

Decisions

LEE A. CRAW (U.S.A.) *v.* UNITED MEXICAN STATES

(September 26, 1928. Pages 1-2¹).

(Text of decision omitted.)

NATIONAL PAPER AND TYPE COMPANY (U.S.A.) *v.* UNITED
MEXICAN STATES

(September 26, 1928. Pages 3-5.)

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim against the United Mexican States is made by the United States of America on behalf of the National Paper and Type Company, an American corporation, for a sum made up of two items.

1. The first item claimed is for the nonpayment of the agreed purchase price, partly fixed in dollars, partly in pesos, of printing machinery, paper envelopes and other goods alleged to have been sold and delivered by the claimants to various departments of the Mexican government between November 12, 1912, and October 16, 1914.

¹ References to page numbers herein are to the original report referred to on the title page of this section.

The claimants admit that goods sold and delivered to the Printing Office of the National Museum, to the amount of \$1,366.57, have already been paid, and they allow a sum of \$195.84 for goods returned. The amount claimed by them is \$26,639.43, U.S. currency.

The respondent government admits the sale and delivery of goods for \$11,401.48 and 23,996.65 Pesos, Mexican currency, but contests the sufficiency of the evidence produced for the rest of the goods, and submits that due to the political disorders in Mexico the Archives of the various Departments do not contain information concerning the goods in question.

No proof of the delivery of the item of goods said to have been sold for \$26.08 accompanies the Memorial. It was argued by counsel for the United States that, since the President of the company had sworn to the Memorial which includes a list giving the number, date and amount of the invoices of these goods, there was in fact before the Commission an affidavit in support of the allegations respecting this item. Under the rules the Memorial must be accompanied by the evidence on which the claimant relies in support of the allegations contained in the Memorial. The fact that under the rules of the Commission as they existed when the Memorial was framed it was required that the Memorial be verified by the claimant would not justify the Commission in sustaining the views of counsel in such a manner that its action would in effect constitute a precedent in the light of which a pleading might be regarded at once as a pleading and as evidence. This item must therefore be disallowed.

The remainder of the goods in question is alleged to have been sold to the House of Correction for Boys and the Correctional School connected therewith, Tlalpam, D. F., Mexico. Invoices and receipts covering all those goods have been submitted. In some cases the receipts have been signed by persons who, in the lack of evidence to the contrary, must be assumed to have been representatives of the institution just mentioned. In many cases, however, the receipts are signed by Guerra Hermanos, a grocery firm in Mexico City. With regard to this point the claimants have submitted the affidavit of an accountant employed by them stating that he, from his handling of the funds and documents of the claimant company, knows that the goods sold to the said institution in many cases, according to orders given by the institution, were delivered to Guerra Hermanos who undertook to bring the goods by their team to the Correction House at Tlalpam. In view of the fact that no declaration from Guerra Hermanos has been produced by the respondent government, the Commission holds that there is sufficient proof of the delivery of the goods in question.

A part of the goods delivered were sold and delivered during the period of the de la Huerta administration, but for the reasons set forth by the Commission in the *George W. Hopkins* case, Docket No. 39,¹ this circumstance does not affect the liability of the United Mexican States.

The amount in Mexican currency should be transferred into U. S. currency according to the rules applied by the Commission in the *George W. Cook* case, Docket No. 663.²

¹ See page 41.

² See page 209.

Interest should be allowed at the rate of six per centum per annum from October 16, 1914, the date of the termination of the transactions in question.

2. The second item claimed is for the nonpayment of sixteen postal money orders for an aggregate sum of 386.65 Pesos, Mexican currency, purchased by the claimant at the post office of the Mexican government at Cordoba, Vera Cruz, on August 19, 1914, and payable at sight to the claimant at Mexico City. The said postal money orders were presented for payment at various times during the period between August 19, 1914, and November 10, 1914, but were not paid.

With regard to this item, the only question raised is with respect to the rate of exchange to which the amount claimed should be transferred into U. S. currency. The Commission applies the principles laid down in the case of *George W. Cook*, Docket No. 663.

Interest should be allowed at the rate of six per centum per annum from November 10, 1914.

Decision

The United Mexican States shall pay to the United States of America on behalf of the National Paper and Type Company \$26,613.35 (twenty-six thousand six hundred and thirteen dollars and thirty-five cents) with interest thereon at the rate of six per centum per annum from October 16, 1914, to the date when the last award is rendered by the Commission, and \$192.74 (one hundred ninety-two dollars and seventy-four cents) with interest thereon at the same rate from November 10, 1914, to the date when the last award is rendered by the Commission.

EDGAR A. HATTON (U.S.A.) *v.* UNITED MEXICAN STATES

(September 26, 1928. Pages 6-10.)

NATIONALITY, PROOF OF. Evidence of nationality of a somewhat inconclusive character *held* sufficient when respondent Government had produced nothing to throw doubt upon claimant's nationality.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—PRESUMPTIONS AND BURDEN OF PROOF.—EFFECT OF ADMISSION IN ANSWER OF JURISDICTIONAL FACT. An admission of nationality made in answer of respondent Government cannot take the place of adequate proof of nationality, which is a jurisdictional fact. Circumstance that respondent Government admitted nationality does not relieve claimant Government of proving such fact.

ADEQUACY OF RECEIPT AS EVIDENCE.—AUTHENTICATION OF EVIDENCE. Authentication according to Mexican law of receipt given by commander of armed forces for animals taken *held* not necessary. Signature of officer proved genuine. Fact that claimant's name not shown on receipt *held* not fatal to his claim.

MILITARY REQUISITION. Claim for military requisition *allowed*.

Cross-reference: Annual Digest, 1927-1928, p. 485.

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of Edgar A. Hatton in the sum of \$575.00, said to be the value of two mules and five saddle horses alleged to have been requisitioned by General Horacio Lucero, commander of Mexican Federal troops, in the month of March, 1924, at a ranch called San Gregorio, located at Villa Acauñá, Coahuila, Mexico. Interest is claimed from March 2, 1924, until the date of payment of any award rendered.

The case involves a small amount, but during the course of written and oral arguments there was raised a number of somewhat vexatious and important questions of evidence which require careful consideration.

In oral argument counsel for Mexico contended that the American citizenship of the claimant was not adequately proved. The proof of nationality accompanying the Memorial of the United States consists of, first, an affidavit by two persons in which they state that "they have known Edgar A. Hatton all of his life, and know him to be an American citizen"; and, second, an affidavit by the claimant in which he asserts that he is a citizen of the United States by birth.

Although the contention respecting nationality was raised in oral argument, the American citizenship of the claimant was expressly admitted in the Answer of the Mexican Government. And in the Mexican brief reference is made to this admission, and it is stated that "in view of the fact of the leniency with which the Honorable Claims Commission has solved the question of adequate proof of the nationality of the claimant, the Mexican Agent does not think himself justified to deny that the American citizenship of the claimant has been proved". After some argument to the effect that proof of nationality is very meagre, it is further stated in the brief that the Mexican Agent "can only call the attention of the Honorable Commission to this fact inasmuch as his absolute right of denial cannot be adduced in this occasion for the considerations aforesaid".

It is not altogether clear what is meant by the statement in the Mexican brief that the Commission has solved questions of adequate proof of nationality with "leniency". Nations of course do not make a practice of pressing diplomatic reclamations of persons other than their own nationals. The Commission has in the past accepted evidence of facts from which it could, in its judgment, draw sound conclusions with respect to the applicable law. But in any case in which there is an absence of such evidence or any evidence throwing doubts upon the nationality of the claimant, it need scarcely be said that the importance of the question of citizenship has not, and will not be, overlooked. The Commission does not minimize the importance of this subject. It realizes, of course, that the nationality of claimants is the justification in international law for the intervention of a government of one country to protect persons and property in another country, and, further, that by the jurisdictional articles of the Convention of September 8, 1923, namely, Articles I and VII, each Government is restricted to the presentation of claims in behalf of its own nationals.

The proof of nationality submitted with the American Memorial is assuredly very meagre, and adverse criticism of it made by counsel for Mexico appears to be well founded. As has been observed, there appears besides the claimant's own statement, only an affidavit sworn to by two persons in which they state that they know the claimant "to be an American citizen". That is a conclusion of law. The affidavit would have been of a different character had it furnished information with regard to the birth or the naturalization of the claimant. From proven facts of that kind the Commission could reach a positive conclusion with regard to claimant's nationality under the Constitution or under statutory provisions of the United States.

It was stated in oral argument by counsel for the United States that, had the nationality of the claimant been challenged in the Mexican Answer instead of being admitted, the claimant Government would have been put on guard and could have amplified its proof. Doubtless that is true. However, it is proper to observe with reference to this point that, as has already been pointed out, convincing proof of nationality is requisite not only from the standpoint of international law, but as a jurisdictional requirement. And the Commission, in refusing, as it does, to sustain the contention made in oral argument that the claim should be rejected, should not be understood to concede that admissions of the respondent Government of the nationality of claimants could in all cases take the place of adequate proof of nationality. Such admissions do not appear to be analogous to a waiver before a domestic court of a question of personal jurisdiction. The jurisdictional provisions of the Convention of September 8, 1923, are concerned with certain specified claims. Having in mind that the admission in the Mexican Answer relates to the nationality of a person resident in Mexico and owning property in that country; that under the arbitral agreement the Commission must take cognizance of all documents placed before it; and that nothing has been adduced to throw any doubt on the assertions of the claimant who swears that he was born in the United States, or on the sworn statement of persons who, in addition to their statement respecting the claimant's citizenship, state that they have known the claimant all their lives, it is believed that the claim should not be rejected on the ground of unsatisfactory proof of nationality.

The United States presented as evidence a copy of a receipt said to have been given to the claimant by General Lucero which reads as follows:

"Vale a la Hda de San Gregorio por 7 siete caballos para la tropa que es a mi mando.

San Gregorio 2 de Marzo—924 El Gral de B.

H. LUCERO."

The Government of Mexico presented a statement from Francisco Ibarra, who it is said acted as guide for General Lucero. This man asserts that a horse and a mule were taken from the San Gregorio Ranch, but that the horse was returned. As against such testimony it is proper to take account of the fact that the claimant has been allowed to remain in possession of a receipt, evidencing that a larger number of animals was taken and that none was returned. The Commission cannot properly disregard the evidential value of that receipt. And it may be particularly pertinent to note with respect to this point that receipts for military

requisitions have been given important standing and recognition in international law and practice. The convention of The Hague of 1907 respecting the law and customs of war on land contains provisions with regard to receipts for military requisitions and contributions.

It was stated in behalf of Mexico that the receipt had not been "authenticated" as required by Mexican law. And furthermore it was urged that the receipt may either have been altered or indeed may have been a fraud, since on the one hand, it refers to "siete caballos" whereas the claimant asked compensation for two mules and five saddle horses, and on the other hand, the body of the receipt was written in pencil and the signature in ink.

It is unnecessary to cite legal authority in support of the statement that an alien in the situation of the claimant is entitled under international law to compensation for requisitioned property. No formalities required by domestic law as to the form of authentication of a receipt for requisitioned property, or the failure of a military commander to comply with those formalities could render such a receipt nugatory as a record of evidential value before this Commission. The important point with respect to the authenticity of the receipt is that the signature thereto by General Lucero is admitted by the Mexican Government. The claimant having received a receipt which recites the taking of seven horses might have presented his claim in the terms of the receipt. However, he accepted, as doubtless he was obliged to do, the form of receipt given to him, and he explains the precise nature of the property taken. The Commission can properly accept his explanation rather than assume that for some reason the claimant chose to alter the receipt. No evidence has been adduced to prompt a supposition that such a fraud was committed, and there is good reason to suppose that it was not. As to the suggestion or contention of counsel that the receipt may be a fraud in view of the fact that the body of the document produced in evidence was in pencil and the signature in ink, it may be observed that such a fraudulent manufacture of the body of the receipt apparently could only have been committed in case the claimant had obtained possession of a piece of paper bearing General Lucero's signature, and some one had, for purposes of fraud, inserted the body of the receipt above the signature. In the absence of any proof suggesting such a crude fraud, the suggestion must be rejected.

There remains to be considered one further point. The receipt accompanying the Memorial does not mention the claimant as the person from whom the animals were requisitioned. It is true that the claimant is in possession of that receipt, but it would be possible for him to be so even if he were not the owner of the ranch and animals found there. It would have been desirable that the United States furnish evidence on this point. To be sure, if Hatton was not the owner of the ranch, Mexico could undoubtedly have been able to show that fact. There should be little difficulty in obtaining information respecting this question of title. And while it is not the function of the respondent government to make a case for a claimant government, it is believed that, in view of the fact that the claimant is in possession of the receipt, and in view of the further fact that Mexico has adduced nothing to show that the claimant was not the owner of the ranch at the time of the requisition, the Commission should accept without question the claimant's allegation that the property requisitioned from the ranch belonged to him. The justification for drawing

inferences from the nonproduction of available evidence has often been discussed by domestic courts. See for examples, *Kirby v. Tallmadge*, 160 U. S. 379; *Bilokumski v. Tod*, 263 U. S. 149.

The proof of the value of the animals taken is meagre, but since it has not been contested, the claimant should have an award for the amount asked with interest from March 2, 1924.

Decision.

The United Mexican States shall pay to the United States of America in behalf of Edgar A. Hatton, the sum of \$575.00 (five hundred and seventy-five dollars) with interest at the rate of six per centum per annum from March 2, 1924, to the date on which the last award is rendered by the Commission.

WILLIAM HOLLIS (U.S.A.) *v.* UNITED MEXICAN STATES

(September 26, 1928. Pages 11-14.)

CRUEL AND INHUMANE IMPRISONMENT.—MISTREATMENT DURING IMPRISONMENT. Evidence held insufficient to establish claim for cruel and inhumane conditions of imprisonment and mistreatment by authorities during imprisonment.

The Presiding Commissioner, Dr. Sindballe, for the Commission :

Claim is made in this case against The United Mexican States by The United States of America on behalf of William Hollis, an American citizen, for indemnity in the sum of \$15,000 for inhuman treatment alleged to have been accorded him in connection with his detention under arrest at Valles, San Luis Potosí, Mexico, during the days from Friday, September 22, to Sunday, September 24, 1911.

In 1911 the claimant was residing in Mexico, employed by the Mexican Petroleum Company at Ebano, San Luis Potosí. On Friday, September 22, he was arrested at his home at Ebano upon a charge of fraud preferred by Señor Rafael Rodriguez of San Luis Potosí. It appears from the record that he had passed a worthless check for 500 pesos which Señor Rodriguez had cashed, and that he had obtained other smaller amounts from other persons. The order of arrest was issued by the Political Chief at Valles according to letters requisitorial from the Criminal Court of San Luis Potosí, and the order was executed by Camerino Enriques, the Chief of the Police at Valles. The claimant was told that he would have to walk to Valles. He protested, saying that he was suffering from acute rheumatism in his right leg and from a severe rupture (hernia). Thereupon he was allowed to go by train on his payment of the travelling expenses for himself and the guard. He arrived at Valles in the evening of the same day, and was detained there until Sunday evening, when he was sent by train to San Luis Potosí, accompanied by Camerino Enriques.

With regard to the way in which he was treated by the authorities at Valles during his detention there, the claimant alleges the following:

Immediately upon his arrival he was confined in the jail, a room fourteen feet by twenty feet in size, occupied by thirty-four prisoners, reeking with filth, with no windows and no ventilation except through a grated door, and with no sewerage or conveniences of any kind. On the following morning he was removed from this room, and for the rest of the time of his detention at Valles he was allowed to stay at the headquarters of the police. Saturday night the jailkeeper, Regino Dominguez, became drunk at a local celebration, and on his return he asked the claimant for some beer. The claimant paid for four bottles. In the course of Sunday Regino Dominguez took the claimant to several saloons, calling for drinks and demanding the claimant to pay, as well as to give him money. When the claimant showed some hesitancy in complying with the demands of the jailkeeper, the latter drew his revolver and flourished it in the face of the claimant and around his own head, saying, "Look out when I am angered, the earth trembles". The claimant was forced to spend more than eighty pesos on that Sunday. His hair, which was dark brown before this experience, became covered with white.

On Saturday the claimant was informed that he would have to walk to San Luis Potosí, about 300 kilometers unless he paid the travelling expenses. He protested and sent telegrams of protest to the American Consul at San Luis Potosí and to the Governor of the State. He further sent a telegram to Señor Rafael Rodriguez, to whom he had passed the worthless check, asking him to pay the travelling expenses—although, according to his own statement as above mentioned, he was in possession of an amount of money sufficient to cover the said expenses. He alleges that he obtained a promise from Rodriguez to the effect that the latter would refund him the expenses. Subsequently he agreed to pay and was accordingly, as already mentioned, sent by train to San Luis Potosí, where he arrived Monday morning, September 25.

On September 28 the claimant was released, the American Consul at San Luis Potosí having obtained a guarantee from the employers of the claimant for the sum due to Rodriguez, and the latter having withdrawn his charge.

A short time after his release the claimant asked the American authorities to claim an amount of \$15,000 from the United Mexican States.

The claim as set forth in this case is predicated upon allegations concerning the following matters: (1) The demand that the claimant would have to walk from Ebano to Valles and from Valles to San Luis Potosí unless he paid the travelling expenses of himself and the guard; (2) The treatment the claimant received from Regino Dominguez on Sunday, September 24; and (3) the confinement of the claimant in the jail described above during the night between Friday, September 22, and Saturday, September 23.

The facts regarding the allegations with respect to the claimant's complaint that he was obliged to walk or to pay his own travelling expenses are too indefinitely shown to make it possible to arrive at any positive conclusion with regard to misconduct on the part of the authorities. It would seem that the claimant chose to pay his travelling expenses or that some one paid them for him, and in any event, he was not forced to the detriment of his health to walk a long distance.

As regards the treatment which it is alleged the claimant received from Regino Dominguez, the question which the Commission has to decide is principally a question of evidence. The respondent government has undertaken an investigation according to which it is true that the claimant and the jailkeeper visited saloons together on the said Sunday, that the claimant paid for the drinks ordered, and that the jailkeeper was drunk, and boisterous, on one occasion throwing the claimant's money on the floor. The respondent government denies, however, that the claimant accompanied the jailkeeper otherwise than from his own free will. Now, besides the claimant's own statement, made for the first time to the American Consul at San Luis Potosí during the claimant's detention there, there is produced an affidavit by one Blodgett to the effect that he saw and heard that money was demanded from the claimant, and a letter from the American Consul at San Luis Potosí stating that the guard who brought the claimant to this city orally confirmed "the intoxication of Dominguez, the threats and demands for money". But these declarations give very few particulars. And the claimant's own declarations suffer from certain exaggerations. Further, the claimant would not seem to be in the charge of or dependent upon the jailkeeper from the time of his alleged removal from the jail, and it appears from the record that he was allowed to send messages and telegrams to several persons and to go to a hotel to take his meals, accompanied by a guard only. In view of those circumstances the Commission holds that the evidence produced does not convincingly prove that the claimant was forced to spend his money in the company of the jailkeeper on the Sunday in question.

With regard to the alleged confinement of the claimant in the jail during the first night of his detention at Valles the only evidence submitted is the statement of the claimant himself made to the American Consul at San Luis Potosí during the claimant's detention there. As the Commission entertains some doubt as to the perfect reliability of the statements of the claimant, it is found that an award cannot be based with sufficient certainty solely on the particular statement in question. Furthermore, this statement has been denied by the guard who brought him to Valles, although first in the course of a governmental investigation which—owing to revolutionary disturbances in the State of San Luis Potosí, it is alleged—did not take place until about a year after the detention of the claimant at Valles.

Decision

The claim made by the United States of America on behalf of William Hollis is disallowed.

IRMA EITELMAN MILLER, LILLIAN EITELMAN, AND
B. B. EITELMAN (U.S.A.) *v.* UNITED MEXICAN STATES

(September 26, 1928. Pages 15-17.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Evidence held not to show a failure by competent authorities to use due diligence in apprehending persons guilty of murder of American subjects.

Cross-reference: Annual Digest, 1927-1928, p. 218.

Commissioner Fernández MacGregor, for the Commission:

1. This claim is presented by the United States of America against the United Mexican States in behalf of Irma Eitelman Miller, Lillian Eitelman and B. B. Eitelman, children of George Eitelman, who at the time of his death was employed by the Cusi Mining Company as blacksmith at their mines situated in the vicinity of Cusihiuriachic, State of Chihuahua, Republic of Mexico. On the morning of September 16, 1916, the body of George Eitelman was found by the roadside bearing wounds which indicated that he had been murdered. His skull was fractured; the bones of the face and some of the bones of the back and chest were also broken. There were some indications pointing to robbery as the motive for the crime. It is alleged that on account of this killing, the children of the deceased, who are American citizens, sustained damages in the sum of \$50,000.00 United States currency, and that the Mexican Government should make compensation in that amount, as the Mexican authorities showed a lack of diligence and intelligent investigation in prosecuting the culprits, to such a pronounced degree as to constitute a denial of justice.

2. The nationality of the claimant was not challenged by the respondent Government except in the course of oral argument. The Commission considers that there is convincing evidence that the deceased, as well as the claimants, are American citizens.

3. The contention of lack of diligence or lack of intelligent investigation on the part of the Mexican authorities after the murder of George Eitelman is made in a general way; the American Consul at Chihuahua, on September 17, 1916, brought the case to the attention of the Governor of that State; on October 1 following, Dr. I. S. Gellert, a reputable resident of Cusihiuriachic, informed the aforesaid Consul that the authorities had done practically nothing, in the two weeks that had passed since the murder; then the Consul again called the attention of the Governor to the inactivity of the authorities at Cusihiuriachic, but his communication, so it is alleged, was ignored by the Mexican officials.

4. From the record it appears that the local authorities, early in the morning of September 16, 1916, proceeded to the spot at which the killing had taken place, and made an investigation, having instituted the necessary legal procedure by appointing experts to make the post-mortem examination. On September 17th following the self-same authorities proceeded to the mine at which the deceased had been working, to obtain

information about him; it was disclosed that the man had only been a fortnight on the mine, and that no one knew him well. On September 19th two men who had been arrested on suspicion were questioned, but as no evidence was found warranting their detention they were released on September 22nd. On September 20th and 21st other persons were summoned and examined, one of whom was probably the last to see Eitelman on the night of September 15th, talking to an unknown man whose general description he gave. On October 3, another man, a prospector, was arrested on suspicion, but was released on the following day for want of evidence against him. On the same day the postmortem certificate was filed by the experts. On October 9, the Supreme Tribunal of Chihuahua transmitted to the Judge at Cusiuhuiachic a letter from the American Consul to the Governor of Chihuahua, requesting greater activity in the apprehension of the culprits; the said Tribunal directed the judge to proceed with more speed and to report immediately, which he did. From that date on nothing is recorded, but the Mexican Agent filed evidence to the effect that the local police made efforts to get clues and to apprehend the culprits.

5. This Commission has in other cases expressed its views regarding criminal procedure, and in the light of the record of this case, and of the principles underlying the decision in the case of *L. F. Neer and Pauline E. Neer*, Docket No. 136,¹ before this Commission, it is not prepared to hold that Mexico is responsible.

Decision

The claim of the United States of America on behalf of Irma Eitelman Miller, Lillian Eitelman, and B. B. Eitelman is disallowed.

JOHN D. CHASE (U.S.A.) *v.* UNITED MEXICAN STATES

(September 26, 1928. Pages 17-20.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—UNDUE DELAY IN JUDICIAL PROCEEDINGS. Claimant was shot during course of altercation with a Mexican subject. Both were arrested and later released on bond, case was prosecuted with due diligence at outset, but guilt of parties was not determined after lapse of fourteen years. Claim *allowed*.

Cross-references: Annual Digest, 1927-1928, p. 217; British Yearbook, Vol. 11, 1930, p. 224.

Commissioner Fernández MacGregor, for the Commission:

1. In this claim presented by the United States of America versus the United Mexican States, \$15,000.00, currency of the United States or its equivalent, with interest on that sum at the rate of 6% per annum until the date upon which payment shall be made, is demanded on behalf

¹ See page 60.

of John D. Chase, a citizen of the United States of America, who was seriously wounded by a Mexican, Jacinto Flores, Chase being disabled, as a result, to perform physical labor of any kind. The American Agent alleged in the Memorial that, although Jacinto Flores was arrested by the authorities, tried, convicted and confined in prison for a short while, the sentence given him entailed an entirely inadequate penalty for the premeditated crime which he had committed; but in the American brief Mexico's responsibility is alleged to consist in not having taken reasonable and adequate measures to apprehend and punish the assailant after he had fled while under release on bond which had been granted him.

