B. E. CHATTIN (U.S.A.) *v.* UNITED MEXICAN STATES.

(July 23, 1927, concurring opinion by American Commissioner, July 23, 1927, dissenting opinion by Mexican Commissioner, undated. Pages 422-465.)

Van Vollenhoven, Presiding Commissioner :

1. This claim is made by the United States of America against the United Mexican States on behalf of B. E. Chattin, an American national. Chattin, who since 1908 was an employee (at first freight conductor, thereafter passenger conductor) of the Ferrocarril Sud-Pacífico de México (Southern Pacific Railroad Company of Mexico) and who in the Summer of 1910 performed his duties in the State of Sinaloa, was on July 9, 1910, arrested at Mazatlán, Sinaloa, on a charge of embezzlement; was tried there in January, 1911, convicted on February 6, 1911, and sentenced to two years' imprisonment; but was released from the jail at Mazatlán in May or June, 1911, as a consequence of disturbances caused by the Madero revolution. He then returned to the United States. It is alleged that the arrest, the trial and the sentence were illegal, that the treatment in jail was inhuman, and that Chattin was damaged to the extent of $50,000.00, which amount Mexico should pay.

2. Mexico has challenged the claimant's citizenship on account of its being established by testimonial evidence only. Under the principles expounded in paragraph 3 of the Commission's opinion in the case of *William A. Parker* (Docket No. 127) [1] rendered March 31, 1926, the American nationality of Chattin would seem to be proven.

3. The circumstances of Chattin's arrest, trial and sentence were as follows. In the year 1910 there had arisen a serious apprehension on the part of several railroad companies operating in Mexico as to whether the full proceeds of passenger fares were accounted for to these companies. The Southern Pacific Railroad Company of Mexico applied on June 15, 1910, to the Governor of the State of Sinaloa, in his capacity as chief of police of the State, co-operating with the federal police, in order to have investigations made of the existence and extent of said defrauding of their lines within the territory of his State. On or about July 8, 1910, one Cenobio Ramírez, a Mexican employee (brakeman) of the said railroad, was arrested at Mazatlán on a charge of fraudulent sale of railroad tickets of the said company, and in his appearance before the District Court in that town he accused the conductor Chattin—who since May 9, 1910, had charge of trains operating between Mazatlán and Acaponeta, Nayarit—as the principal in the crime with which he, Ramírez, was charged; whereupon Chattin also was arrested by the Mazatlán police, on July 9 (not 10),

[1] See page 35.

1910. On August 3 (not 13), 1910, his case was consolidated not only with that of Ramírez, but also with that of three more American railway conductors (Haley, Englehart and Parrish) and of four more Mexicans. After many months of preparation and a trial at Mazatlán, during both of which Chattin, it is alleged, lacked proper information, legal assistance, assistance of an interpreter and confrontation with the witnesses, he was convicted on February 6, 1911, by the said District Court of Mazatlán as stated above. The case was carried on appeal to the Third Circuit Court at Mexico City, which court on July 3, 1911, affirmed the sentence. In the meantime (May or June, 1911) Chattin had been released by the population of Mazatlán which threw open the doors of the jail in the time elapsing between the departure of the representatives of the Diaz regime and the arrival of the Madero forces.

Forfeiture of the right to national protection

4. Mexico contends that not only has Chattin, as a fugitive from justice, lost his right to invoke as against Mexico protection by the United States, but that even the latter is bound by such forfeiture of protection and may not interpose in his behalf. If this contention be sound, the American Government would have lost the right to espouse Chattin's claim, and the claim lacking an essential element required by Article 1 of the Convention signed September 8, 1923, would not be within the cognizance of this Commission. The motive for the alleged limitation placed on the sovereignty of the claimant's Government would seem to be that a government by espousing such claim makes itself a party to the improper act of its national. International awards, however, establishing either the duty or the right of international tribunals to reject claims of fugitives from justice have not been found; on the contrary, the award in the *Pelletier* case (under the Convention of May 28, 1884, between the United States and Hayti) did not attach any importance to the fact that Pelletier had escaped from an Haytian jail, nor did Secretary Bayard do so in expounding the reasons why the United States Government did not see fit to press the award rendered in its favor (Moore, at 1779, 1794, 1800). In the *Roberts*[1] and *Strother*[2] cases (Docket Nos. 185 and 3088) this Commission virtually held that protection of a fugitive from justice should be left to the discretion of the claimant government, and it did so more explicitly in the *Massey* case (Docket No. 352; paragraph 3 of Commissioner Nielsen's opinion).[3] A similar attitude was taken in cases in which forfeiture of the right to protection was alleged on other grounds. In paragraph 6 of its opinion in the *Macedonio J. García* case (Docket No. 607),[4] the Commission held that the American claimant's participation in Mexican politics was not a point on which the question of the right of the United States to intervene in his behalf, and therefore the question of the Commission's jurisdiction, could properly be raised, but that the pertinency of this point could only be considered in connection with the question of the validity of the claim under international law. In the *Francisco Mallén* case (Docket No. 2935)[5] none of the Commissioners held that misstatements or even misrepresentations by the individual

[1] See page 77.
[2] See page 262.
[3] See page 155.
[4] See page 108.
[5] See page 173.

claimant could furnish a ground for the Commission to reject the claim as an unallowable one. It is true that more than once in international cases statements have been made to the effect that a fugitive from justice loses *his* right to invoke and to expect protection—either by the justice from which he fled, or by his own government—but this would seem not to imply that his government as well loses *its* right to espouse its subject's claim in its discretion. The present claim, therefore, apart from the question whether a man who leaves a jail which is thrown open may be called a fugitive from justice, should be accepted and examined.

Illegal arrest

5. It has been alleged, in the first place, that Chattin, contrary to the Mexican Constitution of 1857, was arrested merely on an oral order. The Court's decision rendered February 6, 1911, stated that the court record contained "the order dated July 9, which is the written order based on the reasons for the detention of Chattin"; and among the court proceedings there are to be found (a) a decree ordering Chattin's arrest, dated July 9, 1910, and (b) a decree for Chattin's "formal imprisonment", dated July 9, 1910, as well. Even if the first decree had been issued some hours after Chattin's arrest, for which there is no proof except the statement by the police prefect that Chattin was placed in a certain jail on the Judge's "oral order", the irregularity would have been inconsequential to Chattin. The Third Circuit Court at Mexico City, when called upon to examine the second decree given on July 9, 1910, held on October 27, 1910, that it had been regular but for the omission of the crime imputed (which was known to Chattin from the examination to which he was previously submitted on July 9, 1910), and therefore the Court affirmed it after having amended it by inserting the name of Chattin's alleged crime. The United States has alleged that, since the sentence rendered on February 6, 1911, held that "the confession of the latter" (Ramírez) "does not constitute in itself a proof against the other" (Chattin), the Court confessed that Chattin's arrest had been illegal. No such inference can be made from the words cited, though the thought might have been expressed more clearly; a statement, insufficient as evidence for a conviction, can under Mexican law (as under the laws of many other countries) furnish a wholly sufficient basis for an arrest and formal imprisonment.

Defective administration of justice

6. Before taking up the allegations relative to irregular court proceedings against Chattin and to his having been convicted on insufficient evidence, it seems proper to establish that the present case is of a type different from most other cases so far examined by this Commission in which defective administration of justice was alleged.

7. In the *Kennedy* case (Docket No. 7)[1] and nineteen more cases before this Commission it was contended that, a citizen of either country having been wrongfully damaged either by a private individual or by an executive official, the judicial authorities had failed to take proper steps against the person or persons who caused the loss or damage. A governmental liability proceeding from such a source is usually called "indirect liability", though,

[1] See page 194.

considered in connection with the alleged delinquency of the government itself, it is quite as direct as its liability for any other act of its officials. The liability of the government may be called remote or secondary only when compared with the liability of the person who committed the wrongful act (for instance, the murder) for that very act. Such cases of *indirect governmental liability* because of lack of proper action by the judiciary are analogous to cases in which a government might be held responsible for denial of justice in connection with nonexecution of private contracts, or in which it might become liable to victims of private or other delinquencies because of lack of protection by its executive or legislative authorities.

8. Distinct from this so-called indirect government liability is the *direct responsibility* incurred on account of acts of the government itself, or its officials, unconnected with any previous wrongful act of a citizen. If such governmental acts are acts of *executive* authorities, either in the form of breach of government contracts made with private foreigners, or in the form of other delinquencies of public authorities, they are at once recognized as acts involving direct liability; for instance, collisions caused by public vessels, reckless shooting by officials, unwarranted arrest by officials, mis-treatment in jail by officials, deficient custody by officials, etc. As soon, however, as mistreatment of foreigners *by the courts* is alleged to the effect that damage sustained is caused by the *judiciary* itself, a confusion arises from the fact that authors often lend the term "denial of justice" as well to these cases of the second category, which are different in character from a "denial of justice" of the first category. So also did the tribunal in the *Yuille, Shortridge & Company* case (under the British memorandum of March 8, 1861, accepted by Portugal; De Lapradelle et Politis, II, at 103), so Umpire Thornton sometimes did in the 1868 Commission (Moore, 3140, 3141, 3143; *Burn, Pratt* and *Ada* cases). It would seem preferable not to use the expression in this manner. The very name "denial of justice" (*dénégation de justice, déni de justice*) would seem inappropriate here, since the basis of claims in these cases does not lie in the fact that the courts refuse or deny redress for an injustice sustained by a foreigner because of an act of someone else, but lies in the fact that the courts themselves did injustice. In the British and American claims arbitration Arbitrator Pound one day put it tersely in saying that there must be "an injustice antecedent to the denial, and then the denial after it" (Nielsen's *Report*, 258, 261).

9. How confusing it must be to use the term "denial of justice" for both categories of governmental acts, is shown by a simple deduction. If "denial of justice" covers not only governmental acts implying so-called indirect liability, but also acts of direct liability, and if, on the other hand, "denial of justice" is applied to acts of executive and legislative authorities as well as to acts of judicial authorities—as is often being done—there would exist no international wrong which would not be covered by the phrase "denial of justice", and the expression would lose its value as a technical distinction.

