushing to Secretary of State Marcy under date of May 27, 1855 (7 Ops. Atty. Gen'l 229), it is pertinent to note the precise character of the Peruvian Government's claim with respect to which Mr. Cushing advised Mr. Marcy. A Peruvian vessel was stranded as a result of the unskillfulness or carelessness of a pilot in the Bay of San Francisco. While this pilot was under a measure of supervision of state authorities and was licensed by them, he was employed by the master of the Peruvian vessel, who was at liberty to pilot his own vessel or to employ an unlicensed pilot. Mr. Cushing was of the opinion that neither the state of California nor the

United States was the "guarantor, security, or assurer" of the professional acts of the pilot. It may be still more pertinent to note that the claim evidently directly grew out of a complaint against a marshal for alleged improper conduct in not recovering a judgment which had been obtained against an associated body of pilots to which the incompetent pilot belonged, and that Mr. Cushing stated that the Peruvian claimants had an adequate legal remedy in the courts. The importance which Mr. Cushing attached to the failure to exhaust local remedies (a subject with which we are not concerned in this arbitration in view of the stipulations of Article V of the Convention of September 8, 1923) is clear.

9. In the Bensley case, Moore, *International Arbitrations*, Vol. 3, p. 3016. the Commissioners stated that there was no allegation that the acts complained of were perpetrated by any person or officer "in the employment or under the control of the Mexican Government, or for whose proceedings that government was or ought to be responsible," and that "the injury sustained by the memorialist, as set forth by him, was inflicted by a municipal officer (a village alcalde) of the village of Dolores, against whom redress might have been had before the judicial tribunals of the country."

10. In the Blumhardt case, *ibid.*, p. 3146, the failure of the claimant to resort to local legal remedies against a Mexican inferior judge is clearly emphasized. The Mexican Government could not be held responsible. said Umpire Thornton, for losses when the complainant had "taken no steps by judicial means to have punishment inflicted upon the offender and to obtain damages from him," and when it was "against him that proceedings should have been taken."

11. Sir Edward Thornton, Umpire in the arbitration under the Convention of July 4, 1868, between the United States and Mexico, often rejected claims because of the failure of claimants to exhaust legal remedies. See *ibid.*, pp. 3126-3160.

12. In the Slocum case, *ibid.*, p. 3140, Umpire Thornton stated that the Mexican Government could not be held responsible for the action of a Mexican prefect in ordering the imprisonment of the claimant, who had refused to pay taxes. The Umpire declared that the claimant was not justified in refusing to pay the taxes; that payment should have been made: and that an appeal could have been made to the proper authorities for a refund of improperly levied taxes.

13. In the Leichardt case, *ibid.*, p. 3133, damages were claimed because the claimant had been arrested and mistreated at the direction of a secretary to a governor of a Mexican state. No proceedings were instituted by the claimant against this minor employee who was guilty of such peculiar action in bringing about the mistreatment of the claimant. In dismissing the case. Umpire Thornton said:

> "* * * it must be understood by foreigners in every country that wherever there is a fair prospect of obtaining justice by due course of law for wrongs and injuries inflicted by private persons or by 'paltry petty officers, drest in a little brief authority', like the governor's secretary, for instance, they must resort to the courts of the country, and in such cases only appeal to their own sovereign when the courts of the country refuse to do their duty, or misconceive it, or pervert justice *in re minime dubia*."

14. The Kellet case, *ibid.*, Vol. 2, p. 1862, grew out of difficulties which an American vice consul general had in Siam with Siamese soldiers. A disposition of the affair which resulted in a disciplining of the soldiers, was effected by the American Minister to Siam and an assistant legal adviser

to the Siamese Government. From the available record it does not appear that any claim for pecuniary indemnity was made by the United States in this case.

15. It is stated in the Mexican brief that in the Maal case, Ralston's *Report*, p. 914, the decision holding Venezuela responsible, was based on the fact that certain officers against whose acts complaint was made were never reprimanded or punished, and quotation is made of a statement to the effect that there had been no reprimand, punishment, or dismissal of these officers. It is pertinent to note, however, that the first reason for responsibility given by Umpire Plumley is stated in a sentence immediately preceding the statement quoted. The sentence reads as follows:

"The umpire acquits the high authorities of the Government from any other purpose or thought than the mere exclusion of one regarded dangerous to the welfare of the Government, but the acts of their subordinates in the line of their authority, however odious their acts may be, the Government must stand sponsor for."