2. At the time the events transpired, the claimant was employed as Route Agent by the Wells Fargo Express Company, a concern for which the Mexican, Jacinto Flores, worked in the same capacity as Chase, he being, in addition, Station Agent at Puerto Mexico, Tehuantepec. On September 13, 1913, a shortage was discovered in a remittance of cash consigned to the Cashier of the Tehuantepec National Railway at Rincón Antonio; and as the high officials of the Express Company appointed Chase to investigate the theft, Chase suspected that Flores was responsible and as a result a feeling of enmity arose between Flores and Chase. It appears that each threatened the other and that thereafter there was an exchange of revolver shots between the two participants, without it being possible to affirm, in view of the circumstances involving this claim, who was the first to make threats or who was the aggressor, inasmuch as the statements made by Chase and Flores and the witnesses who were examined were confused and contradictory. Chase received a bullet wound on the second rib of the right side, the projectile going through the thorax and embedding itself under the skin on the back between the ninth and tenth ribs, near the spine. In the course of the firing a Mexican woman who happened to be there was also wounded, her body being pierced by a bullet which entered the level of the sacrum and which passed completely through her. From the evidence filed by the Mexican Agent, it would appear that it was Chase who wounded this woman.

3. All the details of the facts which are succinctly set forth above were thoroughly discussed by both Agencies, which expressed contrary views regarding the classification of the crime committed, the American Agency for its part endeavored to show that the claimant was the victim of a premeditated and treacherous assault committed by Flores; the Mexican Agency on the other hand attempted to excuse Flores, making Chase appear as the aggressor and alleging, therefore, that even if Flores did fire on Chase, he did so in the exercise of the right of self-defense. It is not necessary for the Commission to weigh all the evidence presented by Mexico, as it is not within its province to decide the degree of guilt attaching to Flores or to Chase. The only matter within its jurisdiction is to ascertain whether the Mexican authorities who took cognizance of the criminal acts which have been referred to administered justice pursuant to the principles of international law.

4. The Mexican Agency offered as evidence the record of the trial conducted by the Judge of First Instance of Juchitán, State of Oaxaca. The deliberations in this process cover a period which runs from the date upon which the claimant was wounded until the first of January, 1914, that is, a little more than three months, and during that entire

time it is seen that the Mexican authorities exercised diligence, taking all necessary steps to elucidate the facts, arresting Flores at the beginning and then decreeing his formal commitment, examining all eye-witnesses, confronting them with each other, having experts examine the wounds, etc., etc., all in accordance with Mexican law, regarding which it has not been alleged that there was a variance from the practices of civilized nations. Chase was also committed for trial to answer for his affair with Flores and for the wound he had involuntarily inflicted on the Mexican woman to whom reference has been made. The Commission does not find that any of the procedure considered warrants the opinion that there has been a denial of justice.

5. But from the evidence presented by the Mexican Government it would appear that Jacinto Flores was released on bond of a thousand pesos on the first of January, 1914, just as the claimant, Chase, had previously been released on a bond of three hundred pesos, on October 16, 1913; and it is seen from the record that after the two defendants were released, the Court which was handling the case did nothing further. Fourteen years have since passed. International justice is not satisfied if a Government limits itself to instituting and prosecuting a trial without reaching the point of defining the defendant's guilt and assessing the proper penalty. It is possible that in certain cases the police or judicial authorities might declare the innocence of a defendant without bringing him to trial in the fullest sense of the word. But if the data which exist in a case indicate the possible guilt of a defendant, even in the slightest degree, it cannot be understood why he is not tried to the extent of determining his responsibility. The instant case falls within that category. But in view of its attendant circumstances it does not appear that this denial of justice is an extreme case.

Therefore, taking into account the circumstances above set forth, I believe that an award should be made against the Government of Mexico.

Decision

The United Mexican States shall pay to The United States of America in behalf of John D. Chase the sum of \$5,000.00 (five thousand dollars), without interest.

NORTHERN STEAMSHIP COMPANY, INC. (U.S.A.) *v.* UNITED MEXICAN STATES

*(October 3, 1928, dissenting opinion by American Commissioner, undated.
Pages 20-22.)*

BLOCKADE OF PORT IN CONTROL OF INSURGENTS. Ruling in *The Oriental Navigation Company* claim *infra* followed. Claim *disallowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On April 12, 1924, the steamship *Stal*, time-chartered by the Northern Steamship Company, Inc., an American Corporation, and sub-chartered by that company to the Tampa Box Company, arrived at the port of

Frontera, Tabasco, Mexico, then in the hands of insurgent forces, for the purpose of loading a cargo of cedar logs and forwarding that cargo to Tampa, Florida. The loading was begun on April 14. On April 22, when only part of the cargo had been loaded, the vessel was ordered to put to sea by the gunboat *Agua Prieta*, flying the flag of the Mexican Federal Government. It obeyed the order and proceeded to Tampa with its partial cargo.

On behalf of the Northern Steamship Company, Inc., the United States of America are now claiming that the United Mexican States should pay the company damages in the amount of \$7,439.43 with due allowance of interest on account of the loss suffered by the company from the action of the *Agua Prieta*. On the grounds set forth in the case of *The Oriental Navigation Company*, Docket No. 411,¹ the Commission, however, holds that the action of the *Agua Prieta* did not constitute a breach of international law.

Having unloaded its partial cargo in Tampa, the *Stal* returned to Frontera, loaded a cargo of cedar logs during the time from May 8 to May 18, and brought this cargo to Tampa. This time the vessel met with no hindrances.

On May 30, the *Stal*, still time-chartered by the Northern Steamship Company, Inc., but now sub-chartered to the Astoria Mahogany Company of Long Island City, New York, arrived anew at Frontera for the purpose of taking a cargo of mahogany logs to be shipped by Romano and Company, Frontera, from Frontera to Astoria, Long Island. This time the Federal Mexican Government was again controlling the port. No cargo was delivered to the vessel by Romano and Company, and after having waited several days the vessel left Frontera.

Alleging that the reason why the vessel did not receive any cargo was that a loading permit which had been issued by the Mexican Government was afterwards cancelled as a penalty upon the vessel for her having traded to the port of Frontera while in the hands of insurgents, the United States of America are now claiming that the United Mexican States should pay the Northern Steamship Company, Inc., damages in the amount of \$12,277.79 with the allowance of interest thereon.

From the record it does not appear with any degree of certainty that a loading permit ever was issued. In a telegram dated May 28, the claimant company asked I. H. Drake, Vera Cruz, to secure the necessary loading permit, and by a telegram, dated June 9, Drake informed the claimants that the permit was suspended because of the ship's having operated at Frontera during the occupation of the port by the rebels. On the other hand, it appears that Romano and Company have not been able to deliver the cargo. They apologize—in letters dated June 6 and June 7—that the authorities had promised to place a suitable tug at their disposal, but had failed to fulfill that promise. In a letter to the captain of the vessel, dated June 9, they declare, that it will not be possible to deliver the cargo “inasmuch as the vessel under your command has no permit to load wood”. But on June 5 it appears that Romano and Company asked the Maritime Customs House to certify that as communication with Mexico City was interrupted and as no loading permit was received in the Customs

¹ See page 341.

House, delivery of the cargo in question could only take place on the exportation duties being calculated on the basis of the gross tonnage of the vessel instead of on the basis of measurements of the logs to be exported.

Decision

The claim of the United States of America on behalf of Northern Steamship Company, Inc., is disallowed.

Commissioner Nielsen, dissenting.

The principal reasons why I dissent from the opinion of my associates in this case are stated in the dissenting opinion which I wrote in the case of the *Oriental Navigation Company*, Docket No. 411, and I consider it to be unnecessary to make any further statement.

THE ORIENTAL NAVIGATION COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(October 3, 1928, dissenting opinion by American Commissioner, undated. Pages 23-47.)

BLOCKADE OF PORT IN CONTROL OF INSURGENTS. Although a Government does not have the power to interfere with neutral trade on the high seas destined for ports in the control of insurgents, when one of its public vessels finds a neutral vessel in such a port without proper clearance documents, *held* it may order such vessel to discontinue loading and leave the port. Claim for loss of cargo *disallowed*.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 434; Annual Digest, 1927-1928, p. 531; British Yearbook, Vol. 11, 1930, p. 220.

The Presiding Commissioner, Dr. Sindballe, for the Commission :

On April 15, 1924, the steamship *Gaston*, owned by the Southgate Marine Corporation, and, according to a time charter dated February 28, 1924, operated by The Oriental Navigation Company, an American Corporation, cleared the port of New Orleans with a cargo of general merchandise consigned to Frontera, Tabasco, Mexico. When this cargo was unloaded, the vessel was to load a cargo of bananas, consisting of fifteen or sixteen thousand bunches, which had been purchased by agents of The Oriental Navigation Company and was to be transported from Frontera to New Orleans for the purpose of sale at the latter place for the Company's account.

At that time the port of Frontera and some other Mexican ports were in the hands of insurgents. The Government of the United Mexican States had decreed that those ports should be closed to international trade, and had officially informed the Government of the United States of America about the closure. In reply the Government of the United States of America had declared that it felt obliged to respect the requirements of international law according to which a port in the hands of insurgents can be closed by an effective blockade only, and, further, that

it felt obliged to advise American citizens engaged in commerce with Mexico that they might deal with persons in authority in such ports with respect to all matters affecting commerce therewith.

The *Gaston* arrived at Frontera on April 20, and anchored in the roadstead. The following day the unloading of her cargo was begun. In the afternoon the Mexican gunboat *Agua Prieta* was noticed cruising in the offing and ordering the *Gaston* to put to sea. On April 22 this order, accompanied by some random shots, was repeated, and subsequently the *Gaston*, having communicated with the *U. S. S. Cleveland* and the *U. S. S. Tulsa*, put to sea, having unloaded only part of her cargo, and without having loaded any part of the cargo of bananas. The vessel went back to New Orleans, where the rest of her cargo was unloaded. The cargo of bananas became a total loss.

On behalf of The Oriental Navigation Company the United States of America are now claiming that the United Mexican States should indemnify the Company for the loss suffered by it from the action of the gunboat *Agua Prieta*. The loss is alleged to amount to \$15,400.91, which sum is claimed with the allowance of interest thereon.

The respondent government refers to the fact that the belligerency of the insurgents in question had been recognized by no foreign power. It follows therefrom, the respondent government contends, that the Federal Government of Mexico, notwithstanding the revolution, was vested with full and undivided sovereignty over all her territory, so that it was a question solely dependent upon domestic Mexican law whether or not the Federal Government was entitled to close a Mexican port. But according to the General Customs Regulations of Mexico, whenever a port is occupied by rebels, it will be deemed closed to legal traffic, no Federal Consul or other official will authorize shipment of merchandise to it, and persons violating this law will be liable to the punishment prescribed for smugglers.

In the opinion of the Commission it cannot be said to depend solely on domestic Mexican law whether or not the Government of the United Mexican States was entitled to close the port of Frontera. In time of peace, it no doubt would be a question of domestic law only. But in time of civil war, when the control of a port has passed into the hands of insurgents, it is held, nearly unanimously, by a long series of authorities, that international law will apply, and that neutral trade is protected by rules similar to those obtaining in case of war. It is clear also, that if this principle be not adopted, the conditions of neutral commerce will be worse in case of civil war than in case of war.

Now, it has been submitted by the respondent government that the law protecting neutral commerce is not the same after the world war 1914-19 as it was before. The old rules of blockade were not followed during the war, and they cannot, it is submitted, be considered as still obtaining. Indeed, this seems to be the view of most post-war authors. They point to the fact that the use of submarines makes it almost impossible to have blockading forces stationed or cruising within a restricted area that is well known to the enemy. On the other hand, they argue, it cannot be assumed that there will be no economic warfare in future wars. Is it not a fact that Article 16 of the Covenant of the League of Nations even makes it a duty for the Members of the League, under certain circumstances, to carry on economic war against an enemy of

the League? But the economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the old rule of the Paris declaration of 1856 will have to yield to the needs of a belligerent state subjected to modern conditions of naval war.

If the view above set forth were accepted, there would seem to be little doubt that the rather moderate action of the *Agua Prieta*, consisting in simply forcing off the port a neutral vessel without doing any harm to the vessel or her crew, must be considered to be lawful. The Commission, however, deems it unnecessary to pass an opinion as to the correctness of that view, which, at any rate, for obvious reasons could not be adopted without hesitation. The Commission is of the opinion that the action of the *Agua Prieta* can hardly be considered as a violation of the law obtaining before the world war. It is true that, according to that law, the trading of the *Gaston* to the port of Frontera was perfectly lawful. The Federal Mexican authorities would not be justified in capturing or confiscating the vessel, or in inflicting any other penalty upon it. Neither would a Mexican warship have a right to interfere, if, for example on the high seas, it met with a neutral vessel bound for a port in the hands of insurgents. But, on the other hand, the authorities do not show, and the Commission is of the opinion that it cannot be assumed that the Federal Mexican authorities should be obliged to permit the unloading and the subsequent loading of a neutral vessel trading to an insurgent port without such clearance documents as are prescribed by Mexican law, even in case control of the port should have been obtained again by those authorities before the arrival of the vessel to the port or be reobtained during her stay there. Now, in the present case, it cannot fairly be said that the port of Frontera was in the hands of insurgents at the time when the events in question took place. It was in fact partly commanded by the *Agua Prieta*. That being the case, and none of the authorities invoked by the claimants bearing upon a situation of this nature, the Commission holds that the lawfulness of the action taken by the *Agua Prieta* in forcing off the *Gaston*, which had not applied to the Mexican Consul at New Orleans for clearance. can hardly be challenged.

Decision

The claim of the United States of America on behalf of the Oriental Navigation Company is disallowed.

Commissioner Nielsen, dissenting.

This case raises an issue whether under international law authorities of a Government may properly by some domestic enactment in the form of an executive decree or legislation close a port in the possession of revolutionists, without preventing ingress or egress by means of an effective blockade, as that term is understood in international law and practice. The issue in the instant case may be more specifically stated to be whether, in the absence of a legal blockade, the interference by the Mexican war vessel, *Agua Prieta*, with the steamship *Gaston*, resulting in loss to those operating the latter, entails responsibility under international law on the respondent Government.

In behalf of the United States it is contended that responsibility exists, and contentions to this effect are grounded on assertions found in opinions of international tribunals and in diplomatic exchanges and in connection

with precedents in other forms. As illustrative of the general tenor of these the following passage may be quoted from a statement made in the House of Commons on June 27, 1861, by Lord John Russell, Secretary of State for Foreign Affairs of Great Britain, in regard to an announcement made in that year by the Government of New Granada concerning the closure of certain ports in possession of persons engaged in a civil war:

“The Government of New Granada has announced, not a blockade, but that certain ports of New Granada are to be closed. The opinion of Her Majesty’s Government, after taking legal advice, is that it is perfectly competent to the government of a country in a state of tranquillity to say which ports shall be open to trade and which shall be closed; but in the event of insurrection or civil war in that country, it is not competent for its government to close the ports that are *de facto* in the hands of the insurgents, as that would be a violation of international law with regard to blockades.” (Moore, *Digest of International Law*, Vol. VII, p. 809. For other precedents see *op. cit.*, pp. 803-820; Borchard, *Diplomatic Protection*, p. 181; Ralston, *The Law and Procedure of International Tribunals*, pp. 406-408.)

The burden of the argument made in behalf of the Government of Mexico is a forceful presentation in the brief and in oral argument of the view that the closure of a port under the conditions revealed by the record in the present case, without the institution of a blockade, could properly take place through the legal exercise of sovereign rights recognized by international law, since a distinction must be made between the closure of a port occupied by insurgents possessing a status of belligerency and the closure of a port occupied by revolutionists who have not the status of belligerents. It was pointed out that neither the Mexican Government nor any other government had recognized the belligerency of the de la Huerta forces. Some contention seems also to have been made in the Mexican brief and in the course of oral argument to the effect that the measures taken to close the port of Frontera satisfied the requirements of international law with respect to the exercise of the right of blockade.

Without discussion at this point of the soundness of that contention, it may be pointed out that the argument seems inconsistent with the principal contention upon which the defense is grounded. To be sure it is permissible to plead consistent defenses. However, in the Mexican brief, as well as in the oral argument, it was clearly contended that there was no blockade at Frontera, and that the legal situation of that port was such that the law of blockade could not apply to it. The measures employed to interrupt intercourse with the port of Frontera could not be both a blockade and not a blockade. And it therefore seems to me that unwarranted emphasis is placed in the opinion of my associates on what I may call the secondary ground of defense presented by the Mexican Government, namely, that the action of the Mexican authorities might be regarded as proper in the light of rules of international law with respect to blockade. I shall discuss first and mainly the principal contention upon which, it seems to be clear, the Mexican Government rests its case, namely, that a distinction must be made between the closure of a port in the control of insurgents to whom a status of belligerency has been accorded and the closure of a port occupied by revolutionists not having that status.

On the point whether this distinction exists in the law, information with regard to the precedents cited in the American brief and in the

Mexican reply-brief is incomplete. That information does not reveal the nature of the revolutionary movements to which the precedents cited relate, except as regards the American Civil War, the legal status of which is of course well known. In the early stages of that struggle a state of belligerency was recognized by several Governments, and at least impliedly by the parent Government. Nor was any such information furnished by the United States in a counter-brief after the development of the issue in the Mexican counter-brief.

To my mind no definite conclusion can be drawn from the citations in the brief of each Government as to the existence or nonexistence of a rule of international law *specifically applicable to the case of a closure of a port occupied by insurgents who do not possess the status of belligerents*. It would seem that some Governments have not acquiesced in the principle underlying declarations similar to those made by Lord John Russell. It is therefore important to consider whether it is possible to invoke rules or principles of law which are applicable to the issue raised in the instant case and which can be shown by the evidence of international law to have received the general assent which is the foundation of that law.

I am of the opinion that there are two aspects of this case in the light of which responsibility on the part of the respondent Government should be fixed, even though it may logically be said that responsibility may be determined solely in the light of the principles stated by Lord John Russell. Established principles of international law with regard to blockade were not observed, and a ship engaged in trading in a manner which it is stated in the opinion of my associates "was perfectly lawful" was the victim of an interference which to my mind was an invasion, or it might be said, a confiscation, of property rights.

In my opinion this case does not reveal any arbitrary act on the part of the Mexican Government in the sense that Mexican authorities deliberately ignored international law in declaring the port of Frontera closed. On the other hand, I do not consider that the charterers of the *Gaston* had any intention of flouting a proper Mexican law. They unquestionably suffered loss as a result of the action of Mexican naval authorities, and if that action, which it is explained was taken pursuant to Mexican legislation, did not square with international law, the claimants should receive compensation. If the action was justifiable under international law, the claimants of course must bear the loss they sustained.

I am of the opinion that judicial and administrative officials who have frequently asserted the broad principle embraced by the statement of Lord John Russell, that it is not competent for a Government to close ports in the hands of insurgents except by effective blockade measures, have made no distinction between the closure of ports occupied by revolutionists to whom the status of belligerents has been accorded by some affirmative act, and ports occupied by forces not so recognized as having that status. In my judgment they have logically refrained from making such a distinction, because such a recognition of belligerency is not a sound and practical standard by which to determine the propriety or impropriety of the closing of a port. The consideration of this specific point seems to require an examination into the nature of belligerency and the evidence by which a judicial tribunal might be guided in reaching a conclusion with respect to the existence or non-existence of that status.

Evidence of this nature would not in all cases be such as could warrant sound conclusions of law.

The recognition of a new state, that is, the acceptance by members of the family of nations of a new member, an international person, is regarded by Governments as a political question, although the act of recognition should of course be grounded on a sound legal basis. The same is true—it may perhaps be said more particularly true—with regard to what is sometimes spoken of as a recognition of a change in the headship of a state, or in the form of government of a state; an act that may perhaps be more properly described as a determination on the part of an established Government to have diplomatic relations with a new set of authorities who come into control of a State following an insurrection. This of course is not a case of the recognition of an international person. So it seems to me that the recognition of a state of belligerency, so-called, on the part of governments involves very largely political considerations.

Judge John Bassett Moore has said that the “only kind of war that justifies the recognition of insurgents as belligerents is what is called ‘public war’; and before civil war can be said to possess that character the insurgents must present the aspect of a political community or *de facto* power, having a certain coherence, and a certain independence of position, in respect of territorial limits, of population, of interest, and of destiny.” And he has added as an additional element essential to a proper recognition of a state of war “the existence of an emergency, actual or imminent, such as makes it incumbent upon neutral powers to define their relations to the conflict.” In other words, interests of neutral powers must be affected before they are justified in acting. *Forum*, Vol. 21, p. 291.

Dr. Oppenheim says that “in every case of civil war a foreign State can recognize the insurgents as a belligerent Power if they succeed in keeping a part of the country in their hands, set up a government of their own, and conduct their military operations according to the laws of war.” *International Law*, 3rd ed., Vol. I, p. 137. Such a situation existed following the outbreak of the American Civil War in 1861, which has been referred to in the briefs of both Governments. After President Lincoln had issued a proclamation of blockade by the Federal Government, other Governments were doubtless justified, from a legal standpoint, in taking affirmative action to give recognition to the existence of a state of belligerency between the northern states and the southern states, and some Governments did this by issuing declarations of neutrality. See Moore, *International Law Digest*, Vol. I, p. 185. But in a case in which no such action is taken by a parent Government the situation may be much less simple. Governments are guided by different considerations of policy or expediency as to the conditions and times of recognition either of new states or of a status of belligerency. And it seems to be doubtful that it can be accurately said that such a status in law is necessarily dependent upon some such affirmative acts. A parent Government may not choose to take such action and other Governments may likewise refrain from doing so. Yet the situation described by Dr. Oppenheim may nevertheless exist. The same writer, while asserting, in disagreement with some other writers, that a state becomes an international person through recognition only, observes that international law does not say that a State is not in existence as long as it is not recognized. A new régime or Government may gain control of a country and be the *de facto*, and from the standpoint

of international law therefore the *de jure* Government, even though other Governments may not choose to "recognize" it, as is often said, or as might probably better be said, to enter into diplomatic relations with it. And it seems to me that the same political situation may exist with respect to a state of belligerency, when the term is used to connote simply the fact of the existence of war. Of course I do not mean to suggest that the recognition of belligerency by a parent Government or by other Governments does not entail important consequences. The rights and obligations of revolutionists that are derived from the state of belligerency under international law are well defined. See on this point and on the subject of the conditions warranting recognition of belligerency, Moore, *International Law Digest*, Vol. I, pp. 164-205.

It is interesting to consider in connexion with this question the citation made by counsel for the United States of the opinion of this Commission in the case of the *Home Insurance Company*, Docket No. 73, *Opinions of the Commissioners*, 1927. U. S. Government Printing Office, Washington, p. 51. He quoted from the conclusions of the Commission with regard to the nature of the revolutionary movement in Mexico in 1923 and 1924, as follows:

"The de la Huerta revolt against the established administration of the Government of Mexico—call it conflict of personal politics or a rebellion or a revolution, what you will—assumed such proportions that at one time it seemed more than probable that it would succeed in its attempt to overthrow the Obregón administration. The sudden launching of this revolt against the constituted powers, the defection of a large proportion of the officers and men of the Federal Army, and the great personal and political following of the leader of the revolt, made of it a formidable uprising. President Obregón himself assumed supreme command. Through the vigorous and effective measures taken by the Obregón administration what threatened at one time to be a successful revolution was effectually suppressed within a period of five months from its initiation."

I accept the conclusions of the Commission in regard to the facts stated in this opinion in which I did not participate. Counsel argued that, Mexico not having been held responsible for the acts of insurrectionists in this case, because control over those acts was beyond the power of the Mexican authorities, the Mexican Government should be held responsible in the instant case under international law for improper interference with a ship trading with a port in control of the same forces for whose acts Mexico was held not to be liable in the *Home Insurance Company* case.

If the observations which I have made with regard to considerations that may prompt recognition or non-recognition of belligerency by governments are correct, it would not seem to be logical to attempt to make any distinction between the closure of a port held by insurrectionists who by some affirmative acts have been recognized as belligerents, and a port in the hands of revolutionists to whom such a status has not in this manner been accorded. And since it would appear to be impracticable in all cases to make that distinction, there would seem to be a good reason why it has not been made, as it apparently has not. It is not my purpose to attempt to state any principles as to what constitutes a state of belligerency or justification for recognition of belligerency, nor principles as to the effect of affirmative acts of recognition or of the absence of such acts, but merely to indicate that in my opinion the distinction contended

for by the Mexican Government has not been made by governments or by international tribunals that have dealt with this question of the closure of ports without the enforcement of the closure by blockade measures, and that the distinction is not a logical one.

If this view be correct, it disposes of the Mexican Government's defense, unless account be taken of what I have spoken of as a secondary defense in support of which it was contended that the port of Frontera was blockaded, although it was also contended that the port was not blockaded, and that the legal situation of the port was such that there could be no blockade. If the distinction made by the Government of Mexico has no basis in law, then there is not before the Commission any special situation, but a case governed by applicable, reasonably well established principles of international law with respect to the exercise of the right of blockade. We have not a case governed solely by domestic law, or a case involving a consideration of rules or principles of law which are distinct from those relating to blockade by virtue of some theory that the latter are applicable only in times of international war, or in the case of a civil war when a state of belligerency on the part of insurgents has been recognized by the parent Government or by some other Government. Mexico has adhered to the Declaration of Paris of 1856 which asserts the rule that a blockade to be binding must be effective. It seems to me scarcely to be necessary to say anything to show that no blockade was established and maintained at Frontera in accordance with international law.