10. The practical importance of a consistent cleavage between these two categories of governmental acts lies in the following. In cases of direct responsibility, insufficiency of governmental action entailing liability is not limited to flagrant cases such as cases of bad faith or wilful neglect of duty. So, at least, it is for the non-judicial branches of government. Acts of the *judiciary*, either entailing direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient

unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man. Acts of the executive and legislative branches, on the contrary, share this lot only then, when they engender a so-called *indirect* liability in connection with acts of others; and the very reason why this type of acts often is covered by the same term "denial of justice" in its broader sense may be partly in this, that to such acts or inactivities of the executive and legislative branches engendering *indirect* liability, the rule applies that a government cannot be held responsible for them unless the wrong done amounts to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. With reference to *direct* liability for acts of the executive it is different. In the *Mermaid* case (under the Convention of March 4, 1868, between Great Britain and Spain) the Commissioners held that even an act of mere clumsiness on the part of a gunboat—a cannon shot fired at a ship in an awkward way—when resulting in injustice renders the government to whom that public vessel belongs liable (De Lapradelle et Politis, II, 496; compare Moore, 5016). In the *Union Bridge Company* case the British American arbitral tribunal decided that an act of an executive officer may constitute an international tort for which his country is liable, even though he acts under an erroneous impression and without wrongful intentions (Nielsen's *Report*, at 380). This Commission, in paragraph 12 of its opinion in the *Illinois Central Railroad Company* case (Docket No. 432)[1] rendered March 31, 1926, held that liability can be predicated on nonperformance of government contracts even where none of these aggravating circumstances is involved; and a similar view regarding responsibility for other acts of executive officers was held in paragraph 7 of its opinion in the *Okie* case (Docket No. 275),[2] rendered March 31, 1926, and in paragraph 9 of the first opinion in the *Venable* case (Docket No. 603).[3] Typical instances of direct damage caused by the judiciary—"denial of justice" improperly so called—are the *Rozas* and *Driggs* cases (Moore, 3124-3126; not the *Driggs* case in Moore, 3160); before this Commission the *Faulkner*, *Roberts*, *Turner* and *Strother* cases (Docket Nos. 47, 185, 1327 and 3088) presented instances of this type, in so far as the allegation of illegal *judicial* proceedings was involved therein. Neither in the *Rozas* and *Driggs* cases, nor in the *Selkirk* case (Moore, 3130), the *Reed and Fry* case (Moore, 3132), the *Jennings* case (Moore, 3135), the *Pradel* case (Moore, 3141), the *Smith* case (Moore, 3146), the *Baldwin* case (Moore, 3235), the *Jonan* case (Moore, 3251), the *Trumbull* case (Moore, 3255), nor the *Croft* case (under the British memorandum of May 14, 1855, accepted by Portugal; De Lapradelle et Politis, II, at 22; compare Moore, 4979) and the *Costa Rica Packet* case (under the Convention of May 16, 1895, between Great Britain and the Netherlands; La Fontaine, 509, Moore, 4948) was the improper term "denial of justice" used by the tribunal itself. The award in the *Cotesworth & Powell* case made a clear and logical distinction between the two categories mentioned in paragraphs 7 and 8, above; "denials of justice" on the one hand (when tribunals refuse redress), and "acts of notorious injustice" committed by the judiciary on the other hand (Moore, at 2057, 2083).

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[1] See page 134.
[2] See page 54.
[3] See page 219.

11. When, therefore, the American Agency in its brief mentions with great emphasis the existence of a "denial of justice" in the *Chattin* case, it should be realized that the term is used in its improper sense which sometimes is confusing. It is true that *both* categories of government responsibility —the direct one and the so-called indirect one—should be brought to the test of international standards in order to determine whether an international wrong exists, and that for *both* categories convincing evidence is necessary to fasten liability. It is moreover true that, as far as acts of the *judiciary* are involved, the view applies to *both* categories that "it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country" (*Garrison's* case; Moore, 3129), and to *both* categories the rule applies that state responsibility is limited to judicial acts showing outrage, bad faith, wilful neglect of duty, or manifestly insufficient governmental action. But the distinction becomes of importance whenever acts of the *other* branches of government are concerned; then the limitation of liability (as it exists for *all* judicial acts) does not apply to the category of direct responsibility, but only to the category of so-called indirect or derivative responsibility for acts of the executive and legislative branches, for instance on the ground of lack of protection against acts of individuals.

Irregularity of court proceedings

12. The next allegation on the American side is that Chattin's trial was held in an illegal manner. The contentions are: (a) that the Governor of the State, for political reasons, used his influence to have this accused and three of his fellow conductors convicted; (b) that the proceedings against the four conductors were consolidated without reason; (c) that the proceedings were unduly delayed; (d) that an exorbitant amount of bail was required; (e) that the accused was not duly informed of the accusations; (f) that the accused lacked the aid of counsel; (g) that the accused lacked the aid of an interpreter; (h) that there were no oaths required of the witnesses: (i) that there was no such a thing as a confrontation between the witnesses and the accused: and (j) that the hearings in open court which led to sentences of from two years' to two years and eight months' imprisonment lasted only some five minutes. It was also contended that the claimant had been forced to march under guard through the streets of Mazatlán; but the Commission in paragraph 3 of its opinion in the *Faulkner* case (Docket No. 47)[1] rendered November 2, 1926, has already held that such treatment is incidental to the treatment of detention and suspicion, and cannot in itself furnish a separate basis for a complaint.

13. As to illegal efforts made by the Governor of Sinaloa to influence the trial and the sentence (allegation a), the only evidence consists in hearsay or suppositions about such things as what the Governor had in mind, or what the Judge has said in private conversation; hearsay and suppositions which often come from persons connected with those colleagues of Chattin's who shared his fate. To uncorroborated talk of this kind the Commission should not pay any attention. The record contains several allegations about lawyers being unwilling to give or to continue their services because of fear of the Governor of Sinaloa; but the only statement of this kind proceeding from a lawyer himself relates to an undisclosed behavior on

[1] See page 67.

his part which displeased quite as much the college where he was teaching as a professor, as it displeased the Governor of the State. Among these lawyers who presented bills for large fees, but, according to the record, did not take any interest at all in their clients, and did not avail themselves of the rights accorded by Mexican law in favor of accused persons, there was one who seems to have been willing, only if he were appointed official consulting attorney for the American consulate, not merely to become quite active but also to drop at once his fear of the Governor. It took another lawyer thirty eight days to decline a request to act as counsel on appeal. If really these lawyers have behaved as it would seem from the record, their boastful pretenses and feeble activities were not a credit to the Mexican nation. The Government of Mexico evidently cannot be held liable for that; but if conditions sometimes are in parts of Mexico as they were then in Sinaloa, it might be well to explicitly obligate the Judge by law to inform the accused ones of their several rights, both during the investigations and the trial.

14. For the advisability or necessity of consolidating the proceedings in the four cases (allegations b), here is only slight evidence. Yet there is; and it would seem remarkable that, if the court record can be relied upon in this respect, this point was not given any attention during the investigations and the trial. Among the scanty pieces of evidence against Chattin there exists on the one hand a stub (No. 21), on which Chattin, by a statement made on October 28, 1910, admitted having written on April 24, 1910 (that is, before he came in charge of the track Mazatlán—Acaponeta, and was still on the track Culiacán-Mazatlán) the words "This man is O. K.—Chattin" (there is no addressee's name on the original), and of which he could give no other explanation than that it was issued to "recommend a friend who travelled on the line"; and on the other hand there was produced a stub (No. 23) reading "5/24/10.—Chattin—The two parties are O. K.—Haley", regarding which Haley stated on October 29, 1910, "that he wrote it on May 24th last for the purpose of recommending some intimate friends". These recommendations of travelling friends not only might raise suspicions in connection with the allegation ascribed to Camou and made in court by Batriz (both of them accused Mexican brakemen) that there was one general system of understandings between the several railway conductors, but it also shows that there might have been good reasons to connect the cases of at least Chattin and Haley; and as the cases of Haley and Englehart had been already naturally connected from the beginning, it would seem reasonable that at least the cases of these three men had been linked up. However, the Court which had taken these stubs from secret documents presented to it on August 3, 1910, by the railroad company, instead of making them an object of a most careful inquiry, neither informed Chattin and his colleagues about their origin, nor examined Haley and Chattin as to the relation existing between them. More than two months after the consolidation, to-wit on October 12, 1910, testimony was given that Ramírez, in the south of Sinaloa, had delivered passes to Guaymas, Sonora; but neither is there any trace of an investigation as to this connecting link between the acts of several conductors. Since no grounds were given for the consolidation of the cases, and not a single effort was made to throw any more light on the occurrences from this consolidation, all disadvantages resulting therefrom for those whose cases might have been heard at much earlier dates (Haley, Englehart and Parrish) must be imputed to the Judge. The present claimant, however, Chattin,

is the one who has not suffered from the consolidation, since his case was slowest in maturing for trial and since the others were waiting for him.

