

GEORGE ADAMS KENNEDY (U.S.A.) *v.* UNITED MEXICAN
STATES.

*(May 6, 1927, concurring opinion by American Commissioner, May 6, 1927.
Pages 289-301.)*

Fernández MacGregor, Commissioner:

1. This claim is presented by the United States of America in behalf of George Adams Kennedy, an American citizen, against the United Mexican States, demanding the amount of \$50,000.00, with proper allowance of interest thereon, on account of damages suffered by the claimant, who received a wound in the right leg at the hands of Manuel Robles, a Mexican, on November 5, 1919, in San Javier, Sonora, Mexico. The claim is based (1) on a denial of justice resulting from the failure of the Mexican authorities to take adequate measures for the apprehension and punishment of the persons who, together with Robles, assaulted him, and resulting from the fact that although said Robles was arrested and judged, the proceedings were irregular, with the consequent result that a punishment was imposed on him out of proportion to his crime; and (2) on failure of the aforesaid Mexican authorities to give protection.

2. Briefly summarized, the facts on which this claim is based are as follows: claimant, George Adams Kennedy, was employed as assistant manager and engineer of the W. C. Laughlin Company, which company operated the Animas Mine in San Javier, Sonora, Mexico. It seems that at the time of the events, trouble had arisen between the company and the Mexican employees due to certain exactions on the part of both sides, and that three of the employees, including Manuel Robles, were the chiefs and representatives of said employees; that the company discharged, first, one of the three aforesaid men (November 3, 1919), and that in the morning of the next day (November 4th) placards were found attached to the mine office door and at the shaft of the mine inciting the employees to go on strike; that said placards were sent to the Municipal President of the town of San Javier, to place the matter before him and ask for the necessary protection—which was done orally and confirmed through a letter; that on the same date (November 4th) the other two chiefs or representatives of the workmen were discharged from the company for the best interest of the service; and then, as alleged, made threats against the officials of the company; that later on it was learned, through a shift boss, that the three discharged men were in the plaza of the town of San Javier inciting their companions to strike, for which reason said shift boss was sent to see the Municipal President of the town to inform him of the situation and demand of him that the police be present at the mine at 6.30 o'clock on the following morning, although there is no positive evidence that the Municipal President actually received this second demand for special protection.

3. At 6.30 o'clock in the morning, on November 5th, when the employees came in, Robles and one of the other discharged men appeared and advised their companions not to go to work. Robles demanded from Kennedy and the timekeeper of the mine, a notice which had been posted and which required the employees to come thirty minutes earlier than the usual hour, and upon such demand being refused, he started to argue with Kennedy. The latter alleges that Robles thereupon threatened him with his gun; that he, Kennedy, grasped it and attempted to take it away. A moment

of confusion and struggle followed. Kennedy says that some of the workers, whose names he does not know, dealt him some blows which knocked him down causing him to lose his hold on the gun of Robles; that the latter stepped back; that Kennedy caught a piece of pipe and threw it at Robles, who was able to dodge it, and, then, said Robles fired upon and wounded Kennedy in the right thigh. Robles and the eye-witnesses agree that the former did not fire until Kennedy threw the pipe at him, but they leave in doubt as to whether Robles had previously drawn his gun. Kennedy was subsequently taken up and his wound treated. The local magistrate immediately took notice of the matter and arrested Robles, placing the latter at the disposal of the local judge of San Javier, who proceeded to initiate the prosecution, appointing at once experts to examine the victim of the attack and taking the statements of all the persons who took part in the events or were witnesses thereof. The first proceedings having been concluded, the cause was remitted to the Judge of First Instance of Hermosillo to continue the prosecution. Kennedy left the next day (November 6th) for Nogales, Arizona, U.S.A., where he arrived, after a painful trip, in the night of the same day and was taken to St. Joseph's Hospital. He was operated upon on November 11th and remained in the hospital for four months, after which he went to Denver, Colorado, United States of America, where he arrived on April 1, 1920. On April 3rd, he underwent another operation in the right leg, which left it in a bad condition, for which reason he had to undergo other operations, also unsuccessful, that have left him permanently crippled. In the meantime, the prosecution of Robles before the Judge of First Instance of Hermosillo was continued, said Judge having rendered, on March 2, 1920, a decision sentencing Robles to two months' imprisonment, but he immediately released him, as he had already been kept in jail five months. The sentence became final, because neither of the parties appealed from it.