I do not consider it to be necessary, although I deem it to be proper, to ground my views with regard to the responsibility of Mexico in the instant case solely on principles of law with respect to the exercise of belligerent rights in relation to blockade. In the Mexican brief and in oral argument it was contended that Article VI of the Mexican customs laws is not repugnant to international law. This Commission on several occasions has had under consideration acts of authorities of a government violative of personal rights, also the standing in international law of domestic laws destructive of property rights. It seems to me that this Article of the customs laws, if given the interpretation put upon it by counsel for Mexico in the Mexican brief and in oral argument, according to which interference with the claimant's vessel is justified, must be regarded as legislation of that kind. The Article reads as follows:

"When the place in which a maritime or border custom house is located secedes from the obedience of the Federal Government, or is occupied by forces in revolt, legal traffic therewith shall be held immediately as closed and, from that time, no Federal office shall authorize the despatch of merchandise for the point which has withdrawn from Federal authority, nor shall it receive merchandise coming from such place until it shall return to obedience of the Federal power. Goods en route to the closed custom house may be imported through another custom house as provided by this law. The violators of this provision shall be punished as stipulated by this ordinance for smugglers, without prejudice to applying other penalties corresponding to the case." (Translation.)

In sweeping terms the law purports to close all insurgent ports without reference to any specific port. Let it be assumed for the purpose of discussion—at variance with the contention made in behalf of the United States—that a Government may properly under international law by some form of legal enactment close a given port without effectively by proper blockade impeding ingress and egress. Such action would assuredly

be entirely different from action taken pursuant to a law which closes ports without specifically mentioning the ports closed. The operators of a vessel accustomed to enter a given port might discover as it entered that the place had been occupied by revolutionists on the very day of entry and might find themselves in the position of law-breakers. Doubtless it may be properly stated as a general principle that penal legislation involving punishment by confiscation of property must be framed so as to give some notice of proscribed acts. This principle is obviously entirely distinct from the general principle that ignorance of law is no excuse for violation of the law. A different kind of a law would be one providing for the closing of ports in the hands of insurrectionists following some public pronouncement in a given case with respect to a designated port coming under the control of revolutionists. Such a pronouncement could have the effect of law. The notice sent to the Government of the United States by the Mexican Ambassador under date of December 18, 1923, with regard to the closing of the port of Frontera was not in my opinion any such law. A similar notice might be very important in the case of a proclamation of blockade, that is, of course, if it had the effect of announcing a blockade. But the notice given can not be considered as a law of which the owner of a vessel should take cognizance. And one Government can not expect that its domestic legislation or decrees or orders shall be carried out by another Government through some form of restraint imposed on the vessels belonging to the latter.

I have indicated the view that the interference with the operations of the steamship *Gaston*, which it is said took place pursuant to Article VI of the Mexican customs laws, was destructive of property rights. In the opinion of my associates it is said that "the trading of the *Gaston* to the port of Frontera was perfectly lawful". I agree with that view. If the *Gaston* was engaged in lawful operations when it was prevented from taking on its cargo, which became a total loss as a result of the action taken by the *Agua Prieta*, I am unable to perceive that this action can be regarded as a proper one, entailing no responsibility on the part of the Mexican Government. It does not seem to me that the majority opinion of the Commission justifies the interference by the war vessel with the pursuit of a lawful avocation by the merchant vessel.

It is interesting to consider by the way of analogy in connection with this point an opinion rendered by Mr. Justice Hughes of the Supreme Court of the United States in the case of *Truax v. Raich*, 239 U. S. 33. In that case the contention was made that a law of the State of Arizona, restricting the employment of aliens by employers in that State, was violative of the Fourteenth Amendment to the Federal Constitution, in that it involved a denial of the equal protection of the laws. The contention was sustained. The "right to earn a livelihood" said Mr. Justice Hughes "and to continue in employment unmolested by efforts to enforce void enactments" is one which a court of equity should protect. And he declared that it required no argument to show that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

With respect to the argument made in behalf of the Government of Mexico that Article VI of the customs laws is not in derogation of international law, it seems to be pertinent to take account of another aspect

of that enactment, in the light, of course, of the construction put upon it by counsel. Under that construction the closure of any place which has seceded or which may be occupied by forces in revolt is authorized. No distinction is made in the terms of the law between a port in the hands of revolutionists whose belligerent status has been recognized by some affirmative act, and a port controlled by forces not so recognized. In the Mexican brief the argument seems to be made that, only in the case of international war must the closure of ports be effected by measures of blockade, yet, in oral argument counsel for Mexico evidently took the correct position that, in the case of civil war when a status of belligerency is accorded to insurrectionists, international law requires that the closure of ports in the hands of insurrectionists must be enforced by blockade.

In giving application to law, a judicial tribunal is not concerned with questions with respect to the propriety or the advantages or disadvantages of a rule of law that neutrals have a right to carry on trade with insurgent ports, unless they are prevented from doing so by methods prescribed by international law. The principle underlying the rule may perhaps be said to have something in common with that which has frequently been asserted, to the effect that the right of aliens to deal with insurgents in control of a given territory must be recognized, and that if the aliens are required to pay duties or taxes to insurgents, a Government which regains control of the territory should not exact double payments. See Moore, *International Law Digest*, Vol. VI, pp. 995-996.

By an Act of Congress of the United States of July 13, 1861, the President was authorized to proclaim the closure of ports of the southern Confederacy. However, this enactment seems to have been construed by the Government of the United States as a measure conferring on the Executive authority, if that should be deemed to be necessary, to close these ports. And they were closed by a formal proclamation and the maintenance of a blockade. Moore, *International Law Digest*, Vol. VII, pp. 806-812; Oppenheim, *International Law*, 3rd ed., Vol. 2, p. 515.

I am not certain that I understand the precise ground on which Mexico is absolved from responsibility in the opinion of the majority of the Commissioners. It is said that in "the opinion of the Commission it cannot be said to depend solely on domestic Mexican law whether or not the Government of the United Mexican States was entitled to close the port of Frontera". And the view is indicated that "in time of civil war, when the control of a port has passed into the hands of insurgents", application must be given to international law. It would appear therefore that the majority opinion rejects the Mexican Government's contention that the closing of the port of Frontera, conformably to Article VI of the customs laws, was consistent with international law. The view seems further to be made clear by the statement, to which reference has already been made, that "the trading of the Gaston to the port of Frontera was perfectly lawful", although it was contended in behalf of Mexico that the action of the vessel was a violation of Article VI of the customs laws. If this statement is correct—and I am of the opinion that it is, in the light of international law—it would appear that in the opinion of all three Commissioners Article VI of the customs laws, as construed by counsel for Mexico, is at variance with international law. The further conclusion must therefore follow that in accordance with international law the closure of the port could properly be effected only by a blockade.

The majority opinion proceeds to a discussion of some predictions made in the Mexican brief with regard to the future of international law relative to the exercise of belligerent rights. It is said in the brief that the "modern blockade can no longer be attempted to be subjected to the condition of effectiveness"; that "a blockade will not be established merely by vessels stationed or by cruisers operating in the vicinity of the enemy's coast"; that it will be established "by stationing war vessels in all seas, at every point in the globe, on commercial routes, which will stop all vessels whose destination to the territory declared to be blockaded may be proven or presumed, or by constituting zones of war more or less extensive in the jurisdiction of that territory, in which zones mines will be placed or submarines will cruise". The argument appears further to be made in the brief that the action taken with respect to the closing of the port of Frontera, including the action of the *Agua Prieta*, may be justified in the light of "the new international theories which arose by reason of the War of 1914-1919".

I am unable, as I have already indicated, to reconcile contentions of this kind with statements in the brief (probably not altogether adhered to in oral argument) to the effect that no question of blockade could arise in connexion with the closing of the port pursuant to sovereign rights exercised in accordance with Article VI of the customs laws. As illustrative of statements of this character, attention may be called to the following:

"The first thing to observe in this connection is that the belligerency of the revolutionary movement in question was never recognized by any foreign country and much less by the United States of America. We are, then, before a case where there are no belligerents, where there are no neutral powers and where, therefore, the simple basic elements of the right of blockade are lacking. This shows that the revolution with which we are dealing, cannot be governed by those rules of international law which apply to blockades. But said revolution must be governed by some laws and if the latter are not those of international sanction relative to blockades, they necessarily have to be the laws of Mexico, inasmuch as the unity of this nation and the sovereignty of her only recognized Government were not interrupted for a single moment."

.....

"Summarizing: in case of civil war, while the belligerency of the faction opposed to the Government has not been recognized, the municipal laws of the country continue to be applicable and international law is not applicable."

The views expressed in the Mexican brief with respect to the change and the future of international law appear to find some support in the following passage found in the opinion of my associates:

"The old rules of blockade were not followed during the war, and they cannot, it is submitted, be considered as still obtaining. Indeed, this seems to be the view of most post-war authors. They point to the fact that the use of submarines makes it almost impossible to have blockading forces stationed or cruising within a restricted area that is well known to the enemy. On the other hand, they argue, it cannot be assumed that there will be no economic warfare in future wars. Is it not a fact that Article 16 of the Covenant of the League of Nations even makes it a duty for the Members of the League, under certain circumstances, to carry on economic war against an enemy of the League? But the economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the

old rules of the Paris declaration of 1856 will have to yield to the needs of a belligerent state subjected to modern conditions of naval war.

"If the view above set forth were accepted, there would seem to be little doubt that the rather moderate action of the *Agua Prieta*, consisting in simply forcing off the port a neutral vessel without doing any harm to the vessel or her crew, must be considered to be lawful. The Commission, however, deems it unnecessary to pass an opinion as to the correctness of that view, which, at any rate, for obvious reasons could not be adopted without hesitation."

Of course custom, practice, and changed conditions have their effect on international law as well as on domestic law. However, it need not be observed that a violation of law is not equivalent to a modification or abolition of law. The fact that new instrumentalities of warfare make it inconvenient for a belligerent in control of the sea in a given locality to act in conformity with established rules of law does not *ipso facto* result in a change of the law or justify disregard of the law. And if we indulge in speculation, it would not be a rash conjecture, in the light of experience, that the same belligerent, should his position be changed by a loss of control of the sea, would insist strongly on the observance of established rules and principles. It seems to be probable that among those who have given serious thought to the breakdown of the system of international law with regard to the exercise of belligerent rights on the seas and to the possibility of formulating rules that will be respected, there may be some who would not complacently vision a system of promiscuous seizure of and interference with neutral merchant vessels, or the promulgation of edicts with regard to forbidden mine-planted zones in the high seas in which the nations have a common right. Indeed it may be suggested that some might find it a more proper solution of the problem that the high seas should be maintained as the common highways in time of war, as in times of peace, and that to that end, interference with neutrals might be restricted to belligerent waters only.

A rule of law is put to a test whether it means something when honorable respect for it involves inconvenience or material sacrifice, or whether it is to become farcical by being flouted under some theory of plasticity or changed conditions, theories similar to the somewhat dangerous doctrine of *rebus sic stantibus* with respect to treaties. It is an elementary principle that the propriety of an act is governed by the law in force at the time the act is committed. International law is a law for the conduct of nations grounded on the general assent of the nations. It can be modified only by the same processes by which it is formulated. A belligerent can not make law to suit his convenience. An international tribunal can not undertake to formulate rules with respect to the exercise of belligerent rights, or to decide a case in the light of speculations with regard to future developments of the law, thought to be foreshadowed by derogations of international law which unhappily occur in times of war. Members of the League of Nations doubtless have entered into certain obligations under Article 16 of the Covenant of the League, but it must not necessarily be presumed that they must carry out their contractual obligations in violation of international law. It should rather be assumed that any action taken in fulfillment of such obligations will be executed in a manner consistent with that law. In the agony of great international conflict, resort may be had to expedients to circumvent law, but the law remains. As was said by Acting Chief Justice Sir Henry Berkeley in the case of the *Prometheus*:

"A law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that because any given person or body of persons possessed for the time being power to resist an established municipal law such law had no existence? The answer to such a contention would be that the law still existed, though it might not for the time being be possible to enforce obedience to it." (Supreme Court of Hongkong, 2 Hongkong Law Reports, 207, 225.)

The majority opinion, after discussing views with regard to the possible law of the future, states that it is unnecessary to pass an opinion with regard to those views, and that the Commission "is of the opinion that the action of the *Agua Prieta* can hardly be considered as a violation of the law obtaining before the world war." The reasoning of the opinion up to this point evidently is that the port of Frontera could not be closed by some order or decree pursuant to a domestic law, and that international law was applicable in considering the measures that might properly be employed. Those measures it is concluded were in harmony with international law existing prior to the World War with regard to the exercise of the right of blockade. I disagree with that view. A belligerent is accorded the right to obstruct trade with a port both, as regards ingress and egress, by virtue of the physical power to effect the obstruction and of the exercise of that power. I think that it is unnecessary to enter into any detailed discussion of the meaning of an effective blockade in order to show that none existed at Frontera—even if considerable allowance be made for speculation concerning recent changes in established principles of law.

It appears from the record that the steamship *Stal*, with respect to which a claim was argued in connection with the instant case, had been in port for ten days when the *Agua Prieta* arrived in the locality of Frontera, and that the *Gaston* arrived one day previous to that time. From evidence presented by Mexico it appears that Mexican authorities had undertaken to close several ports on the Pacific, the Gulf and the Atlantic coasts, including the port of Frontera. The coast line along which the Gulf ports and the Caribbean ports were closed, is approximately 900 miles in length. From evidence filed by the Mexican Government it appears that one gunboat, the *Agua Prieta*, and two revenue cutters were engaged in carrying out what is called a blockade in a communication sent by a Mexican naval commander to his Government under date of April 25, 1924. It appears from the record that one of the purposes of the *Agua Prieta* was to conduct an inspection of lighthouses. From a report made by the Commander of the *Agua Prieta* it appears that, due to trouble with the engine, his vessel was able to travel only at approximately two miles an hour. The brief visit of the *Agua Prieta* to the waters outside of Frontera was not an effective blockading of ingress and egress. The communication sent to the Government of the United States with respect to the closing of the port of Frontera which made no mention of blockade was neither notice nor proclamation of blockade. In the written and in the oral argument in behalf of Mexico it was suggested, presumably on the theory that notice was required, that that communication might be considered

as notice of blockade. The firing of some shots in the direction of the *Gaston* lying in the harbor and the signals sent to it ordering it to depart were not a proper substitute for capture or prize court proceedings or warning.

By way of comparison, mention was made in the record of the blockade measures employed during the American Civil War. The coast of the Confederate States to the extent of 2,500 nautical miles was blockaded by about 400 Federal cruisers. Oppenheim, *International Law*, Vol. II, 3rd ed., p. 525. At the single port of Charleston there were stationed in July of the year 1863 twenty-three vessels. *Proceedings of the United States Naval Institute*, Marine International Law, Commander Henry Glass, U. S. N., Vol. XI, p. 442. Possibly a single vessel might have satisfied the requirement of the situation at Frontera, but the visit of the *Agua Prieta* in my opinion did not.

Towards the close of the majority opinion are some observations which would seem to be at variance with the view expressed in a preceding portion to the effect that, in spite of the provisions of Article VI of the Mexican customs laws, and the closure of that port pursuant to that Article, the trading of the *Gaston* with the port of Frontera was perfectly lawful; that domestic law alone was not determinative of the right of the Mexican Government to close the port; and that Federal authorities "would not be justified in capturing or confiscating the vessel, or in inflicting any other penalty upon it." These views it seems to me must be grounded on the theory that the port was out of the control of the Mexican authorities; that therefore international law and not domestic law governed the right of a ship to enter and to leave the port; and that according to international law capture, confiscation or the infliction of any other penalty on the *Gaston* would have been improper. However, it is said in the majority opinion that "it cannot fairly be said that the port of Frontera was in the hands of insurgents at the time when the events in question took place"; that that port was "in fact partly commanded by the *Agua Prieta*; and that this being the case, "and none of the authorities invoked by the claimants bearing upon a situation of this nature, the Commission holds that the lawfulness of the action taken by the *Agua Prieta* in forcing off the *Gaston*, which had not applied to the Mexican Consul at New Orleans for clearance, can hardly be challenged." As I have just observed, this view seems to me to be at variance with the reasoning of other portions of the opinion, and it appears to be equally at variance with the contentions of the Mexican Government, and with the facts disclosed by the record.

In the notice of December 18, 1923, sent by the Ambassador of Mexico to the Department of State at Washington it is stated that the port of Frontera had been removed "from the action of the constituted legitimate authorities." In the Mexican Answer in the case relating to the *Stal*, it was stated that the order of closure was a proper one to prevent that any local or international trade be carried on with the port which because of sedition "has been temporarily wrested from the control of the legitimate authorities as has been in fact the situation with the port of Frontera at the time when the said vessel (the *Stal*) arrived". In a notice sent by the Mexican Legation in Havana to the Secretary of State of Cuba, under date of May 31, 1924, it was stated that the port of Frontera had again "come under the control of the constitutional authorities". In a com-

munication among the records of the de la Huerta insurrection found in the archives of the Department of Foreign Relations of Mexico, it is stated that the ports of the Gulf of Mexico and the Caribbean Sea with the exception of Tampico "are out of the control of the Government". In a message sent by Rear Admiral H. Rodríguez Malpica to the Secretary of Foreign Relations of Mexico, it is stated that the former "effected blockade" in the port of Frontera and other ports "held by rebels".

It is possible to conceive of an interesting situation in which land forces of insurgents might be in control of a seaport town and yet not in complete control of the port, because entry might be commanded by regular forces on an island or promontory from which the mouth of the harbor could be commanded. But in my opinion the casual visit of the *Agua Prieta* for a day in the vicinity of the port of Frontera in the manner disclosed by the record does not justify the conclusion that the port was in fact partly commanded by the *Agua Prieta*. The visit occurred, as has been pointed out, ten days after the *Stal* entered the port and one day subsequent to the entry of the *Gaston*. I do not believe that a single, brief visit of a war vessel in the vicinity of a port occupied by insurgents is tantamount to a control or command of the port that would relieve a government of the obligation to maintain a blockade as required by international law for the purpose of effecting a closure of the port.

As I have indicated, I am of the opinion that international law with regard to the exercise of the right of blockade is applicable to the situation existing at the port of Frontera when the *Gaston* was subjected to interference and consequent loss. I do not think there is any distinction in international law and practice, or in logic, between a port held by insurgents whose belligerency has been recognized by some affirmative act and a port occupied by insurgents to whom that status has not been accorded in that manner. I therefore disagree with the contention upon which the Mexican Government's defense is based with respect to this distinction. And I accordingly must therefore also disagree with a somewhat similar distinction which seems to be made in the American brief in which it is said that "the laws of war, and therefore the laws of blockade, had and could have no application to the situation under discussion, for it does not appear that either the Government of Mexico or the Government of the United States had recognized a status of actual belligerency as existing in Mexico at this time." In the course of oral argument counsel for the United States seemed to depart from that view.

The American brief seems to treat the closing of a port held by insurgents whose belligerency had not been recognized by some government as a kind of special case to which the law of blockade is not applicable. If this view be correct, and if international law with regard to blockade is not applicable in such a case, then a parent government would seem to be impotent, if it can not close a port by domestic enactment, to close the port at all, in the absence of some action by the parent government distinct from a blockade or following some form of recognition by other governments each of which might in behalf of its own vessels solely, or in behalf of the vessels of another country, legalize a blockade. I do not agree with such a view.

President Lincoln did not defer issuing a proclamation of blockade of the ports of the Confederate States until he had by some other affirmative act "recognized a state of actual belligerency" of the seceding states.

The establishment of the blockade has generally been considered to be the recognition of a state of war and has been so regarded by American courts. Prize Cases, 2 Black 635. Nor did President Lincoln before establishing a blockade await some affirmative acts of recognition of belligerency by other governments. Their acts followed the establishment of the American blockade and generally took the form of declarations of "neutrality". Moore, *International Law Digest*, Vol. 1, pp. 184-185.

Insurgent ports can be closed by effective blockade measures. The pronouncements of Governments, the opinions of international tribunals and the writings of authorities, in my opinion, all support the views that effective blockade is necessary to close an insurgent port, and that no distinction such as that for which the Mexican Government contends exists. This view is not at variance with the contention advanced in behalf of Mexico that Mexican sovereignty continued to exist in the territory occupied by insurgents. The Mexican Government was not able to exercise governmental functions in that territory, but I take it that *from the standpoint of international law and relations* the sovereignty of a nation over territory occupied by insurgents is not destroyed until insurrectionists have established their independence.

Some precedents cited by counsel might seem to be at variance with the principles asserted by Lord John Russell to which reference has been made, but on examination I think it will be found that they are not.

With regard to the dispute between Spain on the one hand and Germany and Great Britain on the other hand concerning the closing of ports in the Sulu Archipelago, it should be observed that an examination of the diplomatic correspondence with respect to this controversy shows that both Germany and Great Britain took the position that Spain did not possess sovereignty in the Sulu Archipelago and of course therefore not control. *British and Foreign State Papers*, Vol. 73, pp. 932-996.

In the case of the brig *Toucan*, it appears that Brazilian authorities detained this vessel at São Joze do Norte, where it stopped to discharge a portion of its cargo, and that they refused to let it proceed to Porto Alegre. (Moore, *International Arbitrations*, Vol. V, p. 4615.)

Commissioner Fisher, appointed under an Act of Congress of the United States to distribute the indemnity under the Convention of January 27, 1849, between the United States and Brazil, said that the "preventing of the *Toucan* and other vessels by the Brazilian authorities from going up to an interior port which had been closed on account of a civil insurrection existing there at the time, was but the exercise of a right incident to a sovereign state." If the decision of Commissioner Fisher rejecting a claim made in behalf of the *Toucan* should be considered to be in conflict with opinions of international tribunals to the effect that ports in the hands of insurgents can properly be closed only by a blockade, there would seem to be no reason to attribute to that particular opinion greater weight than to the others. On the other hand, Commissioner Fisher's opinion should probably not be construed to be at variance with the views expressed by the Government of the United States and the Government of Great Britain and by international tribunals and writers on international law, that international law does not sanction the closing of such ports merely by a decree or a domestic legislative enactment. Commissioner Fisher seems to have grounded his opinion mainly if not entirely on treaty provisions between the United States and Brazil. Further-

more, it would seem that much can be said in favor of the view that a Government might, in the proper exercise of sovereignty, refuse to clear a ship from within its jurisdiction, at one of its own ports, for an inland port within its dominions, temporarily occupied by insurgents.

In a somewhat similar situation it may be doubted that it would be in derogation of international law for authorities of a government to refuse to clear foreign vessels from one of its seaports to another seaport within its territory. However, a different view seems to have been expressed by Commissioners under the Convention of September 26, 1893, between Great Britain and Chile in the case of the bark *Chépica*. In 1891 authorities of the port of Valparaiso refused to permit this vessel to sail for Tocopilla, because the latter port was occupied by revolutionary forces. In an opinion rendered on December 12, 1895, this action seems to have been condemned by the British Commissioner and the Belgian Commissioner as violative of international law, although the claim made in behalf of the vessel was dismissed on a jurisdictional point. Moore, *International Arbitrations*, Vol. V, p. 4933. For a discussion of the refusal of Chilean authorities to grant clearance under such conditions, see Moore, *International Law Digest*, Vol. VII, pp. 815-817.

In oral argument counsel for Mexico cited an author, Dr. N. Politis, who appears to sustain the distinction which counsel for Mexico undertook to make. After referring to blockade in an international war and blockade in a civil war, Dr. Politis says:

“So long as the insurrection has not assumed through the recognition of the insurgents in the capacity of belligerents an international character, and remains a purely domestic conflict, the legally constituted government may close all or part of the ports of the country in the exercise of authority, by police measure, without establishing, properly speaking, a blockade.”¹ (*Recueil Des Cours*, 1925, Vol. 1, pp. 94-95.)

However, the author cites no legal authority for this view and gives no reasons for the distinction he makes. In my opinion a correct statement of the law is found in the following passages from an article by Professor George Grafton Wilson found in Volume 1 of the *American Journal of International Law*, 1907, pp. 55, 58:

“The legitimate government cannot in any way throw the burden of executing its decrees upon a foreign state. Even its decrees of closure in time of insurrection must be supported by sufficient force to render them effective....

“Attempts have also been made by the parent State to obtain advantages of a blockade without the obligations of war through a proclamation declaring ports held by insurgents closed. Foreign States have, however, usually taken the position that such decrees are of no effect and the ports in the hands of the insurgents are closed only to the extent to which an effective force may physically prevent entrance....

“If ports in the possession of the insurgents could be closed by decree, there would be a close analogy to the old idea of a paper blockade. The principle has come to be generally recognized that in time of insurrection closure to be respected must be by effective force.”

¹ “Tant que l’insurrection n’a pas pris par la reconnaissance des insurgés en qualité de belligérants, un caractère international et reste une lutte purement interne, le gouvernement légal peut fermer tout ou partie des ports du pays par voie d’autorité, par mesure de police, sans y établir, à proprement parler, un blocus.”