15. For undue delay of the proceedings (allegation c), there is convincing evidence in more than one respect. The formal proceedings began on July 9, 1910. Chattin was not heard in court until more than one hundred days thereafter. The stubs and perhaps other pieces of evidence against Chattin were presented to the Court on August 3, 1910; Chattin, however, was not allowed to testify regarding them until October 28, 1910. Between the end of July, and October 8, 1910, the Judge merely waited. The date of an alleged railroad ticket delinquency of Chattin's (June 29, 1910) was given by a witness on October 21, 1910; but investigation of Chattin's collection report of that day was not ordered until November 11, 1910, and he was not heard regarding it until November 16, nor confronted with the only two witnesses (Delgado and Sarabia) until November 17, 1910. The witnesses named by Ramírez in July were not summoned until after November 22, 1910, at the request of the Prosecuting Attorney, with the result that, on the one hand, several of them—including the important witness Manuel Virgen—had gone, and that, on the other hand, the proceedings had to be extended from November 18, to December 13. On September 3, 1910, trial had been denied Parrish, and on November 5, it was denied Chattin, Haley and Englehart; though no testimony against them was ever taken after October 21 (Chattin), and though the absence of the evidence ordered on November 11 and after November 22 was due exclusively to the Judge's laches. Unreliability of Ramírez's confession had been suggested by Chattin's lawyer on August 16, 1910; but it apparently was only after a similar suggestion of Camou on October 6, 1910, that the Judge discovered that the confession of Ramírez did not "constitute in itself a proof against" Chattin. New evidence against Chattin was sought for. It is worthy of note that one of the two new witnesses, Estebán Delgado, who was summoned on October 12, 1910, had already been before the police prefect on July 8, 1910, in connection with Ramírez's alleged crime. If the necessity of new evidence was not seriously felt before October, 1910, this means that the Judge either has not in time considered the sufficiency of Ramírez's confession as proof against Chattin, or has allowed himself an unreasonable length of time to gather new evidence. The explanation cannot be found in the consolidation of Chattin's case with those of his three fellow conductors, as there is no trace of any judicial effort to gather new testimony against these men after July, 1910. Another remarkable proof of the measure of speed which the Judge deemed due to a man deprived of his liberty, is in that, whereas Chattin appealed from the decree of his formal imprisonment on July 11, 1910—an appeal which would seem to be of rather an urgent character—"the corresponding copy for the appeal" was not remitted to the appellate Court until September 12, 1910; this Court did not render judgment until October 27, 1910; and though its decision was forwarded to Mazatlán on October 31, 1910, its receipt was not established until November 12, 1910.

16. The allegation (d) that on July 25, 1910, an exorbitant amount of bail, to-wit a cash bond in the sum of 15,000.00 pesos, was required for the accused is true; but it is difficult to see how in the present case this can be held an illegal act on the part of the Judge.

17. The allegation (e) that the accused has not been duly informed regarding the charge brought against him is proven by the record, and to

a painful extent. The real complainant in this case was the railroad company, acting through its general manager; this manager, an American, not only was allowed to make full statements to the Court on August 2, 3, and 26, 1910, without ever being confronted with the accused and his colleagues, but he was even allowed to submit to the Court a series of anonymous written accusations, the anonymity of which reports could not be removed (for reasons which he explained); these documents created the real atmosphere of the trial. Were they made known to the conductors? Were the accused given an opportunity to controvert them? There is no trace of it in the record, nor was it ever alleged by Mexico. It is true that, on August 3, 1910, they were ordered added to the court record; but that same day they were delivered to a translator, and they did not reappear on the court record until *after* January 16, 1911, when the investigations were over and Chattin's lawyer had filed his briefs. The court record only shows that on January 13, and 16, 1911, the conductors and one of their lawyers were aware of the existence, not that they knew the contents, of these documents. Therefore, and because of the complete silence of both the conductors and their lawyers on the contents of these railroad reports, it must be assumed that on September 3, 1910, when Chattin's lawyer was given permission to obtain a certified copy of the proceedings, the reports were not included. Nor is there evidence that, when two annexes of the reports (the stubs mentioned in paragraph 14 above) were presented to the conductors as pieces of evidence, their origin was disclosed. It is not shown that the confrontation between Chattin and his accusers amounted to anything like an effort on the Judge's part to find out the truth. Only after November 22, 1910, and only at the request of the Prosecuting Attorney, was Chattin confronted with some of the persons who, between July 13 and 21, inclusive, had testified of his being well acquainted with Ramírez. It is regrettable, on the other hand, that the accused misrepresents the wrong done him in this respect. He had not been left altogether in the dark. According to a letter signed by himself and two other conductors dated August 31, 1910, he was perfectly aware even of the details of the investigations made against him; so was the American vice-consul on July 26, 1910, and so was one H. M. Boyd, a dismissed employee of the same railroad company and friend of the conductors, as appears from his letter of October 4, 1910. Owing to the strict seclusion to which the conductors contend to have been submitted, it is impossible they could be so well-informed if the charges and the investigations were kept hidden from them.

18. The allegations (f) and (g) that the accused lacked counsel and interpreter are disproven by the record of the court proceedings. The telegraphic statement made on behalf of the conductors on September 2, 1910, to the American Embassy to the effect that they "have no money for lawyers" deserves no confidence; on the one hand, two of them were able to pay very considerable sums to lawyers, and on the other hand, two of the Mexicans, who really had no money, were immediately after their request provided with legal assistance.

19. The allegation (h) that the witnesses were not sworn is irrelevant, as Mexican law does not require an "oath" (it is satisfied with a solemn promise, *protesta*, to tell the truth), nor do international standards of civilization.

20. The allegation (i) that the accused has not been confronted with the witnesses—Delgado and Sarabia—is disproven both by the record of

the court proceedings and by the decision of the appellate tribunal. However, as stated in paragraph 17 above, this confrontation did not in any way have the appearance of an effort to discover what really had occurred. The Judge considered Ramírez's accusation of Chattin corroborated by the fact that the porter of the hotel annex where Chattin lived (Rojas) and an unmarried woman who sometimes worked there (Viera) testified about regular visits of Ramírez to Chattin's room; but there never was any confrontation between these four persons.

21. The allegation (j) that the hearings in open court lasted only some five minutes is proven by the record. This trial in open court was held on January 27, 1911. It was a pure formality, in which only confirmations were made of written documents, and in which not even the lawyer of the accused conductors took the trouble to say more than a word or two.

22. The whole of the proceedings discloses a most astonishing lack of seriousness on the part of the Court. There is no trace of an effort to have the two foremost pieces of evidence explained (paragraphs 14 and 17 above). There is no trace of an effort to find one Manuel Virgen, who, according to the investigations of July 21, 1910, might have been mixed in Chattin's dealings, nor to examine one Carl or Carrol Collins, a dismissed clerk of the railroad company concerned, who was repeatedly mentioned as forging tickets and passes and as having been discharged for that very reason. One of the Mexican brakemen, Batriz, stated on August 8, 1910, in court that "it is true that the American conductors have among themselves schemes to defraud in that manner the company, the deponent not knowing it for sure"; but again no steps were taken to have this statement verified or this brakeman confronted with the accused Americans. No disclosures were made as to one pass, one "half-pass" and eight perforated tickets shown to Chattin on October 28, 1910, as pieces of evidence; the record states that they were the same documents as presented to Ramírez on July 9, 1910, but does not attempt to explain why their number in July was eight (seven tickets and one pass) and in October was ten. No investigation was made as to why Delgado and Sarabia felt quite certain that June 29 was the date of their trip, a date upon the correctness of which the weight of their testimony wholly depended. No search of the houses of these conductors is mentioned. Nothing is revealed as to a search of their persons on the days of their arrest; when the lawyer of the other conductors, Haley and Englehart, insisted upon such an inquiry, a letter was sent to the Judge at Culiacán, but was allowed to remain unanswered. Neither during the investigations nor during the hearings in open court was any such thing as an oral examination or cross-examination of any importance attempted. It seems highly improbable that the accused have been given a real opportunity during the hearings in open court, freely to speak for themselves. It is not for the Commission to endeavor to reach from the record any conviction as to the innocence or guilt of Chattin and his colleagues; but even in case they were guilty, the Commission would render a bad service to the Government of Mexico if it failed to place the stamp of its disapproval and even indignation on a criminal procedure so far below international standards of civilization as the present one. If the wholesome rule of international law as to respect for the judiciary of another country —referred to in paragraph 11 above—shall stand, it would seem of the utmost necessity that appellate tribunals when, in exceptional cases, discover-

ing proceedings of this type should take against them the strongest measures possible under constitution and laws, in order to safeguard their country's reputation.

23. The record seems to disclose that an action in *amparo* has been filed by Chattin and his colleagues against the District Judge at Mazatlán and the Magistrate of the Third Circuit Court at Mexico City, but was disallowed by the Supreme Court of the Nation on December 2, 1912.

Conviction on insufficient evidence

24. In Mexican law, as in that of other countries, an accused can not be convicted unless the Judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal never can replace the important first element, that of the Judge's being convinced of the accused's guilt; it can only in extreme cases, and then with great reserve, look into the second element, the legality and sufficiency of the evidence.

25. It has been alleged that among the grounds for Chattin's punishment was the fact that he had had conversations with Ramírez who had confessed his own guilt. This allegation is erroneous; the conversations between the two men only were cited to deny Chattin's contention made on July 13, 1910, that he had only seen Ramírez around the city at some time, without knowing where or when, and his contention made on July 9, 1910, to the effect that he did not remember Ramírez's name. It has been alleged that the testimony of Delgado and Sarabia merely applied to the anonymous passenger conductor on a certain train; but the record clearly states that the description given by these witnesses of the conductor's features coincided with Chattin's appearance, and that both formally recognized Chattin at their confrontation on November 17, 1910. Mention has been made, on the other hand, of a docket of evidence gathered by the railway company itself against some of its conductors; though it is not certain that the Court has been influenced by this evidence in considering the felony proven, it can scarcely have failed to work its influence on the penalty imposed.