16. The report in Moore's *Arbitrations* of the case of Pierce is very meagre. It is merely to the effect that the claimant was arbitrarily arrested by an officer of local police in Mexico; that the authorities proceeded against this official, fined, reprimanded and dismissed him from office; and that the claimant was not "under the circumstances, entitled to an award." In the light of the particular facts in this case it seems reasonable to suppose that little if any fault could be found with this decision.

17. In considering the question of a nation's responsibility for acts of persons in its service, whether they be acts of commission or of omission, I think it is pertinent to bear in mind a distinction between wrongful conduct resulting in a direct injury to an alien—to his person or his property—and conduct resulting in the failure of a government to live up to its obligations under international law. The cases which have been cited are concerned with the former; the instant case with the latter.

18. I believe that it is undoubtedly a sound general principle that, whenever misconduct on the part of any such persons, whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.

19. In an instruction addressed by Secretary of State Hay to the American Minister to Honduras under date of February 25, 1904, directing the presentation of a claim against the Honduran Government on account of the injuries inflicted on Charles W. Renton, an American citizen, and his family, is a passage that seems to be very apposite to the instant case. In that instruction Secretary Hay said:

"The liability of the Government of Honduras is believed to be fully established, however, on grounds apart from the fact that a minor official of that Government was directly concerned in the crime. While a State is not ordinarily responsible for injuries done by private individuals to other private individuals in its territory, it is the duty of the State to diligently prosecute and properly punish such offenders, and for its refusal to do so it may be held answerable in pecuniary damages. There was an inexcusable delay in initiating a judicial investigation. The first proceedings were partial and onesided. The subsequent judicial proceedings, which were the direct result of the naval investigation by the U. S. S. *Montgomery*, terminated in condemning for minor offenses persons who, the evidence before the Department shows, were guilty of a deliberate and brutal murder. And, finally, soon after the decision of the supreme court all of the murderers, with single exception of Dawe, were permitted to escape." (*Foreign Relations of the United States*, 1904, p. 363.)

20. The statement of facts in the above-quoted passage reveals clearly a failure on the part of Honduran authorities to employ adequate measures to punish wrongdoers. Compensation was made by Honduras in satisfaction of the claim.

21. Citation is made in the Mexican brief to the Neer case, Docket No. 136,[1] decided by the Commission. In that case it was contended in behalf of the United States that proper steps had not been taken to apprehend persons who had killed an American citizen. The Commission, while being of the opinion that more effective measures might have been employed, held that the record did not disclose evidence of such a gross degree of negligence as would warrant the Commission in finding that the Mexican Government was chargeable with a denial of justice.

22. Citation is also made in the Mexican brief to the case of Catalina Balderas de Díaz, Docket No. 293, decided by this commission on November 16, 1926.[2] In that case the Commission refused to sustain the charge of a denial of justice made by the Mexican Government against the Government of the United States because of the failure of authorities to apprehend the murderers of a Mexican citizen. The Commission held that not only was there no evidence in the record of "gross negligence on the part of the American authorities," but no evidence whatever of negligence.

23. I am of the opinion that the record in the instant case clearly reveals gross negligence on the part of the Mexican authorities resulting in a denial of justice. This conclusion I ground on an examination of records throwing light on the actions of authorities which the United States has alleged were improper.

24. Saenz having been arrested, certain proceedings were carried on before a Judge at Palo Blanco, a Municipal Court of Tamiahua, and the Court of First Instance at Túxpan. The record before the Commission reveals that during the course of these proceedings statements were made by some persons who had some direct information regarding the killing of Massey. Other persons appeared and related stories that they had heard regarding incidents in the life of Massey entirely unrelated to the slaying of the deceased. For example, a Mexican officer, Lieutenant Gabriel Martínez, testified that he had had an altercation with Massey because Massey had discharged a watchman, and that he (Lieutenant Martínez) had had complaints from several persons, whose names he did not remember, that Massey was attempting to make love to their wives. The Lieutenant also mentioned, as several persons appearing as witnesses did, that it was "rumored" that Massey had had intimate relations with a certain woman whose name frequently appears in the record. The record contains statements of several persons to the effect that Massey was a man of despotic character; that he treated employees under his direction harshly; that he had had disgraceful incidents with several women; that it was rumored that he had illicit relations with a certain Mexican woman; that he was disliked by the majority of the men under him. Turning from these proceedings, we find that they were suspended because of the escape of the accused from jail.