The above quoted statements appear to be of particular interest in connection with the question under consideration, since the author's article is largely concerned with the distinction between war in connection with which there has been a "recognition of belligerency by a state" and war which exists without such recognition. The latter the author for the purposes of his discussion apparently designates as "insurrection".

Of similar particular interest are some references in the message of December 8, 1885, sent by President Cleveland to the Congress of the United States. He referred to "a question of much importance" presented by decrees of the Colombian Government, proclaiming the closure of certain ports then in the hands of insurgents, and declaring vessels held by the revolutionists to be piratical and liable to capture by any power. The President explained that the United States could assent to "neither of these propositions"; that "effective closure of ports not in the possession of the government, but held by hostile partisans, could not be recognized"; and that the "denial by this Government of the Colombian propositions did not, however, imply the admission of a belligerent status on the part of the insurgents." *Foreign Relations of the United States*, 1885, p. v.

G. L. SOLIS (U.S.A.) *v.* UNITED MEXICAN STATES

(October 3, 1928. Pages 48-56).

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—AFFIDAVITS AS EVIDENCE. Affidavits *held* admissible as evidence.

NATIONALITY, PROOF OF. Although nationality of a claimant must be determined in the light of the law of the claimant Government, local law as to evidence sufficient to establish nationality *held* not binding on an international tribunal. Nevertheless, such local law will not be ignored.

BAPTISMAL CERTIFICATE AS PROOF OF NATIONALITY. Baptismal certificate dated May 1, 1883, of child born September 13, 1882, together with two supporting affidavits of third parties, *held* sufficient proof of nationality.

DUAL NATIONALITY. Claim will not be rejected on ground claimant possessed dual nationality solely by virtue of fact claimant's name appeared to be of Spanish origin.

FAILURE TO PROTECT. Evidence of failure to protect against acts of revolutionary forces *held* insufficient.

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY. Claim for taking of property by soldiers, presumed to be under command of officers, *allowed*.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 454; Annual Digest, 1927-1928, pp. 242, 483; British Yearbook, Vol. 11, 1930, p. 220.

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of G. L. Solis to obtain compensation for cattle said to have been taken

by Mexican soldiers from the claimant's ranch, called Morales, in the state of Tamaulipas, Mexico, in 1924. The claim consists of two items, one of \$535.00 for cattle alleged to have been taken by "de la Huerta revolutionary forces", and one of \$120.00 for cattle alleged to have been taken by Mexican federal forces. A "proper amount of interest" is asked for in the Memorial.

In the Answer of the Mexican Government it is alleged that "The American nationality of the claimant does not appear duly proven". Some point is made of a discrepancy in the record with respect to the given name of the claimant, and with respect to an explanatory affidavit accompanying the Memorial, it is stated that it "is wanting in any probatory force, inasmuch as it is *ex parte*." These contentions were forcefully and in much detail elaborated by counsel for Mexico in oral argument and in the Mexican brief.

Affidavits have been used by both parties in the pending arbitration. Use has been made of them extensively in arbitrations in different parts of the world for a century. And in Article III of the Convention of September 8, 1923, Mexico and the United States stipulate that they may be used before this Commission. It is unnecessary to observe, therefore, that the Commission can not regard them as being without any probatory force.

The divergence of views between counsel for the respective parties in the arbitration probably results to some extent from differences in local customs and practices in the two countries. However, this Commission is an international tribunal, and it is its duty to receive, and to appraise in its best judgment, evidence presented to it in accordance with arbitral agreement and international practice.

The records before the Commission contain correspondence between the two Governments, communications of various kinds contemporaneous with the occurrences pertaining to claims, and documents evidencing transactions entering into these claims. It is of course necessary in cases tried either before international courts or domestic courts to obtain evidence with regard to occurrences out of which claims arise. Testimony of witnesses may be offered, subject to cross-examination, but obviously in international arbitrations this procedure is seldom practicable. No oral testimony has heretofore been offered to the Commission. Sworn statements and unsworn statements have been laid before the Commission. Unquestionably it is true, as has been argued before the Commission, that affidavits used before domestic courts have contained false statements, but it does not follow that, because false testimony may be revealed in a given case that there is a presumption that all testimony is false, and that a form of evidence sanctioned by the arbitral agreement and by international practice can not be used profitably. When sworn statements instead of unsworn statements are employed in an international arbitration it is undoubtedly because the use of an affidavit in an arbitration is to some extent an approach to testimony given before domestic tribunals with the prescribed sanctions of judicial procedure. When sworn testimony is submitted by either party the other party is of course privileged to undertake to impeach it, and, further, to analyse its value, as the Commission must do.

Due no doubt in a measure to local custom and practice but slight use of affidavits have been made by the Mexican Government in the

pending arbitration. As has been pointed out to the Commission, and as it is doubtless well known, affidavits are used extensively in the United States by administrative and by judicial officials. Citizenship is a domestic matter in no way governed by international law, although multiplications of nationality frequently result in international difficulties. It has sometimes been said that, since obviously nationality of a claimant must be determined in the light of the law of the claimant government, proof adequate to establish citizenship under that law must be considered sufficient for an international tribunal. Even if this view be not accepted without qualification, it is certain that an international tribunal should not ignore local law and practices with regard to proof of nationality. The liberal practice in the United States in the matter of proving nationality in the absence of written, official records is shown by numerous judicial decisions. See for example, *Boyd v. Thayer*, 143 U. S. 135. It requires only a moderate measure of familiarity with international arbitral decisions, many of which are conflicting, to know that no concrete rule of international law has been formulated on this subject of proof of nationality.

A certificate of baptism showing that the claimant was baptized at Brownsville, Texas, in 1883, accompanies the Memorial. It is doubtless true that a birth certificate would have been more convincing evidence, in view particularly of the fact that the date of baptism is recorded as May 1, 1883, and the date of birth appearing in the certificate is September 13, 1882. To be sure, the claimant might have been born in one country and as an infant taken into another country and baptized there, but the Commission can not assume this to be a fact, and in the light of explanatory affidavits accompanying the Reply, the Commission is justified in reaching the conclusion that he was born in the country in which he was baptized. Irrespective of minute criticisms and speculations that might be made with regard to the affidavit of George Champion, a man 75 years of age, who swears that he is intimately acquainted with the family of the claimant, and that the claimant and his mother and father were born in Texas, there is no reason to disregard the testimony which he offers or to consider it to be unconvincing. The same is true with regard to the affidavit of J. A. Champion, who explains that he possesses similar knowledge concerning the Solis family. It is doubtless well known that birth certificates are often not available among official records in the United States.

A question has been raised with respect to dual nationality. The argument of counsel for Mexico on this point, involving a supposition that the claimant may possess Mexican as well as American nationality, apparently was predicated solely on the fact that claimant's name appears to be of Spanish origin. The prevalence of Spanish names in territories of the United States bordering on Mexico is probably a matter of very general information, and in any event, this fact is of course easily explainable when it is recalled that slightly more than a century ago Texas was Spanish territory, and within a somewhat less period it was Mexican territory. With respect to this point it may be significantly noted that from the certificate of baptism it appears that the names of the clergyman who baptized the claimant and of two sponsors are probably of Spanish origin, and evidently in any event, not of American origin. The same is true with regard to the name of the official who, on June 5, 1925, issued a copy of the certificate at Brownsville.

In the light of the evidence and applicable law, the Commission can not properly reject the claim on the ground of inadequate proof of nationality, or reject it on some theory that the United States is espousing a claim of a person possessing Mexican as well as American nationality.

In view of the nature of the evidence adduced by the United States in support of the claim for compensation for cattle said to have been taken by insurgent troops, the disposition of this item presents no considerable difficulty. To be sure, it is alleged in the Memorial that the cattle were taken by de la Huerta revolutionary forces, and that federal troops stationed in force in the locality of the claimant's ranch made no effort to capture or defeat the de la Huerta troops or to protect or to recover the property of the claimant. And there is some evidence to support these allegations, but that evidence is very general in terms and from the oral argument made by counsel for the United States, it appears that he was uncertain as to the character of the soldiers who took the property. The evidence presented as to the alleged failure of Mexican authorities to give protection to the property, is admitted by counsel to be scanty. With respect to a point of this kind the Commission has repeatedly made clear the obvious fact that it must have convincing evidence.

In the Mexican brief and in oral argument it was contended that Mexico can not be held responsible for the taking of cattle by revolutionary forces.

In the claim of the *Home Missionary Society* presented by the United States against Great Britain under an arbitral agreement signed August 18, 1910, the arbitral tribunal in its opinion discussed the principles applicable to responsibility for the acts of insurgents. In that case claim was made in behalf of an American religious body for losses and damages sustained during a native rebellion in 1898 in the British protectorate of Sierra Leone. It was contended that the revolt was the result of the imposition and attempted collection of a so-called "hut tax"; that it was known to the British Government that this tax was the object of native resentment; that in the face of danger the British Government failed to take proper steps for the protection of life and property; that loss of life and damage to property were the result of negligence and failure of duty; and therefore the British Government was liable to pay compensation. The British Government in defense of the claim stressed the unexpected character of the uprising and the lack of capacity on the part of British authorities to give protection in vast unsettled regions.

The tribunal declared that, whatever warning the British authorities may have had with regard to possible disturbances, it was not such as to lead to apprehension of a revolt such as occurred, and with respect to the law applicable to the case the tribunal said:

"It is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection. (Moore's *International Law Digest*, Vol. VI, p. 956; VII, p. 957; Moore's *Arbitrations*, pp. 2991-92; British Answer, p. 1.)" American Agent's *Report*, p. 425.

The tribunal also referred to the difficulty of affording on a few hours notice "full protection to the buildings and properties in every isolated and distant village", and stated that there was no lack of promptitude or courage alleged against the British troops, but that on the contrary, evidence proved that "under peculiarly difficult and trying conditions

they did their duty with loyalty and daring". The claim of the United States was dismissed, but the tribunal recommended that as an act of grace some compensation be made to the claimants.

In the opinion of Mr. Plumley, Umpire in the British-Venezuelan arbitration of 1903, reference is made to the following provision, as declaratory of international law, found in a treaty concluded in 1892 between Germany and Colombia:

"It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there be due want of diligence on the part of the Colombian authorities or their agents, for the injuries, oppressions, or extortions occasioned in time of insurrection or civil war to German subjects in the territory of Colombia, through rebels, or caused by savage tribes beyond the control of the Government." Ralston, *Venezuelan Arbitrations of 1903*, p. 384.

Following the quotation of this provision, Mr. Plumley said:

"It is also held that the want of due diligence must be made a part of the claimant's case and be established by competent evidence. This is brought out in the treaty of Italy with Colombia in 1892, where the language is 'save in the case of *proven* want of due diligence on the part of the Colombian authorities or their agents,' and such a requirement is strictly in accord with the ordinary rules of evidence." *Ibid.*

It will be seen that in dealing with the question of responsibility for acts of insurgents two pertinent points have been stressed, namely, the capacity to give protection, and the disposition of authorities to employ proper, available measures to do so. Irrespective of the facts of any given case, the character and extent of an insurrectionary movement must be an important factor in relation to the question of power to give protection.

In the light of the general principles referred to above, the item of \$535.00 in the instant claim must clearly be rejected, in the absence of convincing evidence of neglect on the part of Mexican authorities.

The item of \$120.00 for the value of cattle said to have been taken by federal forces involves questions less simple.

In defense of the claim for this item, the Government of Mexico invokes the well-recognized rule of international law that a Government is not responsible for malicious acts of soldiers committed in their private capacity and, further, alleges that the taking of property by federal soldiers has not been adequately proved.

The allegation in the Memorial on this point is to the effect that federal troops were encamped on claimant's ranch, and while there, took, killed and used as food, the cattle for which compensation is asked. As was observed in the opinion rendered by this Commission in the claim of *Thomas H. Youmans*, Docket No. 271,¹ (*Opinions of the Commissioners, U. S. Government Printing Office, Washington, 1927*, p. 150, 158) certain cases coming before international tribunals may have revealed some uncertainty whether acts of soldiers should properly be regarded as private acts for which there is no liability on the state, or acts for which the state should be held responsible. In the absence of definite information concerning the precise situation of the troops, the Commission must consider whether it is warranted in assuming that the soldiers encamped on the claimant's ranch were a band of stragglers for whom there was no responsibility, or that they must have been under the direct command of some officer,

¹ See page 110.

or that responsibility for their location and activities rested with some officer, in the seemingly strange event that no responsible officer was in immediate command. I am of the opinion that it cannot reasonably be assumed that the soldiers were stragglers for whom there is no responsibility. I think it must be taken for granted that some officer was charged with responsibility for their station and acts. There is evidence in the record which has not been refuted that about 100 soldiers were camped on the ranch for about a month. Some light on a situation of this kind may, I think, be found in an analysis of cases made by the tribunal under the Special Agreement of August 18, 1910, between Great Britain and the United States, in the opinion written in the claim of the *Zafiro*, presented by the United States against Great Britain. American Agent's *Report*, pp. 583-84. The tribunal, after citing cases dealing with questions of responsibility for acts of soldiers, said:

"These cases draw a very clear line between what is done by order or in the presence of an officer and what is done without the order or presence of an officer. But it is not necessary that an officer be on the very spot. In Donougho's Case, 3 Moore, *International Arbitrations*, 3012, a Mexican magistrate called out a posse to enforce an order; but no responsible person was put in charge and the 'posse' became a mob so that damage to foreigners resulted. The Mexican Government was held liable. In Rosario & Carmen Mining Company's Claim, Id. 3015, growing out of the same occurrences, Sir Edward Thornton relied in part on the culpable want of discretion shown by the magistrate who called out the posse in not putting it in charge of a proper person or being present himself 'to restrain the violence of such an excited body of men.' In Jeanneaud's Case, 3 Moore, *International Arbitrations*, 3001, a cotton gin belonging to neutrals was burned by volunteer soldiers who were in a state of excitement after a battle. The officers did not use the ordinary means of military discipline to prevent it, and their government was held liable. In the Mexican Claims, 3 Moore, *International Arbitrations*, 2996-7, a government was held liable where the officers failed to restrain such actions after having had notice thereof. (See also Porter's Case, Id. 2998.) And in the Case of Dunbar & Belknap, Id. 2998, there was held to be liability where officers left the property of foreigners without protection when it was in obvious danger from their soldiers."

The difficulties confronting the Commission because of the nature of the records in this case are obvious. On the one hand, the evidence produced by the United States is properly referred to as scanty. On the other hand, no evidence at all accompanies the Answer of the Mexican Government in which appears the following paragraph:

"The Agency of Mexico has made any kind of efforts to obtain data in relation with the facts on which it is pretended to base this claim, concerning the stock that it is alleged was taken by Federal forces. The document filed as Annex to this Answer, shows the only result that said efforts have produced up to the present. If at a later time more information is obtained, the same will be placed in due time before the Honorable Commission, in case it be in accordance with the Rules."

It is asserted in the Mexican brief that the affidavits accompanying the Memorial on which allegations with respect to the action of federal soldiers are based are altogether too vague to warrant the conclusion "that the taking of the cattle was ordered by any commanding officer or even that the alleged soldiers at the time of taking the cattle were under the command of any officer." In the absence of any evidence from the civilian or military authorities of Mexico destroying the value of the

affidavits presented by the United States, the Commission would not be justified in considering them without evidential value. An affidavit is furnished by José T. Rivera, who states that while he was in the employ of the claimant and attending the latter's cattle about one hundred federal soldiers by force and threats carried away the animals for which compensation is sought. In the absence of impeaching testimony it seems to be proper to attribute reliability to a man who had, as he swears, for five years attended the ranch of his employer. The testimony given by Rivera was confirmed by an affidavit of Rosendo Jaramio, who swears that he lived at the Morales Ranch for the past fifteen years; that he is familiar with the brand Solis used on the stock at Morales Ranch which has been used there for many years and which is well known to the people of that vicinity; that federal soldiers encamped on the ranch about a month; that he talked to the soldiers and saw them take and kill cattle. The claimant himself swears that he verified the information concerning these occurrences which were communicated to him by his manager. It is not perceived that there is any good reason to believe either that for some reason the two Mexicans furnished false information, or that the claimant has fabricated a false claim for a comparatively small amount.

The values on which the item of \$120.00 was predicated have not been contested, and the claimant should therefore have an award for this sum with interest from November 24, 1924.

Decision.

The claim is disallowed with respect to the item of \$535.00.

The United Mexican States shall pay to the United States of America in behalf of G. L. Solis, the sum of \$120.00 (one hundred and twenty dollars) with interest at the rate of six per centum per annum from November 24, 1924, to the date on which the last award is rendered by the Commission.

BOND COLEMAN (U.S.A.) *v.* UNITED MEXICAN STATES

(October 3, 1928. Pages 56-61.)

RESPONSIBILITY FOR ACTS OF FORCES.—ACTS OF INSURRECTIONARY FORCES.—FAILURE TO APPREHEND OR PUNISH.—DUTY TO PROTECT IN REMOTE TERRITORY. Claimant was attacked and wounded by insurrectionary forces in remote region. Insufficient evidence was furnished that the military authorities were notified of the attack. No one was apprehended or punished for the injury. *Held*, responsibility of respondent Government not established.

REQUISITION BY MILITARY FORCES.—MEASURE OF DAMAGES.—PROXIMATE CAUSE. Boat was sent to injured claimant to bring him to point where he would receive proper medical care. Commander of Government forces seized and detained vessel for three days, using it to transport troops, but no imperative necessity for this act was shown. Claim for delay in getting medical aid *allowed*.

Cross-reference: Annual Digest, 1927-1928, p. 234.

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of Bond Coleman to obtain an indemnity in favor of the claimant in the amount of \$4,000.00. The claim is predicated on two grounds: (1) failure of Mexican authorities to apprehend and punish persons who seriously injured the claimant, and (2) the action of Mexican military authorities in depriving the claimant of prompt means of conveyance which his employers had put at his disposal to enable him to receive urgently needed medical attention.

Briefly stated the facts in the case as set forth in the Memorial are as follows:

During the month of June, 1924, and for some time previous thereto, the claimant was employed by the *Cía. Mexicana de Terrenos y Petróleo, S. A.*, of Frontera, Tabasco, Mexico, as a geologist. His work necessitated his going into unfrequented and sparsely populated sections of Mexico for the purpose of making geological surveys and investigations. During the first few days of the month of June, 1924, the claimant and three other men in his charge, namely, Bruce Harlton, an Englishman, and Rutilio Vengas and Pedro Carpio, both Mexicans, were travelling, in the conduct of their work, on horseback from Huimanguillo to Villa Hermosa, in Tabasco, Mexico. They carried with them necessary equipment on four pack mules.

On June 4, 1924, while in the performance of their work, the claimant and the men in his charge were unexpectedly attacked by a band of twelve or fifteen armed supporters of de la Huerta, near Soledad on the road between Huimanguillo and Villa Hermosa. The attack was made without warning and was explained by one of the attacking Mexicans as having been made on the assumption that claimant and his associates were members of federal forces.

As a result of the shots fired during the attack, a bullet lodged in the claimant's left wrist, fracturing the bone, and inflicting a painful wound.

After convincing the attackers that neither he nor his associates were in any manner connected with the federal military forces and had no knowledge of the whereabouts of certain Obregón forces, the claimant and his party were robbed of their equipment and pack mules and were thereupon permitted to continue on their way to Villa Hermosa.

The claimant was given medical treatment at Villa Hermosa and then sent to Galveston, Texas, and later to Kansas City, Missouri, for further necessary medical attention. In spite of the seriousness of the claimant's injury and the fact that his employers had chartered a boat and sent it to Villa Hermosa for the purpose of taking the claimant to Galveston, Texas, for medical treatment, General Gonzáles, Federal Commander in charge at Villa Hermosa and vicinity, detained for a period of three days for the purpose of transporting his troops and equipment the boat sent by the *Cía. Mexicana de Terrenos y Petróleo, S. A.* As a consequence of the resulting delay, the wound in the claimant's wrist, which still had fragments of the bullet therein, became infected, it is alleged, causing the claimant further pain, suffering and damage.

It is alleged that, as a result of the injuries received, the claimant was obliged to expend several hundred dollars for medical treatment and attention; that he has never regained the full use of his hand or arm;

and that he is even now suffering from the disability which has impaired his former earning capacity.

Upon arrival at Villa Hermosa, the claimant reported the entire matter to General González and to General Martínez, who were then in military charge of that city and the vicinity, and requested that proper steps be taken for the apprehension and punishment of the offenders. However, no endeavor was made, it is charged, to apprehend or to punish the attackers, who were a band of Mexicans, said to have been notoriously and openly violating the law in that vicinity.

The Commission is confronted with difficulties such as it encounters from time to time because of vagueness or lack of evidence. That which accompanies the Memorial of the United States is scanty on important points, and no evidence at all is presented with the Mexican Answer. The right is reserved in the Answer "to file evidence if it is deemed fit".

It is alleged in the Answer that "the claimant has no right to be heard, inasmuch as the acts of which he complains are not comprised within the Convention of 1923". And the question of jurisdiction is mentioned in the Mexican brief, but it was not raised in oral argument. It is not perceived how there can be any question as to the jurisdiction of this Commission to pass upon a claim involving a complaint against the conduct of Mexican federal military authorities in the month of June 1924.

There was considerable discussion by counsel on both sides whether the persons who wounded the claimant should be considered to be revolutionary soldiers or brigands. In the Memorial it is stated that the claimant and the members of his party were attacked by a band of armed supporters of de la Huerta, but it was contended in the written and the oral arguments by counsel for the United States that the territory in the vicinity of Villa Hermosa was not in control of the de la Huerta forces on June 4, 1924, and that Mexico was not without responsibility for failure to prosecute and punish wrong-doers for wrongs committed in that locality. There was considerable discussion by counsel on each side whether it could be considered that the so-called de la Huerta revolution had been suppressed at that time. It would probably be difficult or impracticable for the Commission to undertake to arrive at a definite conclusion with regard to that point, and it seems to be unnecessary to analyze the contentions made with respect to this matter.

In the opinion rendered in the claim of *G. L. Solis*, Docket No. 3245¹, the general principle with regard to responsibility of a government for the acts of insurrectionists was discussed. It was emphasized that in considering the question account must be taken of the capacity to give protection, and the disposition of authorities to employ proper measures to do so, and that in the absence of convincing evidence of negligence, responsibility could not be established.

In the Mexican Answer and in the brief no defense is made to the claim except the untenable objection to the jurisdiction of the Commission, and the contention that the Mexican Government can not be held responsible for acts of insurgents. However, the broad denial of complete non-responsibility for insurgents made in the Answer and brief apparently was not maintained in oral argument during the course of which counsel explained his view that a government might be held

¹ See page 358.

responsible for acts of insurgents, when it was chargeable with negligence. It is of course important to take cognizance of the precise charge made by the United States which is not a failure on the part of Mexican authorities to prevent the acts from which the claimant suffered, but a failure to apprehend and punish the wrongdoers.

It is alleged in the Memorial that the claimant reported the attack made on his party to General González and to General Martínez, and requested that proper steps be taken for the apprehension and punishment of the offenders. However, there is no evidence in the Memorial to support that allegation. Indeed there is no specific information accompanying the Memorial to show that the military authorities were notified of these deplorable occurrences. However, at the hearing of the case there was introduced an affidavit of the claimant in which he swears that General González was notified that the claimant had been shot, and that no action was taken either by General Martínez or by General González to punish the men who did the shooting. There is no information in the record regarding the nature of the region in which the occurrences in question took place except such as possibly may be inferred from the statements to the effect that the claimant's work necessitated his going into unfrequented and sparsely populated sections of Mexico. There is information that Mexican federal forces at the time of the attack were in the neighborhood of Huimanguillo, "a day and a half travel by mule from this place", and that the shooting took place about twenty-five miles from Villa Hermosa. There is no information as to the number of federal troops or as to the possibilities of apprehension. Whatever conclusions might be made as to a complete or substantially complete suppression of the de la Huerta revolution, the Commission, in the unfortunate state of the record, is constrained to hold that an indemnity can not be awarded on the ground of negligence with respect to the apprehension and punishment of the persons who injured the claimant. The same general principles with regard to proof of negligence in the prevention of wrongdoing is applicable to proof with respect to negligence in the matter of apprehension and punishment. And in giving application to those principles in the instant case it is not important that the persons who attacked the claimant's party should be placed under some precise category or designation.

On the other hand, responsibility must be fixed on the Mexican Government for action of General González in seizing the boat which was sent to enable the seriously wounded man to obtain medical assistance. No defense was made by the Mexican Government to this complaint with respect to this action. It is unnecessary to consider any legal questions with respect to the right of military authorities to requisition, conformably to law and on the payment of proper compensation, a vessel that may be needed for public purposes. This ship was seized without compensation, and at a time when the dictates of humanity should have prompted assistance to the claimant, measures taken for his relief were frustrated. No imperative necessity for taking the boat has been shown. The evidence may leave some uncertainty as to the length of time he was delayed in getting medical aid, and of course as to the precise consequences of the delay. But it may be taken as a certainty that his sufferings and injuries were aggravated by that delay, and it is clear that he was the victim of

wrongful action. It is believed that the claimant may properly be awarded the sum of \$1,000.00 for the injury inflicted upon him.