26. From the record there is not convincing evidence that the proo against Chattin, scanty and weak though it may have been, was not such as to warrant a conviction. Under the article deemed applicable the medium penalty fixed by law was imposed, and deduction made of the seven months Chattin had passed in detention from July, 1910, till February, 1911. It is difficult to understand the sentence unless it be assumed that the Court, for some reason or other, wished to punish him severely. The most acceptable explanation of this supposed desire would seem to be the urgent appeals made by the American chief manager of the railroad company concerned, the views expressed by him and contained in the record, and the dangerous collection of anonymous accusations which were not only inserted in the court record at the very last moment, but which were even quoted in the decision of February 6, 1911, as evidence to prove "illegal acts of the nature which forms the basis of this investigation". The allegation that the Court in this matter was biased against American citizens would seem to be contradicted by the fact that, together with the four Americans, five Mexicans were indicted as well, four of whom had been caught and have subsequently been convicted—that one of these Mexicans was punished as severely as the Americans were—and that the lower penalties imposed on the three others are explained by motives which, even if not shared,

would seem reasonable. The fact that the Prosecuting Attorney who did not share the Judge's views applied merely for "insignificant penalties"—as the first decision establishes—shows, on the one hand, that he disagreed with the Court's wish to punish severely and with its interpretation of the Penal Code, but shows on the other hand that he also considered the evidence against Chattin a sufficient basis for his conviction. If Chattin's guilt was sufficiently proven, the small amount of the embezzlement (four pesos) need not in itself have prevented the Court from imposing a severe penalty.

27. It has been suggested as most probable that after Chattin's escape and return to the United States no demand for his extradition has been made by the Mexican Government, and that this might imply a recognition on the side of Mexico that the sentence had been unjust. Both the disturbed conditions in Mexico since 1911, and the little chance of finding the United States disposed to extradite one of its citizens by way of exception, might easily explain the absence of such a demand, without raising so extravagant a supposition as Mexico's own recognition of the injustice of Chattin's conviction.

Mistreatment in prison

28. The allegation of the claimant regarding mistreatment in the jail at Mazatlán refers to filthy and unsanitary conditions, bad food, and frequent compulsion to witness the shooting of prisoners. It is well known, and has been expressly stated in the *White* case (under the verbal note of July, 1863, between Great Britain and Peru; De Lapradelle et Politis, II, at 322; Moore, at 4971), how dangerous it would be to place too great a confidence in uncorroborated statements of claimants regarding their previous treatment in jail. Differently from what happened in the *Faulkner* case (Docket No. 47),[1] there is no evidence of any complaint of this kind made either by Chattin and his fellow conductors, or by the American vice-consul, while the four men were in prison; and different from what was before this Commission in the *Roberts* case (Docket No. 185),[2] there has not been presented by either Government a contemporary statement by a reliable authority who visited the jail at that time. The only contemporary complaint in the record is the complaint made by one H. M. Boyd, an ex-employee of the railroad company and friend of the conductors, and by the American vice-consul (both on September 3, 1910), that these prisoners were "held to a strict compliance with the rules of the jail while others are allowed liberties and privileges", apparently meaning the liberty of walking in the patio. The vice-consul in his said letter of September 3, 1910, moreover mentioned that one of the conductors regarding whom his colleagues wired "one prisoner sick, his life depends on his release", when allowed by the Judge to go to the local hospital, did not wish to do this; and in summing up he confined himself to merely saying "that there is some cause for complaint against the treatment they are receiving". All of this sounds somewhat different from the violent complaints raised in the affidavits. The hot climate of Mazatlán would explain in a natural way many of the discomforts experienced by the prisoners; the fact that Chattin's three colleagues were taken to a hospital or allowed to go there

[1] See page 67.
[2] See page 77.

when they were ill and that one of them had the services of an American physician in jail might prove that consideration was shown for the prisoner's conditions. Nevertheless, if a small town as Mazatlán could not afford—as Mexico seems to contend—a jail satisfactory to lodge prisoners for some considerable length of time, this could never apply to the food furnished, and it would only mean that it is Mexico's duty to see to it that prisoners who have to stay in such a jail for longer than a few weeks or months be transported to a neighboring jail of better conditions. The statement made in the Mexican reply brief that "a jail is a place of punishment, and not a place of pleasure" can have no bearing on the cases of Chattin and his colleagues, who were not convicts in prison, but persons in detention and presumed to be innocent until the Court held the contrary. On the record as it stands, however, inhuman treatment in jail is not proven.

Conclusion

29. Bringing the proceedings of Mexican authorities against Chattin to the test of international standards (paragraph 11), there can be no doubt of their being highly insufficient. Inquiring whether there is convincing evidence of these unjust proceedings (paragraph 11), the answer must be in the affirmative. Since this is a case of alleged responsibility of Mexico for injustice committed by its judiciary, it is necessary to inquire whether the treatment of Chattin amounts even to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man (paragraph 11); and the answer here again can only be in the affirmative.

30. An illegal arrest of Chattin is not proven. Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court. Insufficiency of the evidence against Chattin is not convincingly proven; intentional severity of the punishment is proven, without its being shown that the explanation is to be found in unfairmindedness of the Judge. Mistreatment in prison is not proven. Taking into consideration, on the one hand, that this is a case of direct governmental responsibility, and, on the other hand, that Chattin, because of his escape, has stayed in jail for eleven months instead of for two years, it would seem proper to allow in behalf of this claimant damages in the sum of $5,000.00, without interest.

Nielsen, Commissioner:

I agree with the conclusions of the Presiding Commissioner that there is legal liability on the part of Mexico in this case. While not concurring entirely in the reasoning of certain portions of the Presiding Commissioner's opinion, including those found in paragraphs 6 to 11 inclusive, I am in substantial agreement with his conclusions on important points in the record of the proceedings instituted against Chattin and the other Americans with whose cases his case was consolidated. Irrespective of the question of the innocence or guilt of the claimant of the charge against him—whatever its precise nature was—I think it is clear that he was the victim of mistreatment.

Contention is made in behalf of the United States that the Governor of the state of Sinaloa, prompted by strong influence brought to bear upon him by the Southern Pacific Railroad Company, improperly undertook to influence the judge of the District Court at Mazatlán to convict the claimant and the other accused men in order that an example might be made of them. I do not think that this charge is substantiated by evidence in the record. A lawyer retained to act in this case withdrew and explained that by the action taken by him in the case he incurred the ill will of the Governor. The offenses for which the claimant and the other defendants in the case were charged was a crime under the federal law, but we find that the Governor appointed a commission to gather evidence against the accused. However it is explained that such action could properly under Mexican law be taken by him with regard to a federal offense, and it seems to me that this explanation cannot in the light of the information before the Commission be rejected. Other charges made by the United States with respect to the proceedings against the prisoners are enumerated in the Presiding Commissioner's opinion, and in a mass of vague evidence, and of technical questions of law concerning which there is considerable uncertainty, there are two outstanding points with respect to which the Commission may in my opinion reach a definite conclusion, namely, first, the delay in the proceedings that took place during the so-called period of investigation (*sumario*); and second, the character of the hearing that took place when the so-called period of proof (*plenario*) was reached. After a very careful consideration of the pleadings, the evidence and the oral and the written arguments, I think it is impossible not to say that the record reveals in some respects obviously improper action resulting in grave injury to the claimant and his fellow prisoners. Counsel for Mexico himself admitted and pointed out irregularities in the proceedings, while contending that they were not of a character upon which an international tribunal could predicate a pecuniary award.

So far as concerns methods of procedure prescribed by Mexican law, conclusions with respect to their propriety or impropriety may be reached in the light of comparisons with legal systems of other countries. And comparisons pertinent and useful in the instant case must be made with the systems obtaining in countries which like Mexico are governed by the principles of the civil law, since the administration of criminal jurisprudence in those countries differs so very radically from the procedure in criminal cases in countries in which the principles of Anglo-Saxon law obtain. This point is important in considering the arguments of counsel for the United States regarding irrelevant evidence and hearsay evidence appearing in the record of proceedings against the accused. From the standpoint of the rules governing Mexican criminal procedure conclusions respecting objections relative to these matters must be grounded not on the fact that a judge received evidence of this kind but on the use he made of it.

Counsel for Mexico discussed in some detail two periods of the proceedings under Mexican law in a criminal case. The procedure under the Mexican code of criminal procedure apparently is somewhat similar to that employed in the early stages of the Roman law and similar in some respects to the procedure generally obtaining in European countries at the present time. Counsel for Mexico pointed out that during the period of investigation a Mexican judge is at liberty to receive and take cognizance of anything placed before him, even matters that have no relation to the offense with which the accused is tried. The nature of some of the things

incorporated into the record, including anonymous accusations against the character of the accused, is shown in the Presiding Commissioner's opinion. Undoubtedly in European countries a similar measure of latitude is permitted to a judge, but there seems to be an essential difference between procedure in those countries and that obtaining in the Mexican courts, in that after a preliminary examination before a judge of investigation, a case passes on to a judge who conducts a trial. The French system, which was described by counsel for Mexico as being more severe toward the accused than is Mexican procedure, may be mentioned for purposes of comparison. Apparently under French law the preliminary examination does not serve as a foundation for the verdict of the judge who decides as to the guilt of the accused. The examination allows the examining judge to determine whether there is ground for formal charge, and in case there is, to decide upon the jurisdiction. The accused is not immediately brought before the court which is to pass upon his guilt or innocence. His appearance in court is deferred until the accusation rests upon substantial grounds. His trial is before a judge whose functions are of a more judicial character than those of a judge of investigation employing inquisitorial methods in the nature of those used by a prosecutor. When the period of investigation was completed in the cases of Chattin and the others with whom his case was consolidated, the entire proceedings so far as the Government was concerned were substantially finished, and after a hearing lasting perhaps five minutes, the same judge who collected evidence against the accused sentenced them.

Articles 86 and 87 of the Mexican federal code of criminal procedure read as follows:

"Art. 86. El procedimiento del orden penal tiene dos períodos; el de instrucción que comprende la serie de diligencias que se practican con el fin de averiguar la existencia del delito, y determinar las personas que en cualquier grado aparezcan responsables; y el del juicio propiamente tal, que tiene por objeto definir la responsabilidad del inculpado o inculpados, y aplicar la pena correspondiente.

"ART. 87. La instrucción deberá terminarse en el menor tiempo posible, que no podrá exceder de ocho meses cuando el término medio de la pena señalada al delito no baje de cinco años, y de cinco meses en todos los demás casos.