4. In view of the foregoing facts, it is alleged, chiefly, that the procedure followed by the Mexican Judge and his findings resulted in a denial of justice: (a) because the persons who took part in the attack provoked against Kennedy, were not punished: and (b) because a punishment was imposed on Robles notoriously out of proportion to the criminal act he committed. There is not sufficient evidence in the record to show that Kennedy may have been assaulted by other persons, outside of Robles; for, although it is true that Kennedy alleges that a young man who was standing near Robles at the time of the scuffle, struck him on the head with the lamp, and that some others did the same thing, also seizing his hands to break his grip on the gun; on the other hand, Robles, as well as seven eyewitnesses ignore such allegations. In the confusion that followed the act of the fight between Kennedy and Robles, nobody probably realized exactly what was happening, and Kennedy himself affirms that he thought at first that the men who intervened "were trying to intervene so that Robles would not shoot him". In view of these circumstances and the evidence which he had before him, the judge in the case could not, surely, consider guilty any other person than Robles, who had confessed his crime. It can not, then, be said that there may be a denial of justice on this ground.

5. The second ground on which a denial of justice is based, is, that the sentence of two months' imprisonment imposed on Robles is out of proportion to the seriousness of his crime. This assertion seems justified. In fact, I think that the international duty which a state has duly to punish those who, within its territory, commit a crime against aliens, implies the obliga-

tion to impose on the criminal a penalty proportionate to his crime. To punish by imposing a penalty that does not correspond to the nature of the crime is half punishment or no punishment at all. In order to reach the conclusion that the shooting was a very malicious act, it is sufficient to note that it was Robles who provoked the quarrel; that Kennedy was unarmed at the moment when he was fired upon; that the Mexican Prosecuting Attorney and judge discard the theory of self-defense; that the nature of the wound inflicted was serious. The Commission has repeatedly expressed the repugnance it feels for the frequent and reckless use of firearms, and in the instant case one can do no less than think that it is a question of a serious aggression. The mere description of Kennedy's wounds shows their seriousness; the first medical report that was given, immediately after the events (November 5th), says that the principal wound "is in the front part of the right thigh and near the groin * * * that the bullet penetrated, crossing the muscles and breaking the femur bone in the third superior section, and remained imbedded in the exterior part below the right hip, from where the bullet was extracted, which was found about to come out". Said report adds that "that wound, although serious, does not, *for the moment*, endanger the life of the wounded person, but it can later place it in danger if complications result". A sentence of two months' imprisonment for such a wound is a disproportionate penalty, and it can almost be said that it is an inducement for the commission of crimes of that kind. A municipal law which would oblige the judge to impose penalties of this nature could be considered, perhaps, as outside of the standards used by civilized countries. But no such charge can be made against Mexican law. As a matter of fact, the Penal Code of Sonora, Mexico, on the question of injuries, adjusts the penalty to their importance and their results, and for that purpose requires that no case involving personal injuries may be decided before the expiration of sixty days from the date on which the crime is committed, in order that the judge may know the probable result of such injuries, before imposing the sentence (Article 434). Furthermore, it provides that upon the expiration of the sixty days, two medical experts shall state the certain, or at least the probable, result of the injuries, and that having in mind such statement, final decision may be pronounced (Article 435). In the present case, the judge, for some inexplicable reason, did not comply with the requisites of his domestic law. It has been alleged that the record contains the medical certificate which described the wounds and to which reference is made above; that later, on December 27, 1919, the same physician who rendered the first certificate, together with a practical expert, certified that the wound received by Kennedy was not of the kind which necessarily endangers life and that it would take six weeks to two months to heal, without its resulting in the permanent incapacitation of the injured member, and that said expert opinion is sufficient, according to a provision of the Code of Criminal Procedure of Sonora (Article 111); that the diligence of the Mexican authorities in this respect, is shown by the fact that, in addition, the Prosecuting Attorney filed a motion on January 13, 1920, asking for a report on the condition of the patient from the physicians who were attending him at the St. Joseph's Hospital, in Nogales, Arizona, which motion was allowed by the judge, who, on his part, appointed two other physicians, Mexicans, who were to examine Kennedy, in pursuance of which letters rogatory were issued to the Judge of First Instance of Nogales, Mexico; it being further alleged that Mexican authorities are not responsible because of the failure to render