Decision

The United Mexican States shall pay to the United States of America in behalf of Bond Coleman the sum of \$1,000.00 (one thousand dollars.)

DANIEL DILLON (U.S.A.) *v.* UNITED MEXICAN STATES

(*October 3, 1928, concurring opinion by American Commissioner, October 3, 1928. Pages 61-65.*)

DETENTION FOR UNREASONABLE PERIOD.—DETENTION “INCOMUNICADO”.—RIGHT OF ACCUSED TO BE INFORMED OF CHARGE AGAINST HIM.—EXPULSION OF ALIENS.—Claimant was imprisoned for at least fifteen days without being allowed to communicate with anyone in connection with his arrest for purposes of expulsion from Mexico. It was also asserted that he was not informed of the charge against him. Claim *allowed*.

CRUEL AND INHUMANE IMPRISONMENT.—INTERNATIONAL STANDARD. Evidence *held* insufficient to establish that conditions of imprisonment were below international standards.

Cross-references: Annual Digest, 1927-1928, p. 236; British Yearbook, Vol. 11, 1930, p. 225.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

Claim is made in this case against the United Mexican States by the United States of America on behalf of Daniel Dillon, an American citizen, to obtain damages in the sum of \$15,000, U. S. currency, for alleged unlawful detention for a period of about fifteen days in June, 1916, and for alleged maltreatment during that time.

The claimant had in the summer of 1915 directed the press publicity of the Carranza government in Washington, D. C., and late in 1915 he went first to Vera Cruz and afterwards to Mexico City as an employee of the Mexican government. During several months he acted as press cable censor in Mexico City. In the spring of 1916, however, his connection with the Mexican government came to an end. At that time he accepted a position as representative of the International News Service in Mexico City.

During the early part of June, 1916, the claimant was arrested by two Mexican Federal officers. He was brought to the Federal Department of Gobernación, and placed in a small outhouse bordering the patio in the rear of the main building. After about three days detention there, he was taken to the penitentiary on the outskirts of Mexico City, and he alleges that there he was placed in a small cell with scant light and

bad ventilation, in which the floor was filthy and the sanitary installations long since out of order. After about twelve days of imprisonment in that cell he was taken to a small room on the top floor of the Municipal Palace, and the next day he was turned over to Mr. John L. Rodgers who was acting as Special Representative of the United States of America. Immediately afterwards the claimant left Mexico.

According to the affidavit of the claimant, and no evidence to the contrary having been produced, it is to be assumed that during all the time of his detention the claimant was kept *incomunicado*, i. e. without being allowed to communicate with anybody, and that no information was given him concerning the purpose of his arrest and detention. He alleges that he had no bed nor bed clothing, and that the food served him was insufficient and bad.

From the record it seems that the purpose for which the claimant was arrested was that the Mexican government intended to expel him from Mexico.

In the pleadings submitted by counsel of the United States of America, the right of the United Mexican States to expel the claimant, without informing his government or himself about the reasons why he was to be expelled, has been challenged. During the oral hearing, however, this part of the pleadings has not been touched upon by said Counsel, and the Commission takes it that the claim is now predicated on alleged mistreatment of the claimant in connection with his arrest and detention only.

With regard to the question of mistreatment the Commission holds that there is not sufficient evidence to show that the rooms in which the claimant was detained were below such a minimum standard as is required by international law. Also the evidence regarding the food served him and the lack of bed and bed clothing is scanty. The long period of detention, however, and the keeping of the claimant *incomunicado* and uninformed about the purpose of his detention, constitute in the opinion of the Commission a maltreatment and a hardship unwarranted by the purpose of the arrest and amounting to such a degree as to make the United Mexican States responsible under international law. And it is found that the sum in which an award should be made, can be properly fixed at \$2500, U. S. currency, without interest.

Nielsen, Commissioner:

I concur in the Presiding Commissioner's opinion, but I desire to make a few explanatory remarks.

The sovereign right of expulsion is not denied by the United States. Complaint is made against the methods used in connection with expulsion. In any event that seems to be the burden of the oral argument in behalf of the United States. Evidently counsel for both sides proceeded on the theory that expulsion may have been in the minds of the Mexican Authorities, although the claimant was detained in Mexico about 15 or 20 days and then appears to have left without being forcibly sent from the country.

The sovereign right of the harsh measure of expulsion being conceded, it might be considered, on the one hand, that in reality a complaint against harsh treatment in a given case is a matter entirely distinct from

expulsion. If this view be taken in the instant case we would have a case of imprisonment in connection with which no charges were made known to the claimant, and no opportunity was given to the claimant to defend himself, and sworn allegations not disproved, of mistreatment during a considerable period of incarceration are in the record. On the other hand, it would seem that in a case involving a complaint of arbitrary and harsh treatment in connection with expulsion, the fact that the measure of expulsion is invoked by a government is something of which account may be taken in appraising the nature of the harsh treatment. There may be no rule of international law or practice with regard to precise, proper methods of expelling an alien, such as those that have been suggested by writers, by conducting a man to an international border or by delivering him to a representative of his government. But when resort is had to a use of unnecessary force or other improper treatment there may be ground for a charge such as is made in the instant case, account being taken of the manner in which expulsion might have been effected.

Having in mind the difficulties frequently confronting the Commission in dealing with evidence, the present case may be said to be an interesting and particularly illustrative one. In the Mexican brief it is attempted to destroy the evidential value of the claimant's affidavit, first, because he was said to have made exaggerated and untruthful statements, and secondly, because his evidence is an unsupported statement in that it is not corroborated by the statements of others. The first charge was withdrawn in oral argument as based on an inaccurate copy of a communication accompanying the Mexican Answer, and it was shown by authentic documents that the claimant did not overstate but indeed underestimated the term of his imprisonment. On the other hand, counsel for the United States referred to the statement in the Mexican brief that "Arbitral commissions with obvious prudence refuse to hear the claimant when he alone speaks or to take his statements literally". (P. 14.) And he argued that, whatever might be said with respect to the unsatisfactory character of the record, nothing could be furnished in support of contentions but an affidavit of the claimant in the instant case, since all information regarding the treatment of Dillon was in the possession of the Mexican Government, and the claimant having been prevented from communication with other persons during his imprisonment, it had become impossible for the United States to submit further evidence. However, it may be observed with reference to this argument, to which there undoubtedly is considerable force, that the United States could have furnished with the Memorial or with the Reply convincing evidence with regard to the extremely important point of length of detention of claimant. Copies of telegrams produced at the hearing furnish not only proof confirming the statement of the claimant made in his affidavit, but proof that instead of over-stating he underestimated the period of his detention.

An arbitral tribunal can not, in my opinion, refuse to consider sworn statements of a claimant, even when contentions are supported solely by his own testimony. It must give such testimony its proper value for or against such contentions. Unimpeached testimony of a person who may be the best informed person regarding transactions and occurrences under consideration can not properly be disregarded because such a

person is interested in a case. No principle of domestic or international law would sanction such an arbitrary disregard of evidence.

It seems to me that whatever may be said with regard to the desirability or necessity of having testimony to corroborate the testimony of a claimant, a statement need not be regarded in the legal sense as unsupported even though it is unaccompanied by other statements. Statements of claimants may be impeached by information showing them to be incorrect, and they may be corroborated by statements showing them to be correct. Evidence produced by one party in a litigation may be supported by legal presumptions which arise from the non-production of information exclusively in the possession of another party, and this well-known principle of domestic law is one to which it seems to me an international tribunal is justified in giving application in a proper case. But few concise rules of adjective law have been developed in international practice, but it is proper for an international tribunal to give effect to certain elementary principles applied by domestic courts.

Decision

The United Mexican States shall pay the United States of America on behalf of Daniel Dillon \$2,500. (two thousand five hundred dollars) without interest.

A. L. HARKRADER (U.S.A.) *v.* UNITED MEXICAN STATES

(*October 3, 1928. Pages 66-68.*)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—INTERNATIONAL STANDARD. Evidence *held* not to show that measures taken to apprehend or punish persons guilty of murder of an American subject and wounding of another fell below international standard from a broad and general point of view.

Cross-reference: Annual Digest, 1927-1928, p. 226.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On Sunday, November 19, 1922, two Americans, Wert D. Harkrader and Dan McKinnon, who were visiting Calexico, California, for the purpose of obtaining employment at this place, went across the boundary between the United States and Mexico to Mexicali, Lower California. They arrived in this town between noon and one p. m. Having taken lunch and some drinks at various places, they started back in the direction of Calexico about two o'clock. They passed a Mexican cabaret where some dancing and music were going on, and Harkrader went into the cabaret, McKinnon waiting for him on the outside. At that time a Mexican addressed McKinnon suggesting that he and his friend take a drive to see the sights of Mexicali in his Ford car that was standing close by with a chauffeur sitting in it. When Harkrader came out of the cabaret, McKinnon told him of the proposal of the Mexican, and they agreed to accept it. Thereupon the four men started, the Mexican chauffeur

and McKinnon sitting in the front seat, Harkrader and the second Mexican in the rear seat. The chauffeur drove to a gasoline station where he took on oil and gasoline. Then he drove around the town, gradually working toward the outskirts, and finally he drove along a road leading from the town into the country. Having proceeded about a mile and a half along this road, the Mexican who was sitting in the rear seat drew his gun, ordered the driver to stop the car, and asked the two Americans to deliver up their money, which they did without making any resistance. Harkrader was then ordered into the front seat between McKinnon and the chauffeur, and the car drove farther into the country, the Mexican in the rear seat holding his gun upon the two Americans all the time. At a turn in the road a big wagon, drawn by six mules, was noticed approaching, and as the two vehicles met McKinnon leaped from the automobile. The armed Mexican fired two shots at him, both of them wounding him. He feigned death until the automobile with his friend and the two Mexicans had gone. Then he started back toward Mexicali. He overtook the mule-drawn wagon and was permitted to ride. Afterwards a Ford automobile came along the road and by that he was taken to the police station at Calexico. Here his wounds were dressed by a doctor called for the occasion, and afterwards he was conveyed by an ambulance to the hospital at El Centro where he remained until December 6.

In the evening of November 19, the lifeless body of Harkrader was found by two Mexicans at the roadside about five miles from Mexicali. The murderers have never been apprehended. The above statement of facts is taken from the affidavit of McKinnon.

Claim is now made against the United Mexican States by the United States of America on behalf of A. L. Harkrader, the father of the deceased and citizen of the United States, for damages in the sum of \$25,000, U. S. currency, for failure on the part of the Mexican authorities to take appropriate steps with a view to the apprehension and punishment of the murderers.

It appears from the record that the Chief of the Police at Mexicali was informed of the facts related by McKinnon by the American Chief of Police at Calexico on November 19, at 5 p. m., and that he immediately ordered a pursuit of the murderers. A commission of policemen departed in the evening of November 19, and another commission departed the following morning. The latter commission located the body of Harkrader, which, as mentioned above, had already been found in the evening of November 19 by two Mexicans, but none of the two police commissions succeeded in apprehending the murderers, and further investigations, including an examination of McKinnon, were equally unsuccessful. It is argued by Counsel of the United States that no endeavor seems to have been made to ascertain who the driver of the mule-drawn wagon was, and it is especially emphasized that McKinnon does not appear to have been questioned as to what persons he and Harkrader and the two Mexicans met with during their drive, although it would have been of the utmost importance for the investigation to have obtained the testimony of the man at the gasoline station who sold oil and gasoline to the car in question. It appears, however, that the record of the investigations submitted by the respondent government on which the criticisms of Counsel of the United States is based, is incomplete, so that it does not follow with certainty that negligence, such as contended by the claimants, actually has been shown. The Commission further is of the opinion that

its conclusion whether the investigation that took place was below the minimum standard required by international law must be based on a broad and general view of the steps taken rather than on a criticism of some particular point. And on the whole, it seems that in the present case considerable efforts were made. It is also stated in dispatches to the American Department of State from the American Consul at Mexicali that in his opinion the Mexican authorities were doing their best.

Decision.

The claim of the United States of America on behalf of A. L. Harkrader is disallowed.

G. W. McNEAR, INCORPORATED (U.S.A.) *v.* UNITED MEXICAN STATES

(October 10, 1928, concurring opinion by American Commissioner, October 10, 1928. Pages 68-73.)

DENIAL OF JUSTICE.—ILLEGAL DETENTION OF PROPERTY. Claimant sold two carloads of wheat to a Mexican importer under bills of lading which were not to be delivered until payment of purchase price. Goods were seized by Mexican customs authorities on ground they were property of Mexican importer, who was charged with payment of import duties and fees. Claimant requested court to order return of goods, showing facts of his ownership, but court ordered goods to be released only on provisional payment of import charges. Goods were then sold to satisfy such charges and a surplus was realized. Claimant then requested Mexican authorities to pay him value of wheat seized and sold but this request was denied. Claim for value of wheat *allowed*.

Cross-reference: Am. J. Int. Law, Vol. 23, 1929, p. 461.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

During May and June 1907 George W. McNear, an American citizen, now deceased, sent two carloads of wheat, sold to S. Montemayor, Ciudad Juárez, Mexico, on a cash basis, by the Southern Pacific Railroad, one, containing 610 sacks, valued at \$1124.90, U. S. currency, from Portland, Oregon, in car No. 83074, and the other, containing 479 sacks, valued at \$1019.90, U. S. currency, from Port Costa, California, in car No. 30758. The Southern Pacific Railroad issued bills of lading according to which the two shipments were consigned to the order of McNear, Ciudad Juárez, via El Paso, where S. Montemayor, care of J. T. Woodside, was to be notified. Sight drafts for the purchase price were sent to the Agency of the Banco Minero at Ciudad Juárez for collection. The bills of lading were attached to those drafts, and the Bank was instructed to deliver the bills of lading to Montemayor upon payment of the drafts only.

In El Paso the two cars with wheat were transferred to the Mexican Central Railway, by which they subsequently were taken to Ciudad Juárez. It seems that Montemayor or a representative of him took care

of having the necessary consular invoice issued, and that he had such an invoice covering besides the two carloads sold him by McNear a third carload of wheat sold him by the Nash-Ferguson Grain Company of Kansas City, Missouri, issued to himself.

At the time when the carloads in question arrived in Ciudad Juárez Montemayor was charged with having imported in a clandestine manner fourteen carloads of wheat without paying consular fees and customs duties thereon. Because of that charge he had fled from the town.

Acting on the belief that the two carloads shipped by McNear as well as the carload shipped by the Nash-Ferguson Grain Company were the property of Montemayor or in his possession, the Customs authorities in Ciudad Juárez requested the District Court to order a seizure of the three carloads in order to establish a security for the Treasury with regard to the pecuniary responsibility that might be imposed upon Montemayor. This request was complied with by the Court. Afterwards a representative of the Banco Minero as well as the American Consul at Ciudad Juárez tried to obtain the release of the goods by application to the court. They pointed to the fact that the bills of lading were in the possession of the bank and that according to a notation on the drafts, they should not be delivered to Montemayor until he paid the drafts, which he had failed to do. Their intervention, however, was opposed by the Administrator of the Customs House as well as by the Agent of the Ministerio Público at Ciudad Juárez, both of whom asserted that the carloads in question had been imported by Montemayor and that he would not have been able to dispose of them, as in fact he did, unless he had paid for them at El Paso. The decision of the Court was to the effect that no release could be ordered, but that a provisional delivery of the wheat could be made on payment of the duties and deposit of the value of the wheat, which amount in due time would have to be delivered to its legitimate owner. It is said in the decision that the proceedings which were being held were those of the summary character referred to in Article 608 of the Customs House Ordinance, and that the court was "unable at present to render any opinion as to the rights which may be had with regard to the attached property". The decision evidently implies, in accordance with Mexican law, that the shipper of the wheat, in order to protect his alleged right of property, would have to bring a formal action before the Court. McNear, however, did not adopt this course, but some years after he petitioned the Mexican government to order the Customs House in Ciudad Juárez to pay him \$2,426.57, U. S. currency, namely the value of the wheat owned by him and seized by said Customs House. At that time the wheat had long ago been auctioned, and the revenue, deduction having been made for import duties and freight due on the goods, had been deposited with the Court. The government rejected McNear's petition. It was argued that, according to Art. 2822 of the Mexican Civil Code, a thing sold belongs to the buyer as soon as there is an agreement between buyer and seller with regard to the sale, and that, according to Art. 657 of the Customs House Ordinance, McNear's right to claim the amount deposited with the court as the balance left from the revenue of the auction sale of the wheat was lost by prescription. At first it was further argued that a business transaction between McNear and Montemayor had taken place when the goods arrived at El Paso, but later on it was admitted that this supposition was erroneous.

Claim is now made against the United Mexican States by the United States of America on behalf of G. W. McNear, Incorporated, an American corporation, to which, prior to his death, George W. McNear assigned amongst other things, "all book accounts, debts, claims and demands" belonging to or pertaining to his business, for damages for wrongful seizure of the wheat in question in the sum of \$2,144.80, U.S. currency, with interest thereon at 6 per cent from July 25, 1907, the date when the seizure is alleged to have taken place.

In the opinion of the Commission there can be no doubt that the detention of the wheat was wrongful. The sale of the wheat to Montemayor was a conditional sale. The intention of the parties to the contract of sale was that the ownership and the possession of the goods should not pass to the buyer before payment of the purchase price had taken place. Upon such a case Art. 2822 of the Mexican Civil Code does not bear, this article being applicable only so far as the parties have not agreed otherwise, and the issuance of a consular invoice covering the goods in question could not alter the legal position of the parties with regard to the goods, as such a document does not confer any title to the goods in the person to whom it is issued. It is possible that the court was justified in ordering the seizure of the goods in the course of proceedings of a summary character, in which it was stated by the Customs authorities that the goods had been imported by Montemayor. But from the moment the Customs authorities were informed that the bills of lading were in the hands of the Banco Minero and could be delivered to the buyer on payment of the purchase price only, it ought to have been perfectly clear to those authorities that the wheat should be released. From that moment their retention of the wheat constitutes a violation of a rule that is of fundamental importance to commerce and with which they should have been familiar. For this violation the Commission holds that Mexico must be responsible under international law, notwithstanding that possibly McNear might have had his right recognized, if he had brought a formal action before the Court. The Commission further holds that the amount to be awarded must be the value of the wheat.

Nielsen, Commissioner:

I agree with the result that flows from the Presiding Commissioner's opinion, because to my mind the seizure and detention of the wheat, the property of the claimant, without compensation, was a confiscation of that property

It is clear, as stated in the Presiding Commissioner's opinion, that the transaction between McNear and Montemayor was in the nature of a conditional sale. Whatever justification there may have been for the seizure of the wheat on suspicion that it belonged to Montemayor, there was no warrant for the detention of the property when the facts of ownership, which were very simple, were made clear. I perceive no proper reason why the same authorities who initiated steps to have the wheat seized should not promptly have initiated steps to have it released, when the facts regarding ownership were made clear to them. Whatever may have been the view of the court whose process was invoked, the administrative authorities, consistently from the beginning of the proceedings up to the time of the last application made by McNear for compensation, continued to adhere to different arguments to my mind all unsound, to the effect that title to the property had vested in Montemayor.

There is not presented to the Commission any case of a seizure and sale of goods for non-payment of duties and the failure of the owner of the goods to apply within a prescribed statutory period for the proceeds of the goods less the amount of the import duties. The goods were seized on the theory that they belonged to Montemayor, and they were retained on that theory. There is no evidence to indicate that it was necessary to sell these goods for non-payment of duty. Had the wheat been seized and sold in accordance with Mexican law for non-payment of duties, and had McNear failed to apply for the proceeds less the amount of the duties, he would have no complaint, because obviously the execution of proper decrees or legislative enactments with respect to the sale of goods for non-payment of duties could result in no wrongdoing to an importer.

Whatever may be said with regard to the original seizure, it is clear that the continued detention without compensation was wrongful. I do not understand that the Mexican Government denied compensation to McNear on the ground that he did not resort to legal remedies. Clearly their denial was based on the ground that he was not the owner of the goods. And whatever legal remedies, if any, may have been open to him against wrongful seizure or detention or both, that point has been eliminated by Article V of the Convention of September 8, 1923. Citation was made in the written and the oral argument by counsel for Mexico to the *Canadian Claims for Refund of Duties* decided by the tribunal under the Agreement of August 18, 1910, between the United States and Great Britain. Those cases are not pertinent to the instant case. In those cases the United States made it clear to the tribunal, which sustained the argument of counsel for the United States, that the United States had not invoked the rule of international law with respect to the exhaustion of legal remedies. It was shown that neither the question of the application of that rule nor provisions of the arbitral agreement in relation thereto was pertinent to a decision of the case upon the law and facts thereof.

Decision.

The United Mexican States shall pay to the United States of America on behalf of G. W. McNear, Incorporated, \$2,144.80 (two thousand one hundred forty-four dollars and eighty cents) with interest at the rate of six per centum per annum from July 25, 1907, to the date on which the last award is rendered by the Commission.

DANIEL R. ARCHULETA (U.S.A.) *v.* UNITED MEXICAN STATES

(*October 10, 1928. Pages 73-77.*)

NATIONALITY.—EVIDENCE NECESSARY TO REBUT PROOF OF NATIONALITY. When evidence was furnished that decedent was born in the United States and held legislative offices in the State of Colorado, fact that he was referred to as a person of Spanish-American parentage *held* not sufficient to rebut conclusion that he was an American national.

EFFECT OF RIGHT TO OPT FOR MEXICAN NATIONALITY UPON AMERICAN NATIONALITY. A person born in territory ceded by Mexico to the United States, who had a right to opt for Mexican nationality under the treaty of cession, considered to be an American national in absence of proof that he exercised such option.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—EVIDENCE NECESSARY TO ESTABLISH DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—DUTY TO PROTECT IN REMOTE TERRITORY.—EFFECT OF LACK OF RECORDS OF RESPONDENT GOVERNMENT. Allegations of denial of justice must be established by proof. Mere silence of Mexican records concerning killing of American subject *held* not sufficient to establish responsibility. Where American subject was killed at his mine in remote region and evidence was lacking as to failure to apprehend and punish those guilty, claim *disallowed*.

Cross-reference: Annual Digest, 1927-1928, p. 302.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$30,000.00 is made in this case by the United States of America against the United Mexican States in behalf of Daniel R. Archuleta, son and sole heir of Antonio D. Archuleta, who was killed in 1918, in the vicinity of Pilares de Nacozari, Sonora, Mexico. The claim is grounded on an assertion of a denial of justice growing out of the failure of Mexican authorities to take adequate steps to apprehend and punish the slayer of the deceased.

The following allegations, briefly summarized, are made in the Memorial with respect to the death of the claimant's father and with respect to the negligence of which the Mexican authorities are said to have been culpable:

The deceased was the holder of patents to mining properties known as the Zulema and Zulemita mines located in the vicinity of Pilares de Nacozari, Sonora. At times previous to the year 1918, the deceased was accustomed to proceed from his home in the State of Colorado to Mexico for the purpose of working the aforesaid mines. About the month of November, 1917, he made his last visit to the mines, intending to return to his home in the United States about May, 1918.

On or about March 21, 1918, the claimant, then residing at Pagosa Springs, Colorado, received a telegram dated March 21, 1918, which was sent to him from Douglas, Arizona, informing him that his father had been murdered near his mine in Mexico, and that the body had been found on March 16, 1918, in a decomposed condition.

Some days after the murder of the claimant's father when the body was discovered, the authorities at Pilares de Nacozari visited the house of the deceased and there made a perfunctory investigation of the murder, ascertaining that the contents of the house were in a disturbed condition, which led to the conclusion that robbery had been the motive of the murder. It appeared that the murder occurred in the house, from which the body was dragged about 75 feet into a tunnel several hundred feet distant from the house, where it was found. Although the authorities arrested several persons suspected of the murder, including a young man about twenty years of age, they failed to continue a conscientious investigation of the murder, placed the "suspected criminals" at large, and

did nothing to clear up the crime with a view to apprehending and punishing the murderers.

In the Mexican Answer it is denied that the citizenship of the deceased is sufficiently proved "for the purposes of the present claim", since "the Memorial does not allege or prove the American citizenship of the parents of the deceased, but rather it appears from the annexes to the Memorial that they were Spanish-American (Mexican) and according to Mexican Law, the deceased was Mexican". Even though the parents of the deceased were Mexicans, that of course is not proof that the deceased was not himself an American. It might be supposed that possibly he possessed a dual nationality, but no contentions appear to be raised in the Mexican Answer or in the Brief that the United States is espousing a claim of a person with a dual allegiance.