"Cuando por motivos excepcionales el juez necesitare mayor término, lo pedirá al superior immediato indicando la prórroga que necesite. La falta de esta petición no anula las diligencias que se practiquen; pero amerita una corrección disciplinaria y el pago de daños y perjuicios a los interesados." [1]

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[1] *Translation.*—86. The criminal process has two periods; that of investigation (instrucción) which embraces the series of steps taken to the end of ascertaining the existence of the crime and determining the persons who in any degree whatsoever may appear responsible; and the trial proper which shall have as its object the defining of responsibility of the accused and the application of the corresponding penalty.

87. The investigation should be terminated in the shortest possible time, not to exceed eight months when the average penalty assigned for the crime is not less than five years and should not exceed five months in all other cases.

When, on account of exceptional reasons the judge may need a greater length of time, he shall ask his immediate superior, indicating the extension which is needed. The failure to so ask shall not annul the steps which already have been taken; but it shall place the judge liable to disciplinary corrective measures and the payment of damages to the parties interested.

In the proceedings in the trial of Chattin the period of investigation lasted approximately five months, and it may be that, considering the nature of the offense with which he was charged the maximum period prescribed by the code was not exceeded. But I think it is proper to note that although maximum periods are prescribed the code also properly requires that the period of investigation shall terminate in the least time possible. Moreover, the hearing after the period of investigation consumed practically no time, and without a determination of the question of guilt the accused Chattin was held for about seven months.

Although delays in criminal proceedings undoubtedly frequently occur throughout the world, I am of the opinion that it can properly be said that in the light of the record revealing the nature of the proceedings in Chattin's case, it was obviously improper to keep him in jail for either five or seven months during which he appealed without success to the judge for a proper disposition of his case. With respect to this period of imprisonment it should be noted that the amount of bail fixed by the judge, the sum of 15,000 pesos —a very large amount considering the nature of the offense charged—was for practical purposes the equivalent of imprisonment without bail.

The purpose of the investigation during which Chattin was held was to ascertain as prescribed in Article 86 of the criminal code, whether an offense had been committed and, to determine upon the persons who appeared to be guilty of such offense. The period of investigation in Mexican law may perhaps in a sense be regarded as a stage of a trial. And it may also be considered that in a measure the Mexican judge during the period of investigation performs functions similar to those carried on by police or prosecuting authorities in other countries, or similar to those of a common law grand jury. The distinguished Mexican diplomat and scholar, Matias Romero, makes the following comparison:

"So far, therefore, as a proceeding under one system may be said to correspond to a proceeding under the other, it may be said that the *sumario*, in countries where the Roman law prevails, corresponds practically to a grand jury indictment in Anglo-Saxon nations." *Mexico and the United States*, Vol. I, p. 413.

The character of the proceedings in Chattin's case are described in some detail in the Presiding Commissioner's opinion. Chattin was arrested because a brakeman named Ramírez stated before the judge that these two men had been engaged in defrauding the railroad. It appears that after this statement, denied by Chattin, had been made the judge determined that it was not sufficient proof upon which to continue to detain him. He was finally convicted on the statement of two persons who stated that they paid to a person on the train whom the judge evidently considered to be identified as Chattin, 4 pesos on the 29th of June. The judge evidently was satisfied from the testimony of these two persons, and from records produced by the manager of the Southern Pacific Railroad that these witnesses rode on the train on the 29th of June, and that Chattin did not deliver the pesos to the railroad company on that same day. These things may be true, but considering the vague charge on which Chattin was originally held and the long period during which he was detained in prison, it seems to me that such a period of detention could not be justified, unless time and effort had been used to obtain more conclusive proof of guilt. In view of the fact that Chattin's case was consolidated with those of the three other conductors, it is proper in considering the propriety of the delays in Chattin's case to

take account of the character of proceedings in the other cases. All cases were terminated by the same decree of the court. The cases of the accused were consolidated. One of the men was brought from the state of Sonora to the state of Sinaloa after a series of loose proceedings. From the arguments advanced by counsel I am unable to perceive the propriety of this action in view of the general principle incorporated into Mexican law that crimes must be tried within the jurisdiction where they are committed. It seems to me to be clear that the case of each defendant was delayed by this process of consolidation, each case being affected by delays incident to other cases. However, while no court seems to have made any pronouncement with regard to a specific issue as to the propriety of such consolidation, inasmuch as a Mexican court was responsible for it, I do not feel that the Commission, in the light of the record before it can properly pronounce the action wrongful. The conductors accused together with Chattin so far as is revealed by the judicial decision rendered in their cases. were convicted on the testimony of certain persons that they had bought from brakeman tickets which were different from those in use on the day they were purchased from the brakeman and had been permitted by the conductors to use such tickets. If conductors knowingly received spurious tickets and profited from the sale of such tickets, they were evidently guilty of defrauding the railroad. However, it is not disclosed by the record of proceedings before the Commission that throughout the long period of retention any time was consumed in ascertaining whether or how the witnesses who testified against the accused knew that the tickets they bought were not of the kind in use on the day of purchase. There is no record that it was attempted to prove that the tickets bought from the brakeman could not be legally accepted by the conductors. There is no definite proof that the brakeman sold spurious tickets or that the conductors knowingly accepted spurious tickets. The brakeman might have fraudulently obtained possession of good tickets. Time was not consumed obtaining possibly important witnesses such as those mentioned in the Presiding Commissioner's opinion. Time was not taken to confront the accused with some important witnesses. Chattin, by taking an appeal against the decree of formal imprisonment did not delay the proceedings, since the investigation was carried on while the appeal was pending. Moreover, it appears that there was a delay of two months in remitting the appeal to a higher court, which required something more than another month to pass upon it, and its decision apparently was not received by the lower court until two weeks later.

When the preliminary investigation was ended the proceedings, so far as the Government was concerned, were virtually terminated. The law apparently permitted either the Government or the defendants to produce further evidence. The defendants submitted nothing, but their counsel rested the cases by presenting written statements in which the position was taken that no case had been made out against the accused in the light of the evidence before the court. I sympathize with that view, but do not consider that it is necessary nor proper for the Commission for the purpose of a determination of this case to reach a conclusion on that point. However, it seems to me that the record upon which the innocence or guilt of the accused was to be determined was of such a character that it was highly essential that the Government, in order to make a case against the accused, should have produced further evidence. And the fact that this was not done furnishes an additional, strong reason why the long period of deten-

tion of seven months cannot be justified by any necessity for such time in making the record upon which the accused men were convicted.

There are many things in the record apart from the records of judicial proceedings to which I think the Commission can give little or no weight. However, as bearing on the question of delay, I think it is proper to take note of a despatch dated July 29, 1910, addressed by Mr. Charles B. Parker, American consular representative at Mazatlán, to the Secretary of State at Washington. In that communication Mr. Parker reported that on July 25th the judge decided to grant bail to Chattin in the amount of 15,000 pesos. Mr. Parker further reports that he was informed by the district judge that there was "a clear case against two of the defendants, Haley and Englehart". It therefore appears that approximately four months before the termination of the period of investigation, and more than six months prior to the date of sentence, the judge expressed himself convinced of the guilt of two of the four accused men whose cases it seems to me were certainly not more susceptible of proof than those of the other defendants. Under date of September 3, 1910, Mr. Parker reported that he had been advised by the American Ambassador at Mexico City to insist on bail for one of the conductors who was sick, and that the judge had stated that the accused men could not be admitted to bail yet "because the case had not progressed far enough".

International law requires that in the administration of penal laws an alien must be accorded certain rights. There must be some grounds for his arrest; he is entitled to be informed of the charge against him; and he must be given opportunity to defend himself.

It appears to me from an examination of the record that the defendant Chattin first learned of the charge against him when he was called into court. It is not disclosed that a specific charge was made against him, but it is recorded that he stated "with regard to the facts under investigation" that he knew nothing about certain things which had been testified against him. In the decision rendered by a higher court on October 27th, sustaining the decree of formal imprisonment, it is said that it was not material that the crime charged was not specifically stated, and the crime is described "as it appears so far, embezzlement". The record does not show that any notice of the charge so stated was served on the defendant, although his lawyer probably could take notice from the record.

On December 17, 1910, a higher court sustained the decree of formal imprisonment against two of the conductors, and directed that the decree of imprisonment for the crime of embezzlement should be amended and that imprisonment should be decreed "for the crime of fraud with breach of trust". In a brief dated December 26, 1910, which was filed by the prosecuting attorney, the conclusion is expressed that offenses charged against the four conductors did not constitute the crime of embezzlement. It seems to me that there is an unfortunate degree of uncertainty on the point whether the defendants were ever properly notified of the offenses with which they were charged. However, I do not think that the Commission is in a position, in the light of the record, to formulate a conclusion that there was impropriety on this point. The subject is one with respect to which an international tribunal should attach more importance to matters of substance than to forms.

Much was said during the course of argument with regard to improper evidence in the record, particularly the anonymous accusations filed with

the judge by Brown, the superintendent of the Southern Pacific Railroad Company. The report seems to have been prepared by persons evidently resident in the state of California who were employed by Brown to make an investigation of rumors that conductors were defrauding the railroad company. In view of the nature of this report, it seems to be clear that the authors might well deem it proper and advisable not to sign it. Brown appeared in court on August 2nd and made sweeping charges against the four conductors. He stated that he had commissioned private detectives to make an investigation and as a result they succeeded in *proving* in the month of June, 1910, that the conductors and others, whom he did not remember, were appropriating money due the company, and that they had a well-organized "stealing scheme". This he could prove, he said, by delivering to the court notes which the detectives had made. He expressed a supposition that irregularities such as had caused the court's investigation had been occurring since the guilty employees entered the service of the company, and he stated that sometime ago many employees were discharged for irregularities. While Brown was submitting to the judge his conclusions, suppositions and offers of anonymous reports, the defendants were in jail. It seems to me that if Brown deemed it proper to exert himself as he did to bring about the conviction of the accused, he could have employed less crude and more efficient methods. I have already indicated the view that, having in mind the system of criminal jurisprudence in Mexico, any conclusions concerning objections to evidence of this character must be grounded not on the fact that the judge received it, but upon the nature of the use which he made of it. I do not question his motives nor competency, nor undertake to reach conclusions regarding his mental operations. But it is pertinent to note that the record of evidence collected during the period of investigation was the record on which the defendants were convicted. In view of the use made of the anonymous reports, as shown by the sentence given by the judge at Mazatlán on February 6, 1911, I cannot but conclude that these reports in some measure influenced the sentence.