such report, and that the judge could not wait indefinitely, in view of the fact that the Mexican Constitution prescribes a maximum period within which the delinquent must be tried. We can not take into account such allegations, because the first medical certificate referred only to the wound at the time it was received; because the second certificate could in no manner help the judge to know the condition of the wounded man at the time of the trial, inasmuch as the physician and the practical expert, who issued such certificate and who were in San Javier, admit that they did not have before them the wounded man, as he was already in United States territory; and because the judge could have made urgent representations to the end that the physicians of the two towns of Nogales, who had later been appointed, would issue their certificate in time, as it must be taken into consideration that such certificate was requested on January 13, 1920, and sentence was not pronounced until March 2 of said year. It is true that the fact that the wounded man was absent made the completion of the proceedings more difficult; it is true that Kennedy's attorneys failed to take the necessary steps in order that the report would be rendered; however, the judge, on finding himself obliged to render judgment bound by the aforesaid provision of the Mexican Constitution, could have based himself, in imposing the sentence, on the nature itself of the wound, at least as described by the first medical certificate, which has all the aspects of being conscientiously made. The result of all was, that the judge ignored the seriousness of the injury suffered by Kennedy and that, exclusively basing his decision on the milder and conjectural certificate of December 27th, he imposed a penalty which was not the proper one for the crime of Robles, and even intentionally imposed the minimum of the inadequate penalty, basing his decision on the extenuating circumstance of confession on the part of Robles, when he had latitude to impose, at least, a longer term of imprisonment between two months and one year. In view of all the foregoing, it seems that there was negligence in a serious degree, and that such negligence constitutes a denial of justice.

6. Much stress has been laid upon the fact that the Mexican judge states in his sentence that the facts relating to the circumstances of the offence committed by Robles are supported by a document addressed by 54 laborers of the mine to one Leopoldo Ulloa, which document is contained in the record of the proceedings. That fact, it is deemed, can prove that the judge allowed himself to be unduly influenced. It is evident that such document could not be taken into consideration by the judge, because it lacked the requisites of evidence legally rendered, and that, therefore, the judge should not have even mentioned it in his sentence. But inasmuch as the judge did not avail himself of it, except to corroborate the circumstances of the offense that were already proven by statements of witnesses rendered according to law, the aforesaid fact does not reveal a serious transgression.

7. With regard to the allegation of failure to give protection, the following may be said: it seems that, notwithstanding the serious disturbances which occurred in that region—one of them being the insurrection of the Yaqui Indians—American lives and property in the mining district of Las Animas had been given adequate protection by the Mexican authorities; there is evidence that escorts had been furnished for the transportation of the company's minerals. On the other hand, there is no evidence that there may have been failure to maintain the usual order which it is the duty of every state to maintain within its territory. The question lies in knowing whether the special demand for protection made by the American employees

of the mine, due to the labor problems which had arisen between the management and the workmen, was such as to require the Mexican authorities to take extraordinary measures. The first alleged demand for protection was that made orally and later confirmed by letter to the Municipal President of San Javier on November 4th; it referred to threats of a strike and other vague threats made by the discharged workmen, the letter sent to the Municipal President mentions "difficulties between the company and its workmen in the mine", the interference by a worker called Rendón, who had repeatedly made threats against his chiefs, which threats are not specified, and it ended saying: "this company respectfully brings this matter to your attention requesting you to take the matter in hand and prevent the said Mr. Rendón from continuing in the interference of the operation and business of this mine". It seems that the Municipal President promised to attend to the matter. Taking into account the circumstances set forth by the company, I do not see that it might be a question of imminent danger which would require urgent measures either that very day or at the beginning of the next day. The second more definite demand for protection was made, according to Kennedy and an American companion of his, after Robles and another fellow worker were discharged, on November 4th, after 9.30 at night, through one Dominguez. The Municipal President was asked to send a *police officer* at six-thirty the following day, November 5th, to "arrest" the "agitators" and, if necessary, "to prevent their interfering with the shift going to work". There is not sufficient evidence that this second demand reached the Municipal President; Mexico might perhaps have cleared up this doubtful point. However, considering the evidence in the record, it seems to me that it is not possible to establish any responsibility on the part of Mexico for failure to give protection.

8. In view of the foregoing, I believe that this claim can be properly grounded only on a denial of justice resulting from the failure to have imposed on Kennedy's aggressor a punishment commensurate with his offense; but, taking into account that the irregularity imputed on the procedure of the Mexican judge was to a certain extent due to the lack of diligence on the part of claimant's attorneys and physicians, taking into account, further, that it is a question of indirect responsibility, and the principles mentioned in paragraph 25 of the opinion rendered in the *Janes* case, Docket No. 168, I believe that the sum of \$6,000.00 (six thousand dollars) is an adequate award.

Van Vollenhoven, Presiding Commissioner:

I concur in Commissioner Fernández MacGregor's opinion.