The reference somewhere in the record to the deceased as a man of Spanish-American parentage casts no doubt on his American citizenship in the light of the evidence before the Commission. There is no reason why the Commission should question the American nationality of the deceased in the absence of evidence to rebut the evidence submitted to prove his nationality. There is evidence in the record that the deceased was born in the United States. Furthermore, there is pertinent evidence that he occupied important legislative offices in the State of Colorado which evidently he could not have lawfully held had he been an alien. Considerable weight has been given to evidence of this kind by courts of the United States and by international tribunals. On this point see the case of *Robert Eakin* under the convention of May 8, 1871, between the United States and Great Britain, *Hale's Report*, p. 15; *Canevaro Case* before the Permanent Court of Arbitration at The Hague, 1912, *Ralston, The Law and Procedure of International Tribunals*, p. 183; *Boyd v. Thayer*, 143 U. S. 135.

While no contention is made in behalf of the respondent Government with respect to the point of dual nationality, it may be observed that it seems to be clear that there can be no serious question as to the American nationality of the claimant's grandfather. There is evidence in the record that he was born in Colorado in 1836. He being born in territory ceded by Mexico to the United States, Article VIII of the treaty concluded February 2, 1848, between the United States and Mexico by which the territory was ceded, operated to sever his allegiance to Mexico, unless he elected within a year from the date of the exchange of ratifications of the treaty to retain his Mexican nationality. There is no evidence that he opted for Mexican citizenship, and there is some evidence to the contrary.

The instant case, while similar to numerous other cases that have come before the Commission as regards the complaint which it involves, possesses certain unusual difficulties in view of the character of the record.

Pertinent evidence in connection with the allegation of negligence on the part of Mexican authorities is unfortunately meagre. It appears that the death of the claimant's father did not come to the notice of the Department of State of the United States until the year 1922. Instructions to American consular officers in Mexico resulted in revealing very little information regarding the circumstances surrounding the death of the claimant's father. In a letter under date of August 15, 1922, signed by a Mr. R. Hiler and sent from Moctezuma to the American Consulate

in Nogales, Sonora, is found the following sentence: "The authorities had a boy about 20 yr old in jail one or two days after that nothing was done as there was no one to press the matter."

In behalf of Mexico it is alleged that Mexican authorities made every possible effort to clear up the facts in relation to the crime, but that this proved to be impossible in view of the absence of clues, and in view of the fact that the crime was committed in a lonely spot and was not discovered until a long time after it was committed. Certain court records of a local court at Pilares de Nacozari accompany the Mexican Answer to show the steps taken by the authorities.

It is contended in behalf of the United States that these records furnish evidence that no energetic action was taken by the authorities. It is true that the records contain but very scant information, and are not such as to create a definite impression that effective measures were employed by the authorities. However, the United States has produced practically nothing bearing on the question of negligence.

The Commission is not called upon to give effect to any rule of evidence with regard to the burden of proof. It must decide the case on the strength of the evidence produced by both parties. It should perhaps not assume, particularly in view of certain matters appearing in the record, that the copies of documents presented by the Mexican Government furnish a complete record of the steps taken to apprehend and punish the guilty person. It may be noted that in a communication signed by R. Hiler, which was furnished by the United States, reference is made to the arrest of a boy 20 years old. This is not recorded in the Mexican court records. The same is true with regard to the statement in the American Memorial that several parties suspected of murder were arrested and that "the suspected criminals" were placed at large. Indeed there is no indication of any evidence in the record on which this statement is based, and no such evidence has been found. When it is said that "suspected criminals" were released, it is presumably meant that certain persons arrested on suspicion of having committed murder were released. And if such arrests were made, it can not of course be assumed, in the absence of evidence showing probable cause why they should have been held for trial, that they were improperly released.

The Commission being guided by principles which it has frequently asserted with respect to the convincing character of evidence which is necessary to sustain a charge of an international delinquency such as is alleged in this case, is constrained to dismiss the claim in the absence of such evidence.

Decision.

The claim made by the United States of America in behalf of Daniel R. Archuleta is disallowed.

J. J. BOYD (U.S.A.) *v.* UNITED MEXICAN STATES

(October 12, 1928. Pages 78-80.)

FAILURE TO PROTECT.—DUTY TO PROTECT IN REMOTE TERRITORY. When only minor crimes had taken place before murder of American subject, with the exception of a murder committed the day before, and territory was sparsely populated, Mexican authorities and forces being established at the nearest point fifty miles away, *held* failure to afford due protection not shown.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—LACK OF DUE DILIGENCE IN CAPTURING CRIMINALS. Where posses were not sent out in pursuit of bandits who murdered American subject for several days after authorities were notified of crime, and orders of arrest of criminal were delayed and not sufficiently distributed, claim for death of such American subject *allowed*.

Cross-reference: British Yearbook, Vol. 11, 1930, p. 226.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On the morning of August 18, 1921, a group of men, consisting of Bennett Boyd, Cecil Boyd, Wayne MacNell, and Sixto Yáñez, while taking part in a round-up of the cattle belonging to the Carretas Ranch, District of Galeana, Chihuahua, Mexico, were attacked by a party of at least five mounted bandits. Bennett Boyd was killed. His companions attempted to defend themselves, and after a considerable number of shots had been fired, the bandits withdrew. Before doing so they stripped Bennett Boyd's body of a revolver and a pair of spurs.

The murderers have never been apprehended by the Mexican authorities.

Claim is now made against the United Mexican States by the United States of America on behalf of J. J. Boyd, an American citizen and the father of Bennett Boyd, for damages in the sum of \$25,000, U. S. currency. The claim is predicated upon alleged failure on the part of the Mexican authorities (1) to afford due protection to the residents of the District of Galeana, and (2) to take appropriate steps with a view to apprehending the murderers.

With regard to the alleged lack of protection the record shows that the civil authorities nearest to the Carretas Ranch were the authorities at Janos, about fifty miles from the Ranch, and that the only military garrisons in the district were those at Casas Grandes and Ascension, both about seventy miles away. However, the district in question being sparsely populated, those facts cannot of themselves be sufficient to establish on the part of Mexico a responsibility for lack of protection. The record further shows several acts of banditry during the time after the death Bennett Boyd, but for the time prior to his death, with the exception of a murder committed on the day before, only minor crimes, especially theft of cattle from the Carretas Ranch are mentioned, and there is no evidence to show that complaint of lack of protection ever was made to the Mexican government by the residents of the District of Galeana. Therefore, the Commission is of opinion that no responsibility on the part of Mexico can be based on the charge of lack of protection.

With regard to the second point at issue in this case the record shows that some efforts have been made by the Mexican authorities with a view to apprehending the murderers. The authorities at Janos were informed about the murder on August 19, and the next day the personnel of the Court at Janos arrived at the place of the murder where some investigations were made and the testimony of Cecil Boyd, MacNell, and Yáñez was taken. Cecil Boyd testified that one of the bandits seemed to be Francisco González. On August 23 the governor of the State of Chihuahua was informed about the murder and he sent out two posses, one of which seems to have killed one of the bandits. On August 25 a warrant for the arrest of Francisco González was issued. On September 1 the judge at Janos closed the proceedings and sent the case to the judge of first instance at Casas Grandes. On September 8 the latter issued orders for the arrest of González to the municipal Presidents of Casas Grandes and Janos. On February 7, 1922, letters rogatory were issued to all the judges of first instance requesting them to arrest González and two other persons who were now assumed to have taken part in the assault that resulted in the death of Bennett Boyd. No evidence is submitted as to what efforts were made to carry out the orders of arrest.

The Commission is of opinion that the steps taken by the Mexican authorities cannot be considered as a fulfillment of the duty devolving upon Mexico to take appropriate steps for the purpose of apprehending the murderers. Ground for adverse criticism is found in the fact that posses were not sent out in pursuit of the bandits until several days after the authorities were informed about the crime that had been committed. And negligence is clearly evidenced by the fact that orders of arrest of González were not sent to the Judges of first instance of the State of Chihuahua before February, 1922, and that such orders were never sent to the Judges of the State of Sonora, although the district of Galeana is situated at the boundary of that State.

The Commission holds that the amount to be awarded the claimant can be properly fixed at \$5,000.00 (five thousand dollars).

Decision.

The United Mexican States shall pay the United States of America on behalf of J. J. Boyd \$5,000.00 (five thousand dollars), without interest.

JACOB KAISER (U.S.A.) *v.* UNITED MEXICAN STATES

(October 15, 1928. Pages 80-87.)

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION. Claimant was arrested during period of revolutionary disturbances on charge he was a seditious propagandist. Since claim was based on deficient administration of justice, rather than revolutionary acts, *held*, tribunal has jurisdiction.

DENIAL OF JUSTICE.—ILLEGAL ARREST. Facts *held* not to establish that claimant was arrested without probable cause.

CRUEL AND INHUMANE IMPRISONMENT. Claimant's unsupported statement *held* insufficient to establish charge of cruel and inhumane conditions of imprisonment.

DEFECTIVE ADMINISTRATION OF JUSTICE. Alleged defects in administration of justice *held* not established by the evidence.

CONFESSION OBTAINED BY FORCE. Evidence *held* insufficient to establish charge claimant's confession was obtained by exercise of force.

DETENTION "INCOMUNICADO". Holding of claimant's mail during period of twelve hours, pursuant to Mexican law, *held* not a violation of international law. Charges that claimant was unable to see friends or counsel *held* not supported by the evidence.

DELAY OR SUSPENSION OF LEGAL PROCEEDINGS. Since suspension of proceedings against claimant did not go beyond period permissible under Mexican law for closing investigation and was caused by fact his imprisonment was one of many such imprisonments of partisans of Madero, *held*, no violation of international law occurred.

RELEASE ON BAIL.—FAILURE TO TRY ACCUSED. Fact that claimant was released on bail and never tried *held* not a basis of claim.

Commissioner Fernández MacGregor, for the Commission:

This claim is presented by the United States of America on behalf of Jacob Kaiser, a naturalized American citizen, who, it is alleged in the Memorial, was without justification deprived of his liberty on February 4, 1911, *held incomunicado* under confinement in the prison of the city of Morelia, Michoacán, Mexico, for a period of five days and later in the Penitentiary of Mexico City for seventy-four days, and finally released on bail under obligation not to leave Mexico City. It is alleged that during the entire time of his confinement the claimant suffered harsh and oppressive treatment and that no judicial procedure was carried out against him to elucidate the acts charged against him. By virtue of the suffering to which he was subjected by the Mexican authorities, the United States claims on his behalf damages in the amount of fifteen thousand dollars with the corresponding interest thereon.

The Mexican Government has submitted as a primary defense against this claim that the case does not come within the jurisdiction of this Commission, as it appears from the evidence presented that the claim arose in the year 1911, having its origin in the revolutionary disturbances which took place in Mexico between November 20, 1910, and May 31, 1920. It alleges, therefore, that pursuant to Article I of the Convention of September 8, 1923, and according to Article III of the Convention of September 10, 1923, this case is beyond the jurisdiction of the Commission. The preamble of the General Claims Convention of September 8, 1923, says: "The United States of America and the United Mexican States, desiring to settle and adjust amicably claims by the citizens of each country against the other since the signing on July 4, 1868, of the Claims Convention entered into between the two countries (*without including the claims for losses or damages growing out of the revolutionary disturbances in Mexico which form the basis of another and separate Convention*), have decided to enter into a Convention with this object, etc., etc...." Article I of that Convention provides, in short, the submission to this Commission of all claims against Mexico or against the United States "*except those arising from acts incident to the recent revolutions.*"

The United States does not predicate this claim upon some loss or damage caused by revolutionists or resulting directly from some revolutionary act, but upon a deficient administration of justice by an established Government, which neither arises from nor may be attributed to revolutionary movements. The mere fact that the claim arose during the period beginning on November 20, 1910, and ending on May 31, 1920, does not preclude the jurisdiction of this Commission, provided that the damaging fact or act does not have its origin in the revolution itself. Therefore I believe that the claim presented comes clearly within the jurisdiction of this General Claims Commission.

With regard to the basic point of the matter, the first charge to be examined is that the claimant was arrested without cause by the authorities of Morelia. It appears from the evidence presented by the Mexican Government that a charge was brought before the Political Prefect of Morelia that Kaiser was a seditious propagandist. It appears that he made proposals to a certain Ernesto Ortiz Rodríguez (who was the accuser), formerly a lieutenant, to take part in an uprising, and that thereupon he repeated them before Police Commandant Camilo Martínez, who was present in disguise. It is not shown that Ortiz Rodríguez was a member of the police force of Morelia. After he was arrested his declaration was taken, in which he did not deny having offered the invitation imputed to him to raise men for the Madero revolution; but he added, first, that he had done so for the purpose of ascertaining the opinions of others in order to publish an article in some foreign periodical; and, later, that his object was to find out whether the individuals with whom he was talking were involved in any plot or conspiracy against the Government so that he might inform the Police Prefect of that place. In view of these declarations, the Police Prefect of Morelia arrested him, sending him temporarily to the Police Headquarters pending his being sent to the City of Mexico. The foregoing facts suffice, in my opinion, to establish that the Mexican authorities who brought about his arrest had sufficient cause, required by international law, as there were grounded suspicions that the claimant was committing a crime for which Mexican law provides a penalty.

It is alleged that Kaiser suffered inhumane treatment during his incarceration in the City of Morelia. In a letter which he wrote, from the Penitentiary of Mexico on March 25, 1911, to a friend of his, he says: "I was thrown in a cell dirty and filthy, in a manner indescribable, without a bed of any kind, on the bare stones, without bread or water for several days, except what little I could buy . . ." From the evidence presented by the Mexican Government it is gathered that Kaiser was not in the general prison at Morelia but in the Police Headquarters which, it is asserted, is a spacious, commodious and clean building, where sanitary conditions prevail, his being placed there having been a special mark of consideration; and that he received good treatment there, and that because he refused to eat the food intended for the prisoners he was furnished food from a restaurant as requested by him. It is probable that this food was paid for by the claimant. Kaiser's statement not being supported by evident proof, I do not believe that doubt should be cast on the declaration of the Mexican authorities as to the good treatment which the prisoner received.

On February 9 the claimant arrived in Mexico City, consigned to the Inspector General of Police of that city. This official consigned him

to the First District Judge of Mexico who was trying the case against Francisco I. Madero and associates for the crime of rebellion. This is proved because it is set forth in a document presented as Annex 3 to the Mexican Answer, which is a certification of the several pieces of evidence relating to Kaiser's case in the suit referred to. The Court headed the document in question saying: "that in Volume VIII of the case tried in this Court which then had only the designation of First District Court, in the month of April, 1911, versus Don Francisco I. Madero and Associates, on folio 1075, there is a document reading as follows: . . ." and there are thereupon copied the pieces of evidence referring to Kaiser. Before the First District Judge of Mexico City Kaiser ratified the declaration he had given before the prefect of Morelia, and as that Judge found grounds for bringing him to trial, he issued orders for his formal commitment on February 10th, holding him accountable for the crime of rebellion, as defined in Chapter I, Title XIV, Book III of the Penal Code of the Federal District. The record does not show what the Judge did during this period.

With these facts as a basis, the American Agent contended (1) that the First District Judge did not issue the order of formal commitment within the period of seventy-two hours provided by Mexican Law, thereby incurring a denial of justice; (2) that moreover the order of formal commitment was given in the absence of any grounds for bringing the claimant to trial. The Mexican Agent argued, with regard to the first charge, that the order for formal commitment, according to Article 142 of the Federal Code of Criminal Procedure, should be issued within 72 hours, but counting from the time that the defendant is placed at the disposition of his judge, explaining that Kaiser's judge was the First District Judge of Mexico, as it was he who had jurisdiction over the entire proceedings against Don Francisco I. Madero and associates, because of which, as has been seen, according to Mexican law, Kaiser's case had to be incorporated with the principal case, he being charged with complicity with the rebels. Thus, although Kaiser was apprehended on February 4, as he did not arrive in Mexico City until the 9th of that month, the decree of formal commitment which was issued on the 10th was within the legal period. It seems to me that the reasoning advanced by the Mexican Agent is supported by the evidence offered and by Mexican jurisprudence, to which he referred in his pleading and that therefore no complaint can be predicated on a defective administration of justice on this point. Now, with regard to the District Judge not having sufficient ground to decree the formal commitment of Kaiser, the evidence submitted by Mexico shows that Kaiser confirmed to the Judge the conversations which he had had in Morelia with Ortiz Rodríguez, and with Camilo Martínez, conversations having to do with an invitation to join a revolutionary movement and therefore there was sufficient cause, as required by International Law, to consider that that invitation was a culpable act, it being in order to define it, according to Mexican law, after all the circumstances of the case were known, that is, upon the conclusion of procedure against Kaiser. It is reasonable that the Judge could not accept, *prima facie*, Kaiser's excuse for those conversations, attributing them to the desire to obtain reports for some definite purpose, inasmuch as his obligation was to investigate thoroughly the facts of the case, which he could only do by proceeding with the investigation. It is to be observed with regard to the charge under examination, that, as was pointed out

by counsel for Mexico, at that time this country was involved in a serious internal crisis and that the Government was struggling for its life. In such circumstances it had the right and even the duty to prevent and punish with greater severity than ever the attacks directed against it, it not being possible to take lightly the simple statements or excuses of suspects.

It was submitted in the American Memorial that Kaiser's confessions had been obtained by exercise of force. The charge is not repeated in any of the other documents presented by the complainant Government and I do not believe that the evidence presented supports such a conclusion. The report of the Mexican judge states that he ratified his declaration "spontaneously and without pressure of any kind having been exerted."

It is alleged that during Kaiser's confinement in the Penitentiary he received bad treatment and was held the entire time *incomunicado*. Regarding the first charge, the claimant says in a letter to a certain Wildermuth, that he "was taken to the Penitentiary and the treatment accorded him there was much better, with sufficient food, a fair bed, and that, except the food all is very clean. . . ." Mexico presented a report of the Judge who tried the Kaiser case in which he says, "the defendant is being held at my disposition in the Penitentiary where he is accorded the same consideration and attention as all the others, being subject to the penitentiary regime and he is furnished with sanitary and abundant food, it being publicly and generally known that this is what the prisoners are given". In view of the foregoing evidence it would not appear that the charge of illtreatment in the Penitentiary of Mexico can be sustained.

The charge that Kaiser was held *incomunicado* during the entire period of his confinement is based on the following salient facts: During his detention in Morelia he wrote several letters, which were intercepted and held for the purpose of being added to the record; two friends of the claimant tried to see him in Mexico City at the Sixth Ward Police station and for three weeks they were unable to see him. Counsel for Mexico alleged that every defendant, according to Mexican law, may be held *incomunicado* for 72 hours and during that time his correspondence may be held; Kaiser's letters which appear in the record were written in Morelia during that period. The foregoing involves no violation of either Mexican or international law.

It furthermore appears, in a way, that Kaiser was sent to Mexico City expressly for the purpose of enabling him, through his friends, to clear himself, as the Prefect of Morelia says in a report: "In view of the circumstances stated, the German, J. A. Kaiser, brings suspicion upon himself; and moreover since he can not furnish any references and *inasmuch as he states that in that Capital (Mexico City) it will be easy for him to do so*, I have deemed it proper to send him, placing him at your disposition" etc. Still further, as early as February 13 he was interviewed by the German Chargé d'Affaires; according to the claimant's own statement, the American Ambassador had contact with him *a number of times* through two of the claimant's friends, he then reiterating that he was reached by his two friends. He affirms all this in a letter which he wrote in the Penitentiary on March 25 and which it appears reached its destination.

In that letter Kaiser affirms that he could not communicate even with a lawyer and the American Brief emphatically reiterates this charge, stating:

"In any event, it is clear that the Mexican authorities prevented the claimant from obtaining the evidence which he deemed necessary for his vindication" and later "it patently amounted to an act of injustice on the part of Mexican authorities in actively preventing the claimant from properly preparing his defense."

But the evidence submitted by Mexico shows that almost as soon as the defendant was brought before his judge he appointed defending counsel, this taking place on February 10th.

The plaintiff government also argues that after the judge had taken the first steps in the Kaiser process the trial was completely suspended. In this respect it is pertinent to observe: (a) that the evidence submitted by the Mexican Government does not purport to include all the procedure in the case of the claimant; (b) that the Mexican judge had before him, as has already been stated, a very complicated process against all the partisans of Madero and that that of Kaiser was incorporated with the principal case, on account of which any delay which might be involved probably should not be adjudged, criticizing parts of the case instead of the entire process as a whole. In a document from the Secretariat of Justice of Mexico, offered as evidence by the respondent Government, it is stated in this regard: "As the record is very voluminous and the personnel of the defendants very numerous, notwithstanding the preference which has been accorded in its handling, it has not yet been possible to put it into shape for submission to the Agent of the *Ministerio Público* and steps continue to be taken in the case because almost daily new defendants are arriving from different States of the Republic". In all events it appears that the judge did not, in so far as Kaiser was concerned, go beyond the period which Mexican law fixes for closing the investigation, a period which, for the reasons stated, this Commission has, on other occasions considered proper to bear in mind. (See *Roberts case*, Docket No. 185.)¹

The last charge brought against the Mexican authorities is that they released the claimant without ever showing by means of a trial that he had committed a crime. The record shows that Kaiser was released on bail on April 28th and counsel for Mexico argued that this was done as a special concession. It seems that Mexican law makes provision for bail for defendants who merit a penalty of less than five years' imprisonment and it may be assumed that that benefit could have been accorded to the defendant if he had requested it earlier.

Kaiser's release on bail does not indicate that the Mexican authorities considered him to be innocent; his trial would have been continued possibly if the triumph of the Madero revolution had not intervened less than a month after the claimant left the Penitentiary.

In view of the foregoing analysis I do not believe that Kaiser has suffered either a denial of justice or mistreatment.

Decision

The claim of the United States of America on behalf of Jacob Kaiser v. the United Mexican States is disallowed.

¹ See page 77.

NORMAN T. CONNOLLY AND MYRTLE H. CONNOLLY (U.S.A.)
v. UNITED MEXICAN STATES

(October 15, 1928. Pages 87-90.)

DENIAL OF JUSTICE.—FAILURE TO PROSECUTE.—FAILURE TO PUNISH ADEQUATELY. Two American aviators were forced down on Mexican territory and there killed by two Mexican subjects. The latter were found in possession of objects belonging to the aviators. After trial, they were finally sentenced to five and five and one-half years' imprisonment, respectively, for homicide during a fight. Claim *allowed* on ground no prosecution had been brought by authorities for robbery.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 464; British Yearbook, Vol. 11, 1930, p. 226.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On the morning of August 16, 1919, the American Lieutenants, Cecil H. Connolly and Frederick D. Waterhouse, both of whom were attached to the Ninth Aero Squadron, stationed at San Diego, California, were detailed to field patrol. Owing to a mechanical defect or some mishap the aeroplane in which they were flying never returned to its base. It was later found on the open beach at Refugio de Guadalupe, and it was disclosed that the two lieutenants had spent about seventeen days at that place without food and that thereafter two Mexican fishermen, Calixto Ruiz, called La Changa, and Santiago Fuerte, had given them food and taken them to Los Angeles, Lower California, where they killed them on or about September 9.

On October 19, 1921, the Judge of the First District Court at Tijuana, Lower California, sentenced the two fishermen to six years' imprisonment for homicide during a fight. The case was appealed to the Fifth Circuit Tribunal at Hermosillo, Sonora, and on April 22, 1922, this Court substantially confirmed the judgment of the lower Court, only the terms of imprisonment were fixed at five years and six months for Ruiz, and five years for Fuerte.

Claim is now made against the United Mexican States by the United States of America on behalf of Norman T. Connolly and his wife Myrtle H. Connolly, American citizens and the parents of Lieutenant Cecil H. Connolly, for damages in the sum of \$60,000, U. S. currency. The claim is predicated on the allegations that (1) Mexican authorities sought to cover up all matters incident to the death of the two aviators and failed to take prompt measures to investigate the murder and bring about the apprehension of the criminals, that (2) the latter ought to have been prosecuted for robbery as well as for homicide, and (3) that the punishment meted out to the murderers was inadequate.

It seems impossible with any degree of certainty to reach a conclusion regarding the motive of the crime. The murderers pleaded that they had acted in self-defense, the aviators not having been satisfied with the food the murderers prepared for them, and one of the aviators having attacked one of the murderers, whereupon a fight followed. The United States alleges that this statement is in itself most improbable, and pointing

to the fact that the declarations of the two criminals were at variance in nearly all particulars they assert that no consideration ought to have been given to those declarations. It is further asserted that robbery no doubt had been the motive of the crime, as the criminals were in possession, after the murder, of several objects belonging to the aeroplane or to the aviators personally. The criminals, on the other hand, explained that the aviators had made them a present of the aeroplane because of their aid. Against the theory of robbery as the motive of the crime it might also be argued that at first the two fishermen had aided the aviators and given them food.

The Mexican Courts rejected the plea of self-defense, but, as already mentioned, they based their judgments on the supposition that the murder had been committed during a fight. The Commission is of opinion that those judgments cannot be considered as constituting a denial of justice.