25. There is no proper arrest and there can be no prosecution in the case of a man who is permitted by police authorities to leave prison. It is argued in behalf of the Mexican Government that the Mexican Government is relieved from responsibility for the failure to bring Saenz to justice

[1] See page 60.
[2] See page 106.

because it arrested and punished José Refugio Vargas, the minor official responsible for the escape of Saenz, and took reasonable measures to apprehend the latter after his escape. Whatever bearing, if any, the arrest of the assistant jail-keeper, Vargas, might be considered to have on the question of Mexico's responsibility in this case, it is not a point of any material importance. With respect to this matter it may be observed, in the first place, that the record does not show that Vargas was prosecuted and punished, although there is evidence that he was arrested and spent some time in jail, and in the second place, that the conditions surrounding the imprisonment of Saenz reveal a situation of something more serious than an unexpected breach of trust on the part of a single minor official. Whether or not the keepers of jails may properly be designated as minor officials, they are assuredly entrusted with highly important duties. The point is more important than the amount or character of their official emoluments or the particular definition or designation of their position under the domestic law of their country. We find Vargas testifying during the course of the proceedings instituted against him that Saenz and three other persons charged with homicide, on one occasion requested Vargas for permission to leave the jail and that, after a conference with the Commandant of the Guard, the jail-keeper permitted the prisoner to depart. Vargas explained that he took such action because he had heretofore seen the warden of the jail do the same thing. The following extract from the testimony of Vargas, irrespective of the question of accuracy in detail, undoubtedly throws some light on conditions in the jail:

"It was about 8 o'clock on the night of the 26th of the current month when the warden of the jail left, whose name is Antonio R. Marquez, leaving the care of the jail to the speaker, and from between 10 and 11 of the same night while he was lying down the commandant of the guard, Amador, whose other name he does not know, came to him and stated that at the window which opens on court No. 2 there were parties talking, and he arose and saw that it was Joaquin R. Saenz, who stated to him that they had permission to go out to the street, Joaquin R. Saenz, Teofilo Florencia, Isaac Ovando and Felix Gamundi, the latter returning about one in the morning; that when they asked the speaker for permission to go outside he consulted the commandant of the guard and on agreement with the latter the above mentioned parties left, that the declarant allowed this to be done because prior thereto he had seen the warden do the same thing, and that by verbal order given him by the same warden for allowing to go out the said Joaquin R. Saenz, Teofilo Florencia and Gamundi, and that on the same day the warden had allowed Corporal Francisco Valenzuela to enter in order to converse with Saenz and Gamundi, the corporal inviting them to take beer, which Saenz and Gamundi accepted and took in the presence of the said warden; that upon the termination of the conversation the speaker shut Saenz and Gamundi up in the presence of the warden."

26. The record shows that Saenz, before the time when he took his final departure from jail by permission, had been allowed to leave the jail on at least one other occasion.

27. With regard to the argument made with respect to the bearing on the question of Mexico's responsibility of the steps taken to apprehend Saenz, it may be concluded that there is no evidence in the record showing that any effective action has been taken by the appropriate authorities to apprehend the accused. On this point counsel for Mexico called attention to a letter written by the Mexican Secretary of the Interior to the Governor of the State of Vera Cruz, requesting that all necessary measures be taken to apprehend Saenz and other fugitives. Citation was also made to a

communication written by the Governor of the State of Vera Cruz to the American Consul at Tampico from which it appears that certain prosecuting authorities had requested a Mexican Judge having knowledge of the case to issue the necessary orders and circular asking for the apprehension of Saenz. But there is no specific evidence that police authorities took any steps to apprehend him and no evidence of any difficulties experienced by such authorities to locate this well-known fugitive. In connection with the citation in the Mexican brief of the claim of Catalina Balderas de Díaz, it is pertinent to note that in that case the record contained evidence that there was no clue whatever to the identity of the guilty person; that military authorities and civilian police authorities had made diligent efforts to locate the guilty person; and that many persons had been arrested on suspicion.

28. In the light of the reasons which I have stated, I consider that the contentions of the United States that there was a denial of justice in this case growing out of the failure of Mexican authorities to take proper measures to punish the slayer of Massey have been established. I am of the opinion that an award of $15,000.00 (fifteen thousand dollars) may properly be made on behalf of the claimant.

Van Vollenhoven, Presiding Commissioner:

I concur in paragraphs 1 to 6, inclusive, 18, 23, and 25 to 28, inclusive, of Commissioner Nielsen's opinion.

Fernández MacGregor, Commissioner:

I concur with the opinion rendered by Commissioner Nielsen. However, I believe proper to state that I differ with him in the estimate he makes of some of the cases cited by the Mexican Agency to support its theory of non-responsibility of States for acts of minor officials. It is not necessary to explain here my view-point regarding such cases.