The Commission has repeatedly expressed its views with regard to the reserve with which it should approach the consideration of judicial proceedings. Generally speaking, we must, of course, look to matters of substance rather than of form. Positive conclusions as to the existence of some irregularities in a trial of a case obviously do not necessarily justify a pronouncement of a denial of justice. I do not find myself able fully to concur in the general trend of the argument of counsel for the United States that the record of the trial abounds in irregularities which reveal a purpose on the part of the judge at Mazatlán to convict the accused even in the absence of convincing proof of guilt. A considerable quantity of correspondence and affidavits included in the record give color to a complaint of that nature against the judge. Whatever may be the basis for the charges found in evidence of this kind, I am of the opinion that the conclusions of the Commission must be grounded upon the record of the proceedings instituted against the accused. Having in mind the principles asserted by the Commission from time to time as to the necessity for basing pecuniary awards on convincing evidence of a pronounced degree of improper governmental administration, and having further in mind the peculiarly delicate character of an examination of judicial proceedings by an international tribunal, as well as the practical difficulties inherent in such examination, I limit myself to a rigid application of those principles in the instant case by concluding that the Commission should render an award, small in

comparison to that claimed, which should be grounded on the mistreatment of the claimant during the period of investigation of his case. While deeply impressed with the importance of a strict application of the principles applicable to a case of this character, such application does not, in my opinion, preclude a full appreciation of human rights which it was contended in argument were grossly violated, and which it is clearly shown were in a measure disregarded with resultant injury to a man who languished in prison for seven months and was severely sentenced on scanty evidence for the alleged embezzlement of four pesos. I do not think it can properly be said that he made an *escape* from jail at the end of eleven months of his sentence, when in a document produced by Mexico it is stated that the accused "were freed at the time the Madero forces entered" the place where they were imprisoned.

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 B. E. Chattin, $5,000.00 (five thousand dollars), without interest.

Dissenting opinion

Fernández MacGregor, Commissioner:

1. This is a case in which the United States of America charges a court of the United Mexican States with maladministration of justice to the prejudice of four citizens of the United States who were prosecuted before said court for the crime of embezzlement. Two decisions appear in the record: One in first instance, dictated by the District Judge of Mazatlán, and another on appeal, dictated by the Justice of the Third Circuit Court of the Federation.

2. This Commission has expressed, in general, its idea of what constitutes a denial of justice, where this expression is confined to acts of judicial authorities only. In the decision rendered in the case of *L. F. H. Neer and Pauline E. Neer*, Docket No. 136,[1] is held that, without attempting to announce a precise formula, its opinion was:

"(1) That the propriety of governmental acts should be put to the test of international standards, and (2) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."

In the case of *Ida Robinson Smith Putnam*, Docket No. 354,[2] I held, with the assent of the Presiding Commissioner, in referring to the respect that is due to the decisions rendered by high courts of a state:

"The Commission, following well-established international precedents, has already asserted the respect that is due to the decisions of the highest courts of a civilized country (case of *Margaret Roper*, Docket No. 183, paragraph 8)[3]. A question which has been passed on in courts of different jurisdiction by the

[1] See page 60.
[2] See page 151.
[3] See page 145.

local judges, subject to protective proceedings, must be presumed to have been lairly determined. Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law."

The charges made against the procedure followed by the District Judge of Mazatlán must be judged in the light of these standards, which I believe justified and prudent. Such charges are, in short, the following: (1) That there was unlawful arrest or detention; (2) influence exercised by the Governor of the State of Sinaloa to have the accused convicted; (3) improper consolidation of the proceedings against the four conductors; (4) undue delay in the proceedings; (5) requirement of exorbitant bail for the provisional release of the accused; (6) lack of knowledge on the part of the accused as to the charges filed against them; (7) lack of counsel and interpreter on the part of the accused; (8) lack of oath by the witnesses who testified; (9) lack of confrontations between the witnesses and the accused; (10) lack of insufficiency of hearings in open court; (11) imposition of penalties out of proportion to the offenses committed; (12) lack of evidence of guilt of the accused and (13) bad treatment of the accused during their confinement in jail.

3. The unlawful arrest of the accused is not proven; neither is the undue influence of the Governor of the State of Sinaloa; nor the lack of counsel or interpreters; nor that the bail required may have been exorbitant; nor the absolute lack of evidence against the accused, nor that there may have been intentional severity in the sentence imposed; nor is it proven, finally, that the accused may have suffered bad treatment in prison. (See the opinion of the Presiding Commissioner.) On the other hand, the following charges are proven: *(a)* Lack of adequate investigation; *(b)* insufficiency of confrontation; *(c)* that the accused was not given the opportunity to know all the charges made against him; *(d)* delay in the proceedings; *(e)* lack of hearings in open court; and *(f)* continued absence of seriousness on the part of the Court.

4. The study which I have made confirms the Presiding Commissioner's conclusions with respect to the charges which he finds unfounded, so that it is necessary for me to examine only the remaining charges to compare them, if I find them sustained, with the standards of international law.

5. It has been alleged that the proceedings instituted against the four conductors should not have been consolidated, because there was no evidence to justify this step. The records show that the consolidation was decreed by the Judge on August 3, 1910; previous to this date the investigation made regarding Chattin had already advanced; on July 19th the Judge received the police reports from Barraza and his associates, which the latter ratified in his presence, and it was only then that sufficient grounds were judged to exist to decree the consolidation. The latter is decreed when there are plausible reasons; complete evidence is not necessarily required. The consolidation means only a saving of time in the proceedings and unity in the judicial action; hence the consolidation always appears as necessary or proper at the beginning of the action, when all the evidence establishing a case has not yet been gathered. It is, therefore, sufficient that there may be a strong presumption, to order this purely economical proceeding, and in the instant case the mere statements of the first witnesses indicated that there might be some probable connection between the delinquent acts

that were imputed to the four conductors. In fact, Ramírez had testified that he sold tickets illegally in combination with Chattin, who was, in turn, in connivance with the other conductors; Barraza and his police associates testified that they had traveled on the railroad lines using false tickets which were always accepted by the corresponding conductors, asserting, further, that those who sold the tickets to them had claimed to be in connivance with the conductors, which could be corroborated to a certain extent by the fact that the unlawful ticket-sellers on one line of the railroad recommended Barraza and his associates to the unlawful sellers in another line of the railroad. The possible connection becomes the more probable when there are taken into account not only the cases of the conductors but those of the Mexican brakemen and other employees of the railroad who were involved in the affair. The Judge gave the reasons for his decree of consolidation, referring only to the applicable articles of the Federal Code of Criminal Procedure, and it suffices to see that Article 329 of said Code provides for this consolidation of actions brought for connected crimes; that Article 330 defines as connected crimes those committed by several persons, even if at diverse times and places, but through agreement among them; and, finally, that consolidation should be decreed ex officio; that is, by a voluntary act of the Judge (Art. 333) to justify such step. Moreover, the accused protested against the consolidation and the Judge limited himself to answering them; that if they filed their complaint in due form he would consider it. A consolidation can not, in general, cause irreparable damage to the defendants; although the most advanced action has to wait for the more backward actions to mature, nevertheless the legal provisions which oblige the Judge to terminate the preliminary investigation *(instrucción)* of the cases within a definite period of time (five months in this case) remain in force; so that it is not evident that the consolidation could have prejudiced (in the international sense of this term) any of the defendants in this case. The Presiding Commissioner is of the opinion that Chattin was, in this case, the one who could suffer the least by the consolidation. I consider that legally Chattin was the one who could suffer the most by the consolidation, for the reason that the proceedings against him were the most advanced and had to wait for the proceedings against the other conductors, or other persons involved in this case, to mature. But aside from all this reasoning which only serves to explain a question of domestic law, I am of the opinion that a judicial decision of a sovereign state can not be attacked by another state before an arbitral tribunal, because domestic precepts regarding consolidation may have been violated, as such internal violations can not constitute a violation of international law or result in damage clearly shown to have been suffered by citizens of the claimant government.

6. With regard to the undue delay in the proceedings, the record shows at once that certain proceedings could have been carried out with more diligence. The tickets and other documents contained in the record could have been exhibited to Chattin before it was actually done; the Judge did nothing in the case, between the end of July and the beginning of October, 1910; the witnesses who claimed to have handed four pesos to Chattin, testified on October 21st, and the report from the conductor on the money delivered to the company was not asked until November 11th; certain witnesses to whom Ramírez alluded in July were not summoned until November 22nd, which made it impossible for some of them, as Virgen, to be found, etc. But it must be noted that all these delays do not violate,

of course, any local law, since they refer only to the instruction period of the prosecution, which the Judge was carrying out, and the law allows him, at this stage, to use his discretion without any limits except that of terminating the preliminary investigation within a certain period, which was five months in the present case. (Art. 87 of the Federal Code of Criminal Procedure.) Now, Chattin's case was started on July 9, 1910, and on November 18th the Judge considered the investigation as completed, which means that he did it within the term of five months, to which I have referred above. In the *Roberts* case, Docket No. 185,[1] the Commission, referring to the time that an alien charged with crime may be held in custody pending the investigation of the charges against him, stated:

"Clearly there is no definite standard prescribed by international law by which such limits may be fixed. Doubtless an examination of local laws fixing a maximum length of time within which a person charged with crime may be held without being brought to trial may be useful in determining whether detention has been unreasonable in a given case."