It cannot but produce an impression of laxity, however, that no prosecution for robbery or theft was instituted. And this impression becomes stronger when some of the facts surrounding the discovery and the investigation of the crime and the apprehension of the murderers are examined. An American citizen, Joseph Allen Richards, who had found the dead bodies of the two aviators, and who at Santa Rosalía boarded an American steamer in order to inform the captain of his discovery, was arrested on—as it seems—rather specious charges of having molested corpses before an inquest had been held and of having robbed the dead bodies of some articles. On November 10, 1919, the First District Court of Lower California, having been requested by the Ministerio Público to issue warrants of apprehension against Ruiz and Fuerte, refused to issue such warrants, although it followed with great probability from testimony given by several persons during investigations undertaken by the United States with the cooperation of Mexican authorities that the said persons were the murderers. When later on, on February 17, 1920, Ruiz had been arrested by the police authorities, the same judge ordered his release, but Ruiz had then already confessed that he and Fuerte had murdered the aviators and therefore the order of the judge was not executed. A warrant for the arrest of Fuerte was not issued until January 13, 1921, at which time it appears that the record in the case, together with the prisoner Ruiz, had been transferred to the Second District Judge of Lower California. On April 12, 1921, Fuerte was arrested. It seems that he presented himself voluntarily.

For the laxity thus shown by some Mexican officials in the prosecution of the crime committed, Mexico must be responsible under international law, and as this laxity can only partly be considered as redressed by the arrest and sentence of the criminals, the Commission is of opinion that on amount of \$2,500, U. S. currency, should be awarded.

Decision

The United Mexican States shall pay to the United States of America on behalf of Norman T. Connolly and Myrtle H. Connolly \$2,500. (two thousand five hundred dollars), without interest.

LOUISE O. CANAHL (U.S.A.) *v.* UNITED MEXICAN STATES

(October 15, 1928. Pages 90-94.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—DILATORY PROSECUTION.—EFFECT OF CHANGE OF GOVERNMENT. Claimant's husband was murdered in territory then occupied by Villa forces. Shortly thereafter Carranza authorities took possession of the state. Orders for arrest of persons responsible were issued but no action to carry them out was taken for over seven years. Claim *allowed*.

Cross-references: Annual Digest, 1927-1928, p. 215; British Yearbook, Vol. 11, 1930, p. 225.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$50,000.00, with interest, is made in this case by the United States of America in behalf of Louise O. Canahl, widow of Gilbert T. Canahl, an American citizen, who was killed in the vicinity of San Diego, near Charcas, State of San Luis Potosí, Mexico, in 1915. The claim is grounded on the contention that Mexican authorities failed to take proper steps to apprehend persons responsible for the death of Canahl, and that the negligence of the authorities constitutes a denial of justice.

Briefly stated, the following allegations are found in the Memorial with respect to the death of Canahl and the negligence of which Mexican authorities are alleged to have been culpable.

On the night of June 16, 1915, Gilbert T. Canahl attended a dance given at San Diego mine, situated about seven miles from Charcas. Late in the night several Mexican citizens who were attending the dance, engaged in a quarrel, which quickly reached a stage in which the participants were attacking one another with knives. Gilbert T. Canahl interfered as a peace-maker and attempted to restore peace. Thereupon the infuriated persons turned upon and attacked him, and while he made an effort to defend himself, he was overcome by them and brutally murdered, his head being crushed.

These facts were immediately brought to the attention of the appropriate authorities of the State of San Luis Potosí, with a view to having them apprehend and punish the persons responsible for the crime. Although these persons were known in the vicinity and to the Mexican authorities, or with due diligence might have been known to them, the authorities were dilatory in their efforts to apprehend the persons responsible for the death of Canahl, and those persons have not been punished for the crime.

In the Mexican Answer it is said that available evidence indicates that Canahl met his death as a result of a quarrel in which he took part. It is alleged that Mexican authorities immediately took steps to apprehend participants in the quarrel for the purpose of thoroughly investigating the facts and of punishing the guilty persons, if they should be found criminally responsible for the death of Canahl. It is asserted that measures taken by the authorities resulted in the apprehension of some persons; that disturbed conditions in the locality in question, due to a state of warfare, prevented further steps for a time; and that the proceedings

were resumed several years later and are still being continued. It is denied that any responsibility can be fixed on the Mexican Government "for the unfortunate death of Gilbert T. Canahl." Certain court records accompany the Answer.

In the Mexican Brief the defense is alleged that at the time Canahl was killed Francisco Villa, who was in arms against the Carranza Government, was in control of the State of San Luis Potosí, and that the Mexican Government can not be held responsible for the acts of the revolutionary faction headed by Villa. It is further said that the authorities of the Federal Government had no knowledge of the killing of Canahl, until the occurrence was brought to their attention in a communication addressed to them by the American Consul at San Luis Potosí some time in August of the year 1922, that is, about seven years after Canahl was killed.

Counsel for Mexico in oral argument analyzed the occurrences entering into the claim by grouping them for convenience under three periods.

The first period was stated to be one beginning with the date of the murder and continuing during a short space of time, when records show that investigation was made of the crime. A Mexican official determined that seven men should be arrested and arrests were made of three. Orders were given for the arrest of four other persons. It seems to have been admitted on the part of counsel for the United States that, irrespective of allegations made in the American Brief, the record does not contain evidence on which to predicate a complaint of serious neglect in this early stage of the proceedings.

There is more uncertainty with regard to the so-called third period, during which counsel for the United States contended there was evidence of neglect. It is true that no persons were apprehended. Occurrences upon which conclusions were predicated were analyzed differently by counsel, and it is difficult, if not impracticable, for the Commission to reach positive conclusions with respect to the nature of the proceedings that have been carried on.

However, the attitude of the Mexican authorities within the so-called second period is something upon which the Commission may predicate a decision. That period was said to be from the end of June, 1915, to the end of the year 1922. During this time the record is silent. After the steps which have been described were recorded the record, as was said by counsel for the United States, ends for a space of about seven years.

There was some discussion by counsel for each Government on the point whether, when Villa forces established themselves in San Luis Potosí they supplanted civilian Carranza authorities entrusted with the administration of justice, and whether when Carranza forces drove out the Villa forces the civilian authorities were again changed. There is no evidence in the record bearing on this point, which might appear to be of some importance in considering the question whether there was continuity in the administration of governmental functions, so that there could be no reason for interruption or delay or obstructions in connection with the discharge of those functions. However, this is not a controlling point in the light of facts developed by counsel for the United States with respect to the situation in the locality in which the crime was committed.

It is definitely established that Carranza authorities took possession of the State of San Luis Potosí approximately three weeks after they drove

out the Villa authorities, who had been in that region about six months. The broad contention advanced in the Mexican Government's Brief that there is no continuity between a mere revolutionary faction and the Government of a country, can not be sustained with respect to the application which it is sought to give to it in the instant case. The change of authority due to internecine disturbances may seriously interfere with the discharge of governmental functions, and doubtless the Commission may well take account of a situation of this kind in considering a complaint against lax administration of justice. But assuredly authorities responsible for law and order in a community could not properly ignore a murder just because it had been committed three weeks before rebel forces were driven from the locality in which the murder took place. A different situation could be conceived, if rebel forces had been in possession of a territory for years after a murder had been committed and if records in relation to the crime had in the meantime been destroyed, but no such situation is revealed in this case. Indeed it is shown that, when the investigation was resumed in March, 1923, and the prosecuting attorney petitioned the local Judge to issue an order for the apprehension of the persons responsible for the murder of Canahl, the Judge issued the following order under date of March 10, 1923: "Inform the prosecuting attorney that the order of apprehension which he requests was issued June 17, 1915." It will therefore be seen that the Judge recognized as valid and in force the order issued in 1915 by the so-called Villista authorities for the arrest of four suspects.

In view of the fact that it is clear that effective measures were not taken for the apprehension of the persons who killed Canahl, an award should be rendered in favor of the claimant.

In fixing the amount of this award account may properly be taken, as has already been observed, of the difficulties attending the administration of justice owing to the revolutionary disturbances. The sum of \$5,000.00 is deemed to be an appropriate indemnity.

Decision

The United Mexican States shall pay to the United States of America in behalf of Louise O. Canahl the sum of \$5,000.00 (five thousand dollars) without interest.

WILLIAM T. WAY (U.S.A.) *v.* UNITED MEXICAN STATES

(October 18, 1928. Pages 94-107.)

PROCEDURE.—RIGHT OF CLAIMANT GOVERNMENT TO RAISE DURING ORAL ARGUMENT A GROUND FOR CLAIM NOT THERETOFORE ADVANCED.—RIGHT OF RESPONDENT GOVERNMENT TO RAISE DURING ORAL ARGUMENT ISSUE NOT THERETOFORE SPECIFICALLY ADVANCED. Upon the oral argument the Agent for the United States contended that claim was founded upon direct responsibility as well as a denial of justice. At the same time the Mexican Agent raised an issue said to have been

included under a catch-all phrase in the answer. Each such new point *held* admissible, subject to right of adverse party to reply to new matter, for which additional time was allowed.

WRONGFUL DEATH.—COLLATERAL RELATIVES AS PARTIES CLAIMANT. Collateral relatives, namely, a half-brother and a brother, the latter by his estate, *held* entitled to claim for death of American subject, notwithstanding absence of proof they were dependent on him for support.

PURPOSE OF MEMORIAL. The purpose of the memorial is to acquaint the respondent Government with the nature of the claim.

PURPOSE OF ANSWER. The purpose of the answer is to acquaint the claimant Government with the defences made to a claim.

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY. —**FAILURE TO STATE GROUNDS FOR ARREST.** A Mexican Alcalde, who under Mexican law is classified as a part of the "judicial police" and has authority to issue proper warrants of arrest, issued a warrant for arrest of an American subject which was void on its face for failure to state any charge against the accused. The arresting officers were supplied with arms and warrant directed officers "to use such means as may be suitable" in order to bring in the prisoner. Evidence indicated that the Alcalde was motivated by personal pique and malevolence toward the American subject. The latter was killed during course of arrest. *Held*, direct responsibility of respondent Government established.

DENIAL OF JUSTICE.—FAILURE TO PUNISH ADEQUATELY. A minor official ordered arrest of American subject under such circumstances as to indicate that he may have desired the killing of the American during the course of the arrest, if the arrest were opposed. There were no legal grounds for the arrest and none was set forth in the order of arrest. The American was killed during the course of the arrest. Of the two arresting officers, one was thereafter sentenced to death, and one was sentenced to two and one-half years' imprisonment. The minor official was sentenced to imprisonment for one year and fifteen days. *Held*, denial of justice not established.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 466; Annual Digest, 1927-1928, p. 210; British Yearbook, Vol. 11, 1930, p. 224.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$25,000.00 is made in this case by the United States of America against the United Mexican States in behalf of William T. Way, individually, and as guardian of the person and estate of John M. Way, Jr. The former is a half-brother and the latter a brother of Clarence Way, an American citizen, who was murdered at Aguacaliente de Baca, State of Sinaloa, Mexico, in 1904. The claim is based on an assertion of a denial of justice growing out of the failure of Mexican authorities adequately to punish one of the persons said to have been responsible for the murder of Way, and further based on the contention that Mexico is responsible for officials whose acts caused the death of Way. This contention was for the first time explicitly raised in oral argument.

The following allegations, briefly summarized, are made in the Memorial with respect to the death of Clarence Way and with respect to complaints made against Mexican authorities:

Clarence Way was employed as Superintendent of the Mescal Works of William V. Lanphar, located at Aguacaliente de Baca, State of Sinaloa, Mexico. On the evening of July 18, 1904, Hermolao Torres, Alcalde of Aguacaliente de Baca, mounted on a mule, approached the store operated by Way as Superintendent. As Torres drew near he pointed a pistol at Way, who was near enough to push it to one side. Torres then spurred his mule, and Way was compelled to release his grip on the pistol. Way then walked towards his house, followed by Torres, who kept shouting that he would shoot Way if the latter did not stop. The reason assigned by Torres for his conduct was that he had passed Way during the day and Way had not saluted him with the respect which was due him as an official. Torres, leaving Way, proceeded to the house of one Arcadio Uzarragui. Without any explanation he ordered Uzarragui and one Vicente Gil to go at once to the house of Way and arrest him and a man named Latimer, who was cooking for Way, telling them to hurry and go to Lanphar's house and bring those gringos to him (Torres) by such means as might be necessary to employ. These men, observing that Torres was under the influence of liquor, did not obey the order given them by Torres, but merely told Way that Torres wanted to see him. Torres was much incensed at the action of the men he had sent and said he would get men at Baca who would carry out his orders.

On the following morning, July 19th, about 5:30 o'clock, Diego Miranda, a clerk in the store conducted by Way, observed two men sitting at the gate in front of the store, one of whom was armed with a pistol and the other with a Winchester rifle. Soon thereafter Way came out of his house, partly dressed, carrying a feed bag in his hand. One of the men presented Way with a writing and informed the latter that it was from Torres. The order which had been issued by Torres and delivered to Castro and Carrasco was found in the pocket of Way, where he had placed it when it had been shown to him by the two men, and was as follows:

"To Messrs. Fidel Carrasco and Francisco Castro:

Proceed with this warrant to the Hacienda of Aguacaliente de Baca and by order of this court, under my charge cause to appear the representative of said Hacienda at this court, and I hereby instruct you, in case that person refuses to accompany you as you are ordered, to use such means as may be suitable in order that the mission with which you are charged may be fulfilled. Lib. and Const. July 18, 1904. Hermolao Torres, alcalde."

Way read the paper and remarked, "all right", further saying that he would return with them to Baca to see the Judge (Torres) just as soon as he could finish dressing and eat his breakfast. Fidel Carrasco, one of the men, replied that the Judge had given them orders to take Way at once and refused to permit him to go inside the house. Way repeated that he would accompany them, but that he wanted to finish dressing and have his breakfast before going. Carrasco then seized Way and began pulling him along towards the front gate, calling to Francisco Castro, his companion, to help him. Way called for help. Latimer, the cook, came out of the house, unarmed, and asked the men to desist, saying that Way would go with them as soon as he dressed. Latimer, anticipating no further trouble, went inside to finish preparing breakfast. Soon thereafter he again heard cries for help from Way, and immediately

returned, unarmed, as before. The two men were attempting to carry Way bodily. Latimer hurried up and grappled with Castro, who was armed with a rifle, and in the struggle they both fell to the ground. As they arose Castro shot Latimer in the back with his rifle and then shot Way, who was being held by Carrasco. Way implored Castro not to shoot and stated that he would go to the Alcalde. Castro shot a second time, and Way fell dead at Carrasco's feet. Latimer was removed to the house and died shortly afterwards.

About two hours after the shooting Torres arrived at the scene of the tragedy and proceeded to review the remains in his capacity as Judge for the purpose, he said, of making a report of the facts. A few hours after the arrival of Torres the *Síndico* from Baca also arrived, and in his official capacity undertook to make an investigation of the whole affair.

The Judge of the Court of First Instance, upon being officially advised of the facts connected with the murder, caused the arrest of Torres, Castro and Carrasco, and had them placed in confinement under a charge of having murdered Way and Latimer, and thereupon began an investigation of the facts for the purpose of a trial.

At the trial which was had soon after the killing, many witnesses appeared and gave evidence. All the material facts in connection with the entire affair were fully presented. It was contended by the prosecution that the person primarily responsible for the murder was Torres. It was shown that no offense of any kind had been committed by Way; that Torres had no legal authority to issue a warrant for the arrest of Way; that the warrant or order which he did issue was illegal in form; and that he was so advised by the *Síndico*. The order or warrant stated no offense on the part of Way and it was violative of Article 16 of the Federal Constitution which provides that "No person shall be molested in his person, family, domicile, papers or possessions, except by virtue of an order in writing of the competent authority, setting forth the legal grounds upon which the measure is taken."

A paper which was found on the person of Torres at the time of his arrest, and which was introduced at the trial, indicated that he desired to have it appear that the deputies, or persons to whom the order of arrest had been delivered, had killed Way in self-defense. The paper read as follows:

"If the Director requires or orders you to make an investigation and gives you particulars concerning the case, I recommend you to tell him that you know that the reason why I commissioned Fidel and Francisco to summon the Gringo to appear was because the latter failed to respect my authority, and that the said commissioned persons, upon the Gringo refusing to obey the summons and throwing himself upon them in order to disarm them, were compelled to make use of their weapons, for although only one of the persons had been summoned, the other Gringo, his companion, allied himself with the one summoned, and it was when they ran to get their weapons that they were fired upon, after a long and tiresome struggle, one of them (the commissioned persons) having received blows, as is known."

At the conclusion of the trial in the Court of First Instance, Torres was sentenced to ten months in jail and fined 500 pesos, or twelve months in jail in default of payment of the assessed fine. Castro was found guilty of murder and sentenced to death. Carrasco was found not guilty and released from custody.

An appeal was taken from the judgment of the Court of First Instance to the Supreme Court of the State of Sinaloa which rendered its final decree. Torres was sentenced to confinement in jail for a year and fifteen days, the period of confinement dating from the day of his arrest. Carrasco was sentenced to imprisonment for a period of ten years and six months. The death penalty on Castro was confirmed.

Some diplomatic correspondence was exchanged between the United States and Mexico regarding this case. Following the decision of the lower court, the Department of State of the United States sent an instruction to the American Ambassador at Mexico City in which he was authorized, in the exercise of his discretion, informally to bring the case to the attention of the Mexican Government and to say that, while the Department disclaimed the least desire to interfere in the internal administration of justice in Mexico, it would take the liberty to communicate the painful impression produced by an examination of the record in the case. It was stated that the evidence clearly showed that Torres, in issuing the order for the arrest of Way, put a revolver in the hands of Carrasco instructing him to lend his rifle to his companion, Castro, and gave the order that they should arrest Way in whatever manner they found suitable. It was observed that in such a case, in the courts of the United States, Torres would be considered jointly guilty with the other actors in the proceeding.

The conclusions submitted in this note and in the allegations made in the Memorial as to the guilt of Torres were not sustained by either the higher or the lower Mexican court which passed upon the charge made against Torres. The higher court held that for lack of evidence Torres should be acquitted of responsibility for the murder.

It was contended in behalf of the United States in the written and the oral argument that the sentence passed on Hermolao Torres, in whose mind the murder was premeditated and the punishment inflicted were wholly inadequate and not commensurate with his guilt, and that the decree as to him appears to have been rendered under circumstances that would indicate there had been a distinct denial of justice. Evidence in the record shows, it was asserted, that Torres had boasted that his political and his family connections would protect him from the infliction of any serious punishment. It was alleged that the sentence of the court with respect to Torres was not in accordance with the facts, and that it bears unmistakable evidence of intentional leniency towards him.

It was argued that Torres was the instigator and actual author of the crime; that those who did the killing were merely his tools for the consequences of whose acts he must be considered to be responsible; that he should therefore have been punished for the crime of murder; and that the failure so to punish him resulted in a denial of justice for which the Government of Mexico is responsible. The criticism of the action of the court was apparently centered on two principal points. It was contended that provisions of the applicable Penal Code would have justified a sentence of Torres either as perpetrator of the crime or in any event, as an accomplice. And it was further argued that, had the court not failed to give proper application and weight to testimony presented at the trial, it would have been established that Torres had, before the issuance of the void order of arrest, given vent to expressions of malevolence towards Way and had given oral instructions to the men who killed Way which it might have been expected would result in murder.

Among provisions of the Code, cited by counsel with respect to persons responsible as perpetrators of crime were the following:

(Article 49 of the Penal Code)

I. "Those who conceive, resolve to commit, prepare and execute same, either by personal act or through others whom they compel or induce to commit the crime, the former taking advantage of their authority or power, or availing themselves of grave warnings or threats, of physical force, of gifts, of promises, or of culpable machinations or artifices;"

II. "Those who are the determinate cause of the crime, although they may not execute it themselves, nor have decided upon it, nor prepared its execution, even when they avail themselves in ways other than those enumerated in the foregoing fraction of this article to cause others to commit same;"

V. "Those who execute acts which are the determining cause from which the crime results, or who direct themselves immediately and directly toward its execution, or who are so indispensable to the act necessary for the commission of the crime that without them such crime could not be committed;"

The following provisions among others were cited with respect to persons responsible as accomplices:

(Article 50 of the Penal Code)

I. "Those who aid the authors of the crime in the preparation of the same, furnishing them instruments, arms, or other adequate means for its commission, or giving them instructions to that end, or assisting in any other way its preparation or execution; provided that they know the use which is to be made of one or the other;"

II. "Those who, without availing themselves of the means spoken of in Paragraph I of the foregoing article, employ persuasion or incite passions for impelling another to commit a crime, if such provocation be one of the determining causes of the commission of the crime, but not the only one;"

III. "Those who in the execution of a crime take part in an indirect or accessory manner;"

Mexico produced the sentence of the Court of First Instance and the sentence of the Supreme Court of Sinaloa. It is contended in the Mexican Brief that these judicial pronouncements and the considerations of both law and fact which the Mexican courts had in mind in fixing the penalty imposed on Hermolao Torres are so clear that it is a waste of time to enter into a detailed analysis of the proofs; that the sentences reveal that there was no gross or palpable irregularity upon which an international delinquency could be predicated.

It was alleged that, whether Torres actually had in mind the desire or intention to cause the death of Way, which he possibly had, is immaterial; that the fundamental point in the case is that from the proofs in evidence before the courts, Torres could not have been found guilty of any offense other than the particular one for which he was finally sentenced in accordance with domestic law and procedure. These proofs, it is asserted, were wholly insufficient to establish that Torres had directed or aided in the murder of Clarence Way, and therefore it was the duty of the Mexican courts, in accordance with the provisions of Mexican law, to acquit Torres of the charge of murder, Article 175 of the Penal Code providing that an accused must be acquitted in case of doubt. There was nothing, it is asserted, in the proceedings before either the lower or the higher court to show that there was a manifest injustice in the trial and conviction of Torres, but that in the light of the evidence before the courts no greater conviction or penalty could have been imposed

on Torres. Mexico's international obligations were fully complied with, it was argued, by the arrest and trial of Hermolao Torres, by the passing of final judgment on him, and by imposing the penalties which according to the laws of Mexico were applicable to the particular offenses committed by him. The defense made by Mexico is further shown by the following passage from their Brief:

"The Court in passing judgment upon Hermolao Torres, found that there was no proof of any other order having been given by him to Castro and Carrasco, than the written order hereinbefore referred to. While Castro on the one hand accepted that he and Carrasco received verbal instructions to the effect that if Clarence Way opposed the arrest, they should bring him the best way they could, Fidel Carrasco, on the other, testified that they had not received any verbal instructions besides the written order. Consequently, the Court held that in view of the express text of the written order, Hermolao Torres could not be considered guilty of the crime of aggravated homicide because he was not embraced within any of the cases provided for in Article 49 of the Penal Code"....

Whatever may be said of some of the reasoning employed by the court, I am of the opinion that by a broad application of the principles which have guided the Commission in dealing with a charge of a denial of justice predicated on the decision of courts, the Commission may refrain from sustaining the charge in the instant case.

When counsel for the United States, at the outset of his oral argument announced that one of the grounds of the claim was based on the action of officials of the judiciary of the State of Sinaloa in committing acts to the injury of Clarence Way, counsel for Mexico objected that neither the Memorial nor the Brief mentioned this particular point, and he stated that therefore he had not been given a proper opportunity to meet it. The Agent of the United States contended that the Memorial filed by him which is the pleading in which the foundation of a claim is laid adequately furnished a basis for argument with respect to direct responsibility.

The position of counsel for Mexico was sound. Undoubtedly the allegations of the Memorial and the evidence accompanying it dealt not only with complaints with regard to the imposition of an inadequate sentence on Torres, but also with regard to his wrongful action in connection with the arrest of Way. However, in the Memorial it was specifically stated that Torres "should have been punished for the crime of murder and the failure so to punish him was a miscarriage and denial of justice for which the Government of Mexico is responsible". And the American Brief begins with the following sentence: "This claim is based upon the failure of authorities of the State of Sinaloa to punish one Hermolao Torres, Alcalde of Baca, Sinaloa, for complicity in the murder of Clarence Way, American citizen, at Aguacaliente de Baca, a place near Baca, on July 19, 1904." It seems to be clear therefore that counsel for Mexico had a right to assume that the United States had chosen to present a claim grounded merely on a charge of lack of proper prosecution, even though the Memorial contained sufficient allegations and facts upon which the other cause of action, so to speak, might have been based.

The point so clearly made by the able counsel for Mexico is obviously an important one. The rules with considerable detail specify the averments which the Memorial shall contain as the grounds of the claim. But obviously the sufficiency of a Memorial can not be solely determined

on the basis of some quantitative measure of the allegations. The allegations must make clear the complaint presented. This was very aptly clarified by the use by counsel for Mexico for purposes of illustration, of a term of domestic law when he stated that the Memorial must clearly reveal the "cause of action", or as may be said with reference to proceedings before an international tribunal, the precise character of the wrong of which complaint is made. The difficulty in the instant case is that the Memorial, so far from doing this with respect to the issue of direct responsibility, by the language employed indicated, as observed above, that the claimant Government had chosen to rely on the sole complaint of failure of adequate punishment of the wrongdoers, and counsel for Mexico was justified in making his defense on that theory.