I also wish to state, with respect to a denial of justice due to lack of adequate prosecution and punishment of a person guilty of murder, committed on the person of an unfortunate American citizen—denial of justice which is the international delinquency claimed in this case—that I differ somewhat with Commissioner Nielsen in a certain estimate which he seems to make of its extent. In fact, Mr. Nielsen seems to want it noted that the inadequate and improper action of the Mexican authorities is noticeable from the time that the Judges of Tamiahua and Túxpan initiated the prosecution of the case, and even before the escape of Saenz occurs. This view is principally contained in paragraph 24 of his Opinion, as he makes a salient relation of the testimony rendered by various witnesses against the character or morality of the deceased Massey. The paragraph cited apparently contains a criticism of the procedure followed by the judge upon receiving the testimony of witnesses in the instruction of the cause, and perhaps implies that such procedure may be considered improper, applying thereto the criterion of international law.

In my opinion such criticism would be unfounded. The judicial investigation made for determining the circumstances in which the murder of Massey was committed, was in no way a deviation from Mexican law, and the system of this law is not contrary to any principle of international law. In the *Neer* case (Docket No. 136), the Commission, expressing its idea of denial of justice, said:

"It is not for an international tribunal such as this Commission to decide, whether another course of procedure taken by the local authorities at Guana-

cevi might have been more effective. On the contrary, the grounds of liability limit its inquiry as to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task."

It may seem strange to one who is familiar with the opposite Anglo-Saxon practice, that in a judicial investigation, witnesses be permitted to render all the testimony they wish, without any impediment. There are, however, systems like that of Mexican law, that of French law, that of Italian law, and others of countries of Latin origin, in which the witness has that privilege and the judge the duty to respect it. The accused may present as many defense witnesses as he desires, and their testimony has only the limitation placed on its veracity by the prosecution witnesses presented by the Prosecuting Attorney, the representative of the victim, or by penal law itself when the witness is convicted of perjury. This system serves to let the judge form his conviction regarding the guilt of the accused; its object is to prepare the criminal prosecution, and its liberality is such that in some countries no penalty is imposed on a witness for false statements made during the period of instruction:

"L'information, qui se retrouve dans notre droit criminel, va servir d'élément à la conviction des juridictions d'instruction, mais non à celle des juridictions de jugement. Aussi la jurisprudence a-t-elle décidé, en se fondant sur le caractère *provisoire* de la déposition, qu'une déclaration mensongère, devant le juge d'instruction, ne saurait constituer le crime de faux témoignage." (*Précis de Droit Criminel*, R. Garraud, p. 572.) [1]

Mexican law does punish a witness guilty of perjury (art. 733 of the Penal Code of the Federal District similar to that of Vera Cruz). But, on the other hand, it imposes on the judge the duty to examine witnesses "whose statement may be requested by the interested parties * * *" (art. 152 of the Code of Criminal Procedure of the Federal District, similar to that of Vera Cruz). It also imposes on him the duty to examine all the circumstances of the crime) (art. 151); the duty to ask the witnesses if they have any cause for hatred or animosity towards the accused or the victim (art. 169).

The provisions last cited evidently serve to weigh the testimony of a given person. Hence, as much in the instruction as in the trial properly called, a witness may speak freely and he can be questioned not only by the judge, the Prosecuting Attorney, and the counsel of the defendant, but also by the jurors (articles 295, section V, and 297). Mexican law, like other systems of law already cited, leaves to the honor and conscience of the judge the use of the means which may serve to help in making the truth evident (art. 295, final paragraph).

In view of the above, and taking into account that the Commission has under its consideration only a judicial record which was not completed, I do not believe that the procedure, as followed by the Mexican judge up to the time of the escape of Saenz may be a deviation from his municipal

[1] "The information found in our criminal law serves as an element to conviction as to the jurisdiction of instruction, but not to that as to jurisdiction of judgment. Thus, jurisprudence, basing itself on the *provisional* character of a deposition, has decided that a false statement made before a 'juge d'instruction' could not constitute the crime of perjury. * * *"

law. The system of that law is not contrary to any rule of international law; therefore, in the present case, the facts emphasized in paragraph 23 [1] of Commissioner Nielsen's Opinion could not form the basis of a judgment of improper or strange judicial action, which action, on the other hand, unfortunately, is in my opinion clear, in view of the other facts which left the crime in question unpunished.

Decision

For the reasons stated above the Commission decides that the Government of the United Mexican States must pay to the Government of the United States of America on behalf of Gertrude Parker Massey the sum of $15,000 (fifteen thousand dollars), without interest.