The present case had been brought to trial on January 27, 1911, and it was decided in first instance on February 6th of the same year; that is to say, before the lapse of seven months after the initiation of the first proceeding instituted against Chattin. I believe that, from an international point of view, all incidental delays in general procedure disappear before an international tribunal, which can not call the Judge to account for each one of his acts, as if it were his hierarchical superior. This same criterion necessarily has to be applied to other defects which may be certainly found in the Judge's acts.

7. I do not believe that the accused was ignorant of a single one of the charges made against him, for the simple reason that the records formed in a criminal process are not secret, according to Mexican law, and are, from the time of their commencement, at the disposal of the defendants or their counsel, who have the right to attend all the proceedings for filing of evidence and other proceedings held in Court (Art. 20, section IV, of the Federal Constitution of 1857 and Art. 39 of the Federal Code of Criminal Procedure). There is no trace in the record in question of the fact that the accused, Chattin, was at any time deprived of these rights, and, on the contrary, it is established that on many occasions notice was served on him and his counsel of the different steps that were being taken in the process. It has been said in this connection that the accused had no knowledge of a document which contains a record of the investigations made by certain detectives from the United States at the request of the Southern Pacific Railroad of Mexico to ascertain whether the conductors of the trains of such railroad were defrauding the company by accepting tickets issued illegally. The record shows, under date of August 2nd, less than a month after the proceedings had been initiated, the statement of Elbert N. Brown, superintendent of the railroad in question, who referred to the private investigation made by the detectives from Los Angeles, California, U.S.A.; said superintendent made a further statement on August 3rd, and at the latter proceeding he exhibited a set of papers of 35 sheets containing the information that has been called secret. By decree of August 3rd, the judge ordered that the exhibited documents be annexed to the record and their corresponding translations be made, in view of the fact that they were in

[1] See page 77.

English, one Arturo E. Félix having been appointed translator for such purpose, and the latter accepted the commission and asked for the documents in question, which were delivered to him immediately. Later, on December 18th, the entire record was ordered to be placed in the hands of the defendant for three days so that he might take notes. Since the aforementioned documents were annexed to the record, and since the record could be consulted by the defendant and by his counsel, according to the legal provisions above cited, theoretically and legally Chattin could take notice of the charges placed against him as a result of the private investigation made by the detectives from Los Angeles, and, if neither he nor his counsel made use of their rights, such a circumstance can not furnish grounds for the responsibility of the District Judge of Mazatlán. It can not be argued that this disputed document was in the possession of the translator, for, even in such case, it was legally within the reach of the defendant and his counsel. It is an established fact that the counsel had knowledge of this information. Counsel Adolfo Arias, in the motion dated January 31, 1911, signed by Parrish, Englehart, and Haley, makes reference to the proceeding in which Brown delivered said documents (folio 192 of the record); counsel Fortino Gómez makes reference to the same secret testimony of the same detectives from Los Angeles, in his motion dated January 16, 1911, folio 209; and it is to be taken into account that all the counsel of the defendants in this case were wholly in agreement and communicated with one another in regard to the circumstances of the proceedings, as established in the record of this claim. It must be noted, also, that if the information adduced by Brown created an unfavorable impression which, it is said, was had by the Court towards the accused, the latter and his counsel could have eliminated such impression by presenting proper evidence which the Judge could not legally ignore. There is no proof of the defendant's having made use of this right, either. Finally, it must be also remembered that the Judge did not base himself in his decision on the results of this so-called secret information, for he limited himself to considering the real evidence of guilt which existed against the accused. In view of the above consideration, I believe that the charge under discussion can not be maintained.

8. It has been alleged that the trial proper (meaning by trial that part of the proceedings in which the defendants and witnesses as well as the Prosecuting Attorney and counsel appear personally before the Judge for the purpose of discussing the circumstances of the case) lasted five minutes at the most, for which reason it was a mere formality, implying thereby that there was really no trial and that Chattin was convicted without being heard. I believe that this is an erroneous criticism which arises from the difference between Anglo-Saxon procedure and that of other countries. Counsel for Mexico explained during the hearing of this case that Mexican criminal procedure is composed of two parts: Preliminary proceedings *(sumario)* and plenary proceedings *(plenario)*. In the former all the information and evidence on the case are adduced; the *corpus delicti* is established; visits are made to the residences of persons concerned; commissions are performed by experts appointed by the Court; testimony is received and the Judge can cross-examine the culprits, counsel for the defense having also the right of cross-examination; public or private documents are received, etc. When the Judge considers that he has sufficient facts on which to establish a case, he declares the instruction closed and places the record in the hands of the parties (the defendant and his counsel on the one side and the Prose-

cuting Attorney on the other), in order that they may state whether they desire any new evidence filed, and only when such evidence has been received are the parties in the cause requested to file their respective final pleas. This being done, the public hearing is held, in which the parties very often do not have anything further to allege, because everything concerning their interests has already been done and stated. In such a case, the hearing is limited to the Prosecuting Attorney's ratification of his accusation, previously filed, and the defendants and their counsel also rely on the allegations previously made by them, these two facts being entered in the record, whereupon the Judge declares the case closed and it becomes ready to be decided. This is what happened in the criminal proceedings which have given rise to this claim, and they show, further, that the defendants, including Chattin, refused to speak at the hearing in question or to adduce any kind of argument or evidence. In view of the foregoing explanation, I believe that it becomes evident that the charge, that there was no trial proper, can not subsist, for, in Mexican procedure, it is not a question of a trial in the sense of Anglo-Saxon law, which requires that the case be always heard in plenary proceedings, before a jury, adducing all the circumstances and evidence of the cause, examining and cross-examining all the witnesses, and allowing the prosecuting attorney and counsel for the defense to make their respective allegations. International law insures that a defendant be judged openly and that he be permitted to defend himself, but in no manner does it oblige these things to be done in any fixed way, as they are matters of internal regulation and belong to the sovereignty of States.

9. I have already expressed my opinion with regard to the general imputation that the accused were not informed of the charges that had been filed against them. But particular reference has been made, for instance, to the fact that the general manager of the railroad company was never confronted with the accused; that the confrontations between the accused and the witnesses who testified against them do not reveal effort on the part of the judge to find the truth; that no efforts were made to find witness Manuel Virgen, nor one Collins; that it was not attempted to establish whether it was eight or seven passes or tickets which were shown to Chattin on October 28, 1910, nor to ascertain the reason why the two witnesses on whose testimony the Judge based himself in convicting Chattin, said that the trip to which they were referring had been made on July 29th, and other charges of this nature. The Agent of Mexico averred that the general manager of the railroad was not the complainant, and that therefore it was not necessary to confront him with the prisoners. He argued that Brown had only advised the authorities that he suspected that the employees of the railroad were defrauding the company, but he made no specific charges against any individual employee. Under such circumstances he was neither a complainant nor a witness for the prosecution, because he did not refer to specific and certain facts imputable on any conductor. He added that, according to Mexican law in 1910, it was not constitutionally obligatory even to confront the accused with his accuser, specially in view of the fact that the real accuser in criminal causes is the State. Article 20 of the Constitution of 1857, in force in 1910, provides that it is the right of the accused to be informed as to the name of the accuser, if there be such, but not to be confronted with such accuser on motion of the Judge. The accused has, of course, the right to demand such confrontation and the Judge can not refuse to grant it.

10. I admit that the other deficiencies pointed out in the preceding paragraph exist and that they show that the Judge could have carried out the investigation in a more efficient manner, but the fact that it was not done does not mean any violation of international law. The Commission stated in its decision in the case of *L. F. H. Neer and Pauline E. Neer*, Docket No. 136:[1]

"It is not for an international tribunal such as this Commission to decide whether another course of procedure taken by the local authorities at Guanacevi could be more effective. On the contrary, the grounds of liability limit its inquiry to whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in willful neglect of their duties, or in a pronounced degree to improper action, or (2) that Mexican law rendered it impossible for them properly to fulfill their task."

I believe that this rule is perfectly applicable to this case; an ideal Judge or a more experienced Judge would have carried out the proceedings in a better way, but the Commission is not competent to judge such a question.

11. The negligence of the Judge in holding certain proceedings is alleged specially with respect to the evidence against the accused. The essential point is that the Judge may have had sufficient evidence to convict them and not that he may not have accumulated more evidence when he was able to do so. The first statement against Chattin was rendered by Cenobio Ramírez; the latter stated that various persons had seen him deal with Chattin; such persons having been summoned, Ramírez's allegations could not be corroborated in an evident manner and, perhaps, for this reason the Judge abandoned this clue by not summoning all the persons named by Ramírez, etc. But it is doubtless that two witnesses free from all impediment testified that Chattin had collected in the train four pesos for a passage without giving a receipt, which fact was thereafter verified by the report rendered by Chattin that day to the company, that the four pesos had not been accounted for by him. The Federal Code of Criminal Procedure provides, in its Article 264, that testimony rendered in the manner in which it was rendered against Chattin, constitutes full evidence. The crime of embezzlement is defined by Article 407 of the Penal Code, as follows:

"He who, fraudulently and to the prejudice of another, disposes wholly or in part of an amount of money in coin, in bank bills, or in paper currency; of a document entailing an obligation, release, or transfer of rights, or of any personal property belonging to another, which he may have received in virtue of any of the contracts of pledge, agency, deposit, lease, *commodatum*, or any other contract which does not transfer title, will suffer the same penalty that, taking into account the circumstances of the case and the delinquent, would be imposed on him, had he committed larceny of such things."

Taking advantage of his position Chattin had appropriated to himself the four pesos that had been delivered to him, which is sufficient to justify the penalty of two years that was imposed on him, conformably with Article 384 of the Criminal Code. Such penalty does not reveal severity on the part of the Judge, for it is the pure and simple application of Mexican law. The latter provides that the medium penalty be imposed whenever there are no extenuating or aggravating circumstances, and such penalty is, in this case, two years.

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[1] See page 60.