The argument of counsel for the United States on the question of direct responsibility was deferred pending consideration of the objection made by counsel for Mexico. A proper solution of this unfortunate question of procedure was prompted by the action of counsel for Mexico, who, although objecting that he had been surprised by matters of which he had no notice, proceeded in his turn, to make a lengthy argument, for all of which he asserted there was foundation in the following allegation in the Mexican Answer: "It is expressly denied that William T. Way and John M. Way, Jr., have any standing to claim an award or indemnification for the death of Clarence Way." The Spanish text of this sentence is as follows: "Se niega la personalidad jurídica y el derecho que pretenden tener William T. Way y John M. Way, Jr., para pedir una indemnización por la muerte de Clarence Way." He explained that by legal standing he meant what is called in Spanish "the personality." Provisions of the rules with respect to the Answer contain the following requirements:

"The Answer shall be directly responsive to each of the allegations of the memorial and shall clearly announce the attitude of the respondent government with respect to each of the various elements of the claim. It may in addition thereto contain any new matter which the respondent Government may desire to assert within the scope of the Convention."

Technical rules of Mexican law with regard to "personality" of a claimant have no application in the present arbitration, and under the rules the meaning of words in Spanish is no more controlling than their meaning in English. The two parties to each case coming before the Commission are Mexico and the United States. The nationality of a claimant in any given case must be proved because that is determinative of the right of either Government to espouse his claim. The merits of a claim must be determined in the light of international law which governs the relations of the two contracting parties. The general allegation with regard to the standing or right of a claimant could not give notice to a claimant Government of any of the numerous arguments discussed in oral argument by counsel, any more than a broad allegation in a Memorial that a claimant has standing would afford a proper foundation for the discussion of a broad range of similar questions by a claimant Government. Under the general allegation that the claimant has no "standing to claim an award" counsel discussed questions relating to nationality; the right of a half-brother to claim indemnity; the theory that one of the claimants is illegitimate; the standing of an insane person; the character of injuries that might be suffered by an insane person; the amount of

the claim, including the subject of evidence bearing on the sum claimed; and other matters.

However, in the Brief it is asserted that it was not proved that the claimants were dependent for support on the decedent during his life time, and in connection with this allegation it is contended that therefore they are not entitled to claim indemnity on account of the death of Clarence Way. With respect to the propriety of awarding indemnity in favor of collateral relatives, it is argued that the instant case should be differentiated from the cases of *Connelly and Youmans*, Dockets Nos. 270¹ and 271.²

Procedure before the Commission does not permit the enforcement of the strictest kind of rules such as are applied by some domestic tribunals. Fair and efficient procedure is dependent in a considerable measure, as it should be, upon the conduct of counsel. A reasonable compliance with the provisions of rules with regard to the preparation of the Memorial can not fail satisfactorily to acquaint the respondent government with the nature of the claim. And a similar compliance with the provisions of the rules with regard to the Answer should undoubtedly result in fully informing the claimant government of the defenses made to a claim. The Commission has in the past endeavored to apply as rigidly as possible these rules to the end that all their advantages should be fully enjoyed by each party. Pertinent suggestions have been made by the Commission from time to time with this object in view.

Mention was made by counsel for Mexico of the *Massey* case, Docket No. 352.³ In that case Mexican counsel presented a detailed oral and written argument with regard to non-responsibility for so-called minor officers, although neither the Commission nor the claimant Government had notice of this argument until the filing of the Brief. The Commission gave thorough consideration to these arguments, pointing out, however, with a view to promoting compliance with the rules, that the defense had not been advanced in the Answer, and that it was questionable that it could properly have been advanced in the Brief and oral argument.

On June 29, 1927, the Commission called attention to the purpose of the rules that the Commission and each party to the arbitration should be fully informed at the proper time regarding contentions advanced and evidence on which they are based. This action was taken in relation to Answers filed by the Mexican Agent in two cases in one of which it was said:

“ . . . no admission is made for the present, of any of the allegations contained in the several paragraphs of the Memorial and in due time the Mexican Agent will formulate the proper defenses or exceptions in consonance with the new evidence to be received.”

In the instant case the Commission adopted a course obviously fair to both parties, namely, to allow each of them necessary time in which to reply to new matters. For irrespective of what might have been a proper disposition of the question arising out of the indifferent preparation of the American Memorial and Brief, the Commission could not properly ignore Mexican counsel's departure from the Answer and at the same

¹ See page 117.

² See page 110.

³ See page 155.

time refuse to give consideration to important evidence accompanying the Memorial and to applicable law.

The Mexican Agent declined to make a statement with regard to the time the Mexican Agency might require to present argument or evidence with respect to the question of direct responsibility, and stated he would be obliged before making any statement to the Commission, to consult his Government. Subsequently, after consultation with his Government, he refused to present anything further, and therefore no argument was presented in behalf of Mexico on the question of direct responsibility. Counsel for the United States contented himself with merely remarking with reference to this subject that it is well established that a Government is responsible for the acts of its officials.

The Commission has in other cases extensively considered cognate questions relating to responsibility of a Government for its officials, including such as are some times called "minor officials".

In the *Massey* case it was argued by counsel for Mexico that a minor official who had allowed a prisoner to walk out of jail had been apprehended and strong action had been taken against him, and that therefore no responsibility attached to the Mexican Government for his conduct. It was stated in the opinion written in that case that to attempt by some classification to make a distinction between "minor" officials and other kinds of officials must obviously at times involve practical difficulties. And it was said that in reaching conclusions in any given case with respect to responsibility for acts of public servants the most important considerations of which account must be taken are the character of the acts alleged to have resulted in injury to the persons or property, or the nature of functions performed whenever a question is raised as to their proper discharge. It was pointed out that the conduct of officials had been such that there had been no proper arrest and prosecution of a person who had committed murder, and that therefore there had been a failure of observance of the general rule of international law with respect to the proper action looking to the punishment of a person who injures an alien.

It is believed to be a sound principle that, when misconduct on the part of persons concerned with the discharge of governmental functions, whatever their precise status may be under domestic law, results in a failure of a nation to live up to its obligations under international law, the delinquency on the part of such persons is a misfortune for which the nation must bear the responsibility.

It appears from the record that the Alcalde of Aguacaliente de Baca exercised certain judicial functions. He is classified under the Code of Criminal Procedure of Sinaloa as a part of the "judicial police". Under international law a nation has responsibility for the conduct of judicial officers. However, there are certain other broad principles with respect to personal rights which appear applicable to the instant case. These principles are recognized by the laws of Mexico, the laws of the United States and under the laws of civilized countries generally, and also under international law. There must be some ground for depriving a person of his liberty. He is entitled to be informed of the charge against him if he is arrested on a warrant. Gross mistreatment in connection with arrest and imprisonment is not tolerated, and it has been condemned by international tribunals. It seems scarcely to be necessary to say that guarantees of this nature were violated when the Alcalde who, as it appears from the decision of the Sinaloa court, had authority to issue

proper warrants, issued a void warrant as the court held, a warrant stating no charge, and directed the execution of that so-called warrant by armed men who killed a cultured and inoffensive man, who evidently had sought to avoid trouble with the Alcalde. For this tragic violation of personal rights secured by Mexican law and by international law, it is proper to award an indemnity in favor of the claimants. The sum of \$8,000.00 may be awarded in the light of precedents which it is proper to consider in connection with the instant case.

Decision

The United Mexican States shall pay to the United States of America in behalf of William T. Way, individually, and as guardian of the person and estate of John M. Way, Jr., the sum of \$8,000.00 (eight thousand dollars), without interest.

C. E. BLAIR (U.S.A.) *v.* UNITED MEXICAN STATES

(*October 18, 1928, dissenting opinion by American Commissioner, undated.
Pages 107-117.*)

JURISDICTION.—CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.
—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Claim based on failure to punish assailant of claimant, caused by release of such assailant from prison by Madero forces, *dismissed* for lack of jurisdiction.

Cross-reference: Annual Digest, 1927-1928, p. 475.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On January 19, 1911, C. E. Blair, an American citizen, who lived at Lagos, Canton of Cosamaloapan, Vera Cruz, Mexico, was assailed and treated in a cruel manner by a bandit named Manuel Gutiérrez. Some days after the assailant was arrested by the Mexican authorities and confined in the jail at Cosamaloapan. Before he was brought to trial, however, one of the leaders of the Madero revolution, José Santa Cruz, captured Cosamaloapan and released all the prisoners. Gutiérrez then joined the forces commanded by Santa Cruz, and afterwards he was killed in a battle.

Alleging that Mexico is responsible for the failure to punish Gutiérrez, resulting from his release by the Madero forces, the United States of America, on behalf of C. E. Blair, are now claiming damages in the sum of \$10,000, U. S. Currency, against the United Mexican States.

The respondent Government contends that the General Claims Commission has no jurisdiction in the present case, as the claim in question falls within the exclusive jurisdiction of the Special Claims Commission established by the Convention of September 10, 1923.

As the alleged responsibility of Mexico in the present case is based exclusively upon the failure to punish Gutiérrez resulting from his release by the Madero forces, the Commission is of opinion that the claim under

consideration belongs to the group of claims "arising from acts incident to the recent revolutions" which, according to Art. 1 of the General Claims Convention of September 8, 1923, is excepted from the jurisdiction of this Commission.

Decision

The claim of the United States of America on behalf of C. E. Blair is dismissed.

Commissioner Nielsen, dissenting.

The record in the instant case is extremely vague and confusing, and the argument made in behalf of the United States relating to jurisdictional matters was very meagre. I consider this to be very unfortunate in view of the great importance of the question of jurisdiction which has been raised. In my opinion, a proper disposition of the case requires that the Commission apply to the allegations of liability made by the claimant Government fundamental rules and principles with respect to jurisdiction which in my opinion are generally applicable to cases coming before domestic tribunals and to cases before international tribunals.

Jurisdiction may be defined as the power of a tribunal to determine a case conformably to the law creating the tribunal or other law defining its jurisdiction. *U. S. v. Arredondo*, 31 U. S. 689; *Rudloff Case, Venezuelan Arbitrations of 1903*, Ralston's Report, pp. 182, 193-194; Case of the *Illinois Central Railroad Company*, Docket No. 432,¹ before this Commission, pp. 15, 16.

Generally speaking, when a point of jurisdiction is raised, we must of course look to the averments of a complainant's pleading to determine the nature of the case, and they will be controlling in the absence of what may be termed colorable or fictitious allegations. Matters pleaded in defense with respect to the merits of the case are not relevant to the question of jurisdiction. *Odell v. F. C. Farnsworth Co.* 250 U. S. 501; *Smith v. Kansas City Title Co.* 255 U. S. 180; *Lambert Run Coal Co. v. Baltimore & O. R. Co.* 258 U. S. 377.

Arbitral tribunals seem occasionally to have fallen into some confusion with respect to this last mentioned point. Thus it appears that, when it has been pleaded in defense of a claim that a claimant has failed to resort to local remedies, the plea has been considered as one that raised a question of jurisdiction before an international tribunal. *Cook's Case*, Moore, *International Arbitrations*, Vol. III, pp. 2313, 2315. The proper view would seem to be that in such a case the issue is whether the claim is barred by the substantive rule of international law with regard to the necessity for recourse to legal remedies prior to diplomatic intervention.

So in reclamations involving alleged breaches of contractual obligations it seems that occasionally the insertion into contracts of stipulations designed to prevent a resort to diplomatic protection has been regarded as raising a question of jurisdiction. *Case of Flannagan, Bradley, Clark & Co.*, Moore, *International Arbitrations*, Vol. IV, p. 3564; *Turnbull, Manoa Company (Limited), and Orinoco Company (Limited) Cases, Venezuelan Arbitrations of 1903*, Ralston's Report, pp. 200, 245. Under international law a government has a right to protect the interests of its nationals abroad through diplomatic channels and through the instrumentality of

¹ See page 21.

an international tribunal. Whether according to that law that right may be restricted by contractual obligations entered into by the nationals of one country with the government of another country it is not necessary for me to discuss. The question appears clearly to be one of substantive law and not of jurisdiction. Tribunals that have proceeded as if a jurisdictional question were involved seem in reality to have decided the cases according to their views of the merits and then nominally to have based their decisions on a point of jurisdiction.

In the opinion of my associates it is stated that the United States is claiming damages "Alleging that Mexico is responsible for the failure to punish Gutiérrez resulting from his release by the Madero forces". It is further stated that the Commission considers that the claim is excepted from the jurisdiction of this Commission "As the alleged responsibility of Mexico in the present case is based exclusively upon the failure to punish Gutiérrez resulting from his release by the Madero forces". The allegations made by the United States appear to me to be given a somewhat inaccurate description in these statements, prompted perhaps by some allegations of defense made in the Mexican Answer and in the Mexican brief.

In considering, from the standpoint of jurisdiction, the case presented in behalf of the claimant, we must look first to the Memorial. It is unfortunately difficult to determine from that just what is the nature of the complaint or complaints underlying the claim.

In paragraph IV of the Memorial it is alleged that "an excited Mexican" (also called a "bandit") robbed the claimant of money, threw a lasso over his wrist and dragged the claimant across the prairie over rocks and through vines and bushes, leaving him finally for dead in a terribly weakened condition.

In paragraph V it is alleged that as a result of this outrage the claimant was incapacitated for months from attending to his growing crops, which in the meantime were pillaged, while many farm implements were stolen and destroyed.

In paragraph VI it is alleged that the bandit was arrested but was later paroled or dismissed and that no steps were taken towards apprehending and punishing him. It is also alleged that the judge before whom the offender was given a preliminary hearing, when informed that the claimant and other Americans were robbed on the night when the outrage took place, stated that "neither claimant nor any of the other Americans had any right in a Mexican court because they were Americans and they had no right in Mexico." It is further alleged that the claimant has been unable to obtain any redress whatever from the Mexican Government or authorities although he has made repeated efforts to do so.

Paragraph VII contains the following allegations :

"Because of these and similar acts and the general lack of protection afforded to Americans in that district by the Mexican Government and the constant fear of personal injury and even of death at the hands of the marauding Mexicans, claimant was compelled to return to the United States; and many other American settlers in that district similarly terrorized through the failure of the Mexican Government to afford them due protection and the failure of the authorities to prosecute the perpetrators of attacks and assaults, were compelled to return to the United States."

The following allegations are found in paragraph VIII:

"Since his return to the United States claimant has continued to suffer greatly from the injuries inflicted by his Mexican assailant and his physical condition has been permanently impaired. Said injuries consist of a severe shock to the nervous system and internal injuries to his left side. Being a farmer and having sustained serious and permanent physical disabilities, claimant's earning capacity has of necessity been reduced and damaged. By reason of his physical injuries and property losses he has been damaged in the total sum of \$10,000.00."

From the sentence last quoted above it would appear that the claim presented by the United States in the amount of \$10,000.00, which is the sum prayed for, is for *physical injuries and property losses*. On page 3 of the brief of the United States are similar allegations with respect to physical injuries and destruction and theft of property.

Whether direct responsibility for personal or property injuries could be established in the absence of allegations or proof with regard to warning or absence of proper preventive measures is of course a matter pertaining to the merits of a claim.

In the oral argument counsel for the United States apparently predicated liability on the non-prosecution of the person who outraged the claimant. He referred to the case of *Ida Robinson Smith Putnam*, Docket No. 354,¹ in which it was revealed by the record that a Mexican policeman named Uriarte killed an American citizen, George B. Putnam. The policeman, after having been imprisoned, was released. The Commission held the Mexican Government liable because of the non-prosecution of the offender. Counsel further stated that the claim was predicated upon a denial of justice resulting from the action of Madero forces in releasing the man who robbed and assaulted the claimant.

The Mexican Answer is concerned largely with an objection to the jurisdiction of the Commission, but it is also argued that, assuming that the Commission has jurisdiction, there is no responsibility in the case on Mexico under international law. It is alleged that Gutiérrez, the man who assaulted the claimant, was confined in jail at Cosamaloapan, and that one of the leaders of the Madero revolution, on capturing this town, set at liberty a number of prisoners, including Gutiérrez, who joined the revolutionary forces and was killed in battle. It is contended that the case "falls within the exclusive jurisdiction of the Special Claims Commission."

In the Mexican brief it is argued that, assuming the facts to be as alleged, it appears that the claim arose during the revolutions and disturbed conditions which existed in Mexico covering the period from November 20, 1910, to May 31, 1920, and that it was due to acts of bandits, which, according to Article I of the Convention of September 8, 1923, and under the express provisions of Article III of the Convention of September 10, 1923, fall within the exclusive jurisdiction of the Special Claims Commission. Consequently, it is said, the General Claims Commission has no jurisdiction to pass upon the claim. It is further argued that, apart from the fact that this claim arises from acts of bandits during the period stated in Article III of the Special Claims Convention, the claim is exempted from the jurisdiction of this Commission for the further reason that the United States bases its claim on acts of Madero revolutionary

¹ See page 151.

forces during that period. It is clear and manifest, it is said, that the claim should have been brought before the Special Claims Commission.

In the American brief it is alleged that clearly the assault on the claimant was made by a single person, and it is argued that the assailant was not a bandit "in the true sense of the word, or as used in the Special Claims Convention", Article III of which provides that the Commission thereby constituted shall pass upon certain claims, including acts of bandits. It is further argued that claims "for injuries done by a person not confederated with others are not excluded from the jurisdiction of the General Claims Commission by the provisions of the Conventions of September 8, and September 10, 1923." It is said that Article III of the Special Claims Convention when literally and technically construed relates to claims due to acts of bodies of men; that it is conceivable that the specific act causing the injury might be committed by an individual; but that to come within the provisions of Article III of the Special Claims Convention, such individual must be a member of one of the forces or bodies of men enumerated. By these contentions it would seem to be intended to maintain the jurisdiction of the Commission with respect to a cause of action predicated on responsibility of Mexico for the act of the so-called bandit. On the other hand, reference is made in the brief to the allegations in the Mexican Answer that the assailant was released by Madero forces, and it is asserted that the Government is responsible for the acts of revolutionists, who succeeded in their efforts to establish a government in accordance with their will. It is presumably largely, if not entirely, on this portion of the brief that the majority opinion justified statements to the effect that the claim of the United States is grounded on the failure to punish Gutiérrez resulting from his release by the Madero forces. Whatever uncertainty there may be with respect to this portion of the brief, it seems to me that it must be construed as an attempt to meet the Mexican Government's defense set up in the Answer to the effect that Gutiérrez was released by Madero forces. In other words, it was intended to maintain that, assuming the allegations in the Answer to be correct, Mexico would be responsible for the acts of successful revolutionists. And with respect to this portion of the brief it should be further noted that in a further section of the brief are additional allegations with respect to physical injury and loss of property, closing with an estimate of the value of the lost property at \$910.00 and with a prayer for an award of \$10,000.00.

In oral argument the American Agent took the position that in order that the question of the jurisdiction of the Commission could be raised it must appear on the face of the record that more than one man joined in inflicting the injury upon the claimant; that it should appear that the injury underlying the claim was inflicted by any one of the forces mentioned in the five classifications of forces stated in Article III of the so-called Special Claims Convention of September 10, 1923. And with respect to the jurisdictional point raised in connection with allegations in the Answer relative to the release of Gutiérrez by Madero forces, the Agent argued that, if the Mexican Government could establish that this release was an act perpetrated against the claimant by the Madero forces, causing the claimant personal loss or damage, then the question of jurisdiction might be considered to be raised, but that until this preliminary point was decided by the Commission, the question of jurisdiction was not before the Commission.

Since the Agent at this stage limited himself to an expression of views as to the way in which a question of jurisdiction could be raised, counsel for Mexico replied, stating that the question of jurisdiction had been raised in the Mexican Answer and in the Mexican brief in the only manner provided for by the Rules, and the Commission agreed with that view. With reference to the jurisdictional issues, the American Agent thereupon briefly argued, on the one hand, that, in order to have any claims fall within the jurisdiction of the Special Commission acts must be committed by more than one man, and on the other hand, that the claim was based on a denial of justice. And as regards the question whether the so-called General Claims Commission had jurisdiction, it was immaterial he said whether one or more men committed the act, because the claim was based on a denial of justice, the failure on the part of the Government to punish whomsoever committed the wrongful acts. If the claim was finally pressed as one based on a denial of justice growing out of the non-prosecution of the person who assaulted the claimant, then it would seem that all the allegations of the Memorial with respect to a claim based on direct responsibility for injuries to person and property were discarded, although the Memorial is the pleading in which the claim is presented and a claim of this character is dealt with in the brief and seemingly also to some extent in the oral argument. As has been shown, the Memorial also contains allegations with respect to lack of protection and with respect to improper action of a Mexican court during the administration of President Diaz.

With respect to the contentions made in behalf of Mexico that this claim is clearly within the jurisdiction of the Special Commission, and the contentions made in behalf of the United States that the claim is not within the jurisdiction of that Commission, it may be observed that obviously the fundamental question which this Commission must determine is whether the claim is embraced by the law, so to speak, which defines the jurisdiction of this Commission, that is, the Convention of September 8, 1923, which created this Commission and which by its Articles I and VII prescribes the Commission's jurisdiction.

While the Commission obviously has no power to decide that a claim is within the jurisdiction of some other Commission, it may be proper for this Commission, in construing the Convention of September 8, 1923, to consider provisions of the Convention of September 10, 1923, as the Commission previously has done. See the opinion in the *Home Insurance Company* case, Docket No. 73.¹ When there is need of interpretation of a treaty it is proper to consider provisions of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration. Pradier-Fodéré, *Traité de Droit International Public*, Vol. II, Sec. 1188, p. 895. And it is permissible to consider negotiations leading to the conclusions of a treaty. Crandall, *Treaties Their Making and Enforcement*, 2nd ed., pp. 377-386. This principle is one that may sometimes be given important application. It would have been desirable indeed if the representatives of either Government could have furnished the Commission with material of the latter kind, throwing light on the scope of the exception stated in Article I of the Convention of September 8, 1923, with respect to claims "arising from acts incident to the recent revolutions." No information

¹ See page 48.

has been given to the Commission whether or not such material is available—perhaps there is none.

In my opinion there is much need of interpretation of the jurisdictional provisions of Article I of the Convention of September 8, 1923. The jurisdictional provisions of the Convention of September 10, 1923, are more detailed and specific than those of the Convention of September 8, 1923. As stated in the opinion of the Commission in the case of *Jacob Kaiser*, Docket No. 1166¹, Article I of the Convention of September 8, 1923, confers jurisdiction on the Commission in all outstanding claims “except those arising from acts incident to the recent revolutions.” The phrase “incident to the recent revolutions” is meagre and general language which must frequently require interpretation.

In the case of *Bond Coleman*, Docket No. 209², decided at the present session of the Commission, it was said in the opinion of the Commission with respect to a jurisdictional question raised by Mexico that it was not perceived how there could be any question as to the jurisdiction of this Commission to pass upon a claim involving a complaint against the conduct of Mexican federal military authorities in the month of June, 1924. In the *Kaiser* case, involving a complaint of mistreatment of an American citizen during the so-called revolutionary period, it was said by the Commission that the United States did not predicate its claim on some loss or damage caused by some revolutionists or resulting directly from some revolutionary act, but upon an improper administration of justice by an established government, and that the mere fact that the claim arose during the period from November 20, 1910, to May 31, 1920, does not exclude the jurisdiction of the Commission. The case of *Pomeroy's El Paso Transfer Company*, Docket No. 218³, which was argued in June, 1927, involved claims for compensation for services rendered to Mexican Federal authorities and to revolutionary forces in 1911. With respect to a question of jurisdiction raised by Mexico in that case counsel for the United States argued, as is clear, that the fact that a claim arises between 1910, and 1920, does not exclude it from the jurisdiction of this Commission. Further observations were made to the effect that the claim was of a contractual nature. In view of the meagre argument presented with respect to the point of jurisdiction the Commission, by an order of July 8, 1927, directed that the case be reopened for the purpose of further argument on that point.

Taking account of the similar meagre argument on the part of the claimant Government in the instant case, and of the uncertainty of the record as to what is the precise nature of the complaint or complaints underlying the claim made by the United States, I am of the opinion that, as stated at the outset, it is proper to look to the Memorial for a definition of the nature of the claim. If the claim is based, as stated in the Memorial, on physical injuries and property losses sustained during the administration of President Diaz, then the Commission has clearly, it seems to me, jurisdiction in the case. If the claim should be considered to be based on a denial of justice occurring during the same administration, as a result of non-prosecution of the person who robbed and assaulted

¹ See page 381.

² See page 364.

³ See page 551.

the claimant, then it seems to me the Commission likewise should take jurisdiction. Faulty governmental administration is the basis of each complaint. The decision in the case of *Ida Robinson Smith Putnam*, Docket No. 354¹, which was cited by counsel for the United States as bearing on the merits of the instant case seems to be very apposite. In the opinion rendered in that case it was said, after a reference to two escapes of the policeman, Uriarte, occurring, respectively, in 1911 and in 1913:

“The first escape surely does not give ground for imputing responsibility to Mexico, since she apparently did everything possible to find the prisoner and to inflict on him the remaining punishment imposed. Nothing further is known concerning the second escape except the facts given above; it is not known who Colonel Joaquín B. Sosa was, to what forces he belonged (although it can be supposed