Nielsen, Commissioner:

On November 5, 1919, George Adams Kennedy, an American citizen, was shot at San Javier, Sonora, Mexico, by a Mexican citizen, Manuel Robles, seriously wounded, and evidently permanently crippled. The United States contends that the Mexican authorities at San Javier had been warned that Robles and others were dangerous agitators who were inciting the workmen in a mine at that place to interfere with the operations of the mine, and that the authorities failed to afford protection against the activities of these agitators. It is further contended that no proper steps were taken to prosecute persons who assaulted Kennedy, and in particular that there was a miscarriage of justice in connection with the trial of Robles.

Numerous citations were made in the brief of the United States from the works of writers on international law with regard to the duty of a state to take appropriate action to prevent injuries to aliens. The general rule on this subject is, of course, well established. But cases involving complaints of lack of protection often present difficulties, in that evidence is vague and scanty on the important point whether authorities have been put on notice with respect to apprehended illegal acts.

An indemnity in the sum of \$40,000 was paid by the United States to the Government of Greece on account of destruction of property belonging to Greek subjects and personal injury inflicted on them in the City of South Omaha in the year 1909. Public, No. 207, 65th Congress. An interesting point in connection with this case was the question whether a mass meeting held by citizens of the city shortly before the riot began was a warning to the local authorities of a possible riot. The meeting was prompted by a feeling of hostility which existed among the people of the city against the Greeks, who were said to be guilty of offensive conduct and unlawful acts. One of them on the day previous to the meeting had killed a policeman. The Government of the United States did not admit legal liability in the case, but did, however, pay an indemnity as an act of grace without reference to the question of liability. *House Reports*, vol. 1, 64th Cong., 2nd Sess., 1916-1917.

In the *Home Missionary Society* case, under the Special Agreement of August 18, 1910, between the United States and Great Britain, claim was made by the United States on account of losses sustained during an insurrection in the British Protectorate of Sierra Leone in Africa in 1898. It was argued in behalf of the United States that representatives of the British Government in the Protectorate had notice that the natives regarded a so-called "hut tax" imposed on them as unjust, and that forcible resistance, dangerous to the lives and property of foreigners, would be made to the collection of the tax. *American Agent's Report*, p. 421. The tribunal held that the imposition of the tax was a legitimate exercise of sovereignty, and, further, that, although it might be true that some difficulty might have been foreseen, there was nothing to suggest that it would be more serious than is usual and inevitable in a semibarbarous protectorate and certainly nothing to lead to widespread revolt.

The difficulties with respect to evidence inherent in cases of this nature exist in the present case. The Mexican *Presidente Municipal* at San Javier was informed during the course of an interview which he had with Kennedy that certain employees in the mine were instigating discord between workmen and the so-called shift bosses. Placards inciting the men to strike were brought to the notice of the *Presidente*, and he was requested to prevent the agitators from interfering with the operation of the mine. A communication dated November 4, 1919, was delivered to the *Presidente*, calling attention to the activities of Victoriano Rendón, a discharged employee, stating that Rendón was inciting the employees of the mine to insubordination and disturbances and was threatening his chief, and requesting that steps be taken to prevent Rendón from continuing in the interference with the operation and business of the mine. In the Memorial is printed a sworn statement made by Kennedy to the effect that he sent an employee of the mine, Trinidad Dominguez, to the *Presidente* with instructions to inform the latter that Robles and two other discharged employees had been in the so-called Plaza inciting the men to strike and threatening violence to any who might go to work on the following day, and that a demand

was made of the *Presidente* to send a police officer to the mine at 6.30 o'clock in the morning on the following day to arrest the agitators if necessary and to prevent interference with the miners in going to their work. There is no testimony that Dominguez delivered the message other than the sworn statement of Kennedy that he had the assurance of Dominguez that the latter delivered the message immediately on leaving the office of the mine. It would seem, however, that if it were not delivered, testimony to that effect might have been furnished by the Mexican Government. The mine which employed several hundred men was an important industrial plant and presumably one from which the local community derived much benefit. Undoubtedly there was abundant reason why the local authorities should be solicitous to afford protection to persons and property at the mine in case they had warning of threatened violence to life or property.

The record leaves some doubt as to the specific nature of the warning given to the Mexican authorities. The *Presidente* at San Javier was evidently informed that the operators of the mine had had difficulties with some workmen. It is not entirely clear to me that the duty to give protection was suitably performed, but in the light of the general principles which the Commission has announced in the past with respect to the necessity for grounding pecuniary awards on convincing evidence of improper governmental administration, I am not prepared to say that the charge of lack of protection can be maintained.