12. In the procedure under examination, the requisites established by international law in matters of this kind were observed in the principal features; the accused were arrested for probable cause; they had the opportunity to know all the charges pressed against them; they were permitted to defend themselves, there being no indication of the defense having been hampered; all the defenses which they pleaded were considered; they were confronted with the witnesses who testified against them; they were given the opportunity to be heard in open trial; they were convicted on evidence which, although not abundant, nevertheless met the requisites of Mexican law necessary to convict them; finally, the penalty fixed also by Mexican law was imposed on them. Hence, if the essential rights granted by the law of nations were respected, it matters not that certain precepts of the domestic adjective law may have been violated or that the Judge may have shown a certain degree of negligence and carelessness. This opinion is supported by the decision rendered in the *Cotesworth and Powell* case, which is celebrated in this matter and which summarizes what is established in international law on the question of denial of justice and on maladministration of justice. I quote the following passages:

"The judiciary of a nation should be respected as well by other nations as by foreigners resident or doing business in the country. Therefore, every definite sentence of a tribunal, regularly pronounced, should be esteemed just and executed as such. As a rule, when a cause in which foreigners are interested has been decided in due form, the nation of the defendants can not hear their complaints. It is only in cases where justice is refused, or palpable or evident injustice is committed, or when rules and forms have been openly violated, or when odious distinctions have been made against its subjects that the government of the foreigner can interfere * * *."

"No demand can be founded, as a rule, upon more objectionable *forms* of procedure or the *mode* of administering justice in the courts of a country; because strangers are presumed to consider these before entering into transactions therein. Still, a plain violation of the substance of natural justice, as, for example, refusing to hear the party interested, or to allow him opportunity to produce proofs, amounts to the same thing as an absolute denial of justice * * *."

"Nations are responsible to those of strangers, under the conditions above enumerated, *first*, for denials of justice, and, *second*, for acts of notorious injustice. The first occurs when the tribunals refuse to hear the complaint, or to decide upon petitions of the complainant, made according to the established forms of procedure, or when undue and inexcusable delays occur in rendering judgment. The second takes place when sentences are pronounced and executed in open violation of law, or which are manifestly iniquitous." (Cotesworth & Powell; Moore's *International Abritrations*, pages 2050, *et seq.*)

13. To appraise the defective administration of justice which the United States alleges in this case (the American Agent calls it denial of justice in his Memorial and Brief), the Presiding Commissioner has entered into a study of the differences which exist between wrongful acts when the latter are caused by the judicial department of a nation, on one hand, and the same acts when caused by either the executive or the legislative department. I believe that the grouping of things in categories is very beneficial, provided these arise from or show essential differences. Establishing purely formal categories, if useful for certain determined purposes of economy of thought, carry the danger of inducing one to commit transcendental errors. There is no doubt but that there is a slight difference between a judicial act which involves refusal to repair a previous wrongful act and a judicial act which, without a previous injury, causes the damage of itself.

But this is not important in fixing the liability of the State. The latter exists only when the judicial act causes damage in violation of a principle of international law, and as much in the case of a previous wrongful act as in the case where the latter is lacking the State is only liable for its own act; in the first case, for the damage which is caused by its failure to repair a previous injury, and in the second, for the damage caused by its act violating the substantive or adjective law. In both cases the liability is direct, in international questions, as recognized by the Presiding Commissioner himself, when he says, in referring to so-called indirect liability: "*Though, considered in connection with the alleged delinquency of the government itself, it is quite as direct as its liability for any other act of its officials. The liability of the government may be called remote or secondary only when compared with the liability of the person who committed the wrongful act (for instance, the murder)* * * *." And I believe that the liability of this person, if a private person, is not an international question.

14. If this is so, if the liability arising out of judicial acts of any kind is direct, then it is the same as the liability arising out of wrongful acts of the executive and legislative departments, it resulting therefrom that the three classes must be governed by identical principles, inasmuch as they do not differ essentially. The liability for executive or legislative acts of a government is not, then, stricter or greater than the liability arising out of judicial acts. It does not matter that some decisions may have established that acts of the executive or legislative departments give rise to liability even when they may not contain the element of bad intention. The intention has nothing to do in international law. What is to be determined, as already stated (and this agrees with the definitions which have been given as to what is an international claim), *is whether there exists an injury*, and whether the act which causes it violates *any rule of international law*, regardless of whether the act is intentional or not.

15. However, it seems that Anglo-Saxon practice has tried to establish this difference between judicial and executive acts; with regard to the latter, it has been said that once there exist the two elements, damage to a citizen of another country and violation of international law, the indemnization accrues at once, without any further steps, whereas such is not the case when dealing with judicial acts, for it is then necessary that the remedies furnished by the local law be exhausted, and, further, that the act involved bad faith, willful neglect of duty, or very defective administration of justice.

16. In my opinion, different things are confused and tests are applied which should serve for widely different classes of ideas. With respect to exhausting local remedies, I maintain, together with many publicists, that it should always be required with regard to any class of acts. An international claim should not accrue except as a last resort and not immediately as desired by the practice of Anglo-Saxon countries, which establish such principle because in them the State can not be sued. I consider that it is more dangerous to admit the right to an immediate claim when referring to wrongful acts of the executive or legislative, as a nation will resent more this procedure if it is a question of acts of the organs in which apparently sovereignty rests conspicuously, than if it is a question of violations made by its tribunals. The most important thing in the world is the preservation of peace among nations, and this is attained only through the most constant respect for sovereignty. If a nation inflicts damage on a citizen of another,

the one who causes the injury should be given the opportunity to repair it *through her own means*, and these are generally represented by judicial remedies. In this sense, it can be said that all claims accrue from a denial of justice. Hence, in this respect there is no difference between claims arising out of acts of the different agencies of a State.

17. With respect to the test that is applied to judicial acts, to wit, that in order to give rise to an international claim they must show bad faith, willful neglect of duty, or such a deviation from the practices of civilized nations as to be recognized at first sight by any honest man, it only serves to determine when judicial acts violate a principle of international law, it being unnecessary to apply this test to executive and judicial acts, as they, due to being more direct and simple, are more easily discerned when they deviate from a certain international rule. The important thing, it is insisted, is that the act which gives rise to the claim *causes damage in violation of a rule of international law*, and this is very difficult to determine when it is a question of judicial acts. There are many acts of this nature which, although involving a violation of domestic law, either do not cause measurable damages or do not violate any specific international principle, and, in both cases, lacking one of the elements of the claim, the latter does not accrue. I believe, in view of the foregoing, that to admit the classification of liability arising out of judicial acts into direct and indirect results in the confusion of the first class with the liability arising out of acts of the executive and the legislative; and as it is attempted to apply to the latter a stricter test (the Presiding Commissioner holds that the liability for these acts is unlimited and immediate), this test would seem applicable also, by analogy, to the so-called direct liability for judicial acts, to the detriment of the respectability of decisions, so much proclaimed by publicists and by arbitral tribunals.

18. Returning to the particular case on which I am commenting, I must say that, although the Presiding Commissioner makes clear the exception that, when dealing with decisions of courts, in regard to direct as well as indirect liability, the principle of respect for the judiciary prevails, nevertheless it appears to me that his clear and righteous spirit could not remove itself from the influence of the idea that, as the acts of the District Judge of Mazatlán do not amount to a denial of justice, but to a defective administration of it, or in other words, inasmuch as they involve *direct liability*, such acts must be judged with a severity which, although it does honor to his sense of abstract justice, is not based on international law.

19. I consider that this is one of the most delicate cases that has come before the Commission and that its nature is such that it puts to a test the application of principles of international law. It is hardly of any use to proclaim in theory respect for the judiciary of a nation, if, in practice, it is attempted to call the judiciary to account for its minor acts. It is true that sometimes it is difficult to determine when a judicial act is internationally improper and when it is so from a domestic standpoint only. In my opinion the test which consists in ascertaining if the act implies damage, wilful neglect, or palpable deviation from the established customs becomes clearer by having in mind the damage which the claimant could have suffered. There are certain defects in procedure that can never cause damage which may be estimated separately, and that are blotted out or disappear, to put it thus, if the final decision is just. There are other defects which make it impossible for such decision to be just. The former, as a rule, do not

engender international liability; the latter do so, since such liability arises from the decision which is iniquitous because of such defects. To prevent an accused from defending himself, either by refusing to inform him as to the facts imputed to him or by denying him a hearing and the use of remedies; to sentence him without evidence, or to impose on him disproportionate or unusual penalties, to treat him with cruelty and discrimination; are all acts which *per se* cause damage due to their rendering a just decision impossible. But to delay the proceedings somewhat, to lay aside some evidence, there existing other clear proofs, to fail to comply with the adjective law in its secondary provisions and other deficiencies of this kind, do not cause damage nor violate international law. Counsel for Mexico justly stated that to submit the decisions of a nation to revision in this respect was tantamount to submitting her to a régime of capitulations. All the criticism which has been made of these proceedings, I regret to say, appears to arise from lack of knowledge of the judicial system and practice of Mexico, and, what is more dangerous, from the application thereto of tests belonging to foreign systems of law. For example, in some of the latter the investigation of a crime is made only by the police magistrates and the trial proper is conducted by the Judge. Hence the reluctance in accepting that one same judge may have the two functions and that, therefore, he may have to receive in the preliminary investigation *(instrucción)* of the case all kinds of data, with the obligation, of course, of not taking them into account at the time of judgment, if they have no probative weight. It is certain that the secret report, so much discussed in this case, would have been received by the police of the countries which place the investigation exclusively in the hands of such branch. This same police would have been free to follow all the clues or to abandon them at its discretion; but the Judge is criticized here because he did not follow up completely the clue given by Ramírez with respect to Chattin. The same domestic test—to call it such—is used to understand what is a trial or open trial imagining at the same time that it must have the sacred forms of common-law and without remembering that the same goal is reached by many roads. And the same can be said when speaking of the manner of taking testimony of witnesses, of cross-examination, of holding confrontations, etc.

20. In view of the above considerations, I am of the opinion that this claim should be disallowed.