In considering the contentions advanced by the United States with regard to the impropriety of the proceedings instituted against the person who shot Kennedy, the Commission of course must have in mind the general principles asserted in behalf of Mexico with regard to the respect that is due to a nation's judiciary and the reserve with which an international tribunal must approach the examination of proceedings of domestic tribunals against which a complaint is made. As said by counsel for Mexico, such a tribunal of course does not act as an appellate court, but it is not precluded from making a most searching examination of judicial proceedings, and it is the duty of a tribunal to make such an examination to determine whether the proceedings in a given case have resulted in a denial of justice as that term is understood in international law. The principles which must guide the Commission in a case of this character were stated to some extent in the separate opinions written in the *Neer* case, Docket No. 136. There are numerous cases in which international tribunals have been called upon to examine the propriety of proceedings of domestic tribunals. See for examples, decisions in prize cases and other cases, cited in Dr. Borchard's *Diplomatic Protection of Citizens Abroad*, p. 342. See also the case of *Cotesworth and Powell*, Moore, *International Arbitrations*, vol. 2, p. 2050; the *Rio Grande* case under the Special Agreement of August 18, 1910, between the United States and Great Britain, American Agent's *Report*, p. 332; the *Brown* case, *ibid.*, p. 162; and the *Webster* case which was concerned with the action of quasi-judicial tribunals, *ibid.*, p. 537.

I agree with the conclusions stated in Commissioner MacGregor's opinion to the effect that the imposition of a sentence of two months' imprisonment on Robles was clearly an inadequate penalty for the grave crime which he committed. If Mexican law had required this penalty, the wrong resulting from the inadequate sentence should be predicated on the character of the law itself. But I think it is clear that the law authorized and required the infliction of a more serious penalty for the offense committed, and that therefore the Mexican Judge at Hermosillo who sentenced Robles did not

properly apply Mexican law. Such conduct on his part is assuredly some evidence bearing on the question of a denial of justice, but there is further evidence of the impropriety of the proceedings in connection with the trial of Robles. A medical certificate, which was obtained by order of a Judge at San Javier, and which evidently under Mexican law was evidence with regard to the injuries of Kennedy, reads in part as follows:

"In the front part of the right thigh and close to the groin there is located the principal wound caused by firearms, the bullet having passed into and through the thigh, breaking the femur bone in the upper third section, passing through the outer part of the hip bone on the left, from which place the bullet was extracted at the point where it had almost passed out of the body. The scalp showed a superficial wound an inch long, and there was a scratch on the right cheek near the eye. In addition on both hands and almost in the same place there were found scratches between the thumb and the index finger. The wound of the muscle, although serious, does not put in peril for the moment, the life of the wounded man, but it may later endanger it if complications result."

The certificate clearly shows the serious nature of the injuries inflicted on Kennedy. From the decision of the Judge at Hermosillo it appears that the Judge, in imposing a sentence of but two months' imprisonment, relied upon a second certificate signed by the physician who executed the first certificate and one other person, evidently not a physician. This certificate was executed nearly two months after the date of the first certificate, without any reexamination of Kennedy. The second certificate declares that the injury "is of a character that does not necessarily endanger life and will require from six weeks to two months to heal, without for that reason resulting in a permanent disability of the wounded member". The failure to obtain a further certificate for which steps apparently were taken can presumably be excused, at least to some extent, by the fact that Kennedy at the time when these steps were taken was no longer within Mexican jurisdiction.

Another feature of the proceedings before the Judge at Hermosillo which to my mind reveals their impropriety is the appearance in the record of a communication signed by 54 workmen in the mine at San Javier which was addressed to one Leopoldo Ulloa. In this communication the workmen requested Ulloa to endeavor to obtain the release of Robles and recited a series of complaints against the mining company with regard to the improper treatment said to have been accorded to the workmen in the mine. The extent to which the Judge was influenced by this communication is a point concerning which perhaps no positive conclusions may be drawn, but the communication is clearly made a part of the record of the proceedings and is cited by the Judge. It would seem that more appropriate action with respect to a matter of this kind would have been to take effective steps to discipline the person who ventured to put it before the Judge evidently for the purpose of influencing his action in a case in connection with which the consideration of such a communication was, to say the least, highly improper.

Several other matters were mentioned by counsel for the United States in analysing the proceedings before the Judge at Hermosillo with a view to showing their impropriety. Whatever might be said of their controlling importance, if any, I think that enough has been said to justify the conclusion which the three Commissioners have reached to the effect that the instant case reveals a denial of justice within the meaning of international law.

Decision

The Commission decides that the Government of the United Mexican States is obligated to pay to the Government of the United States of America on behalf of George Adams Kennedy the sum of \$6,000.00 (six thousand dollars) without interest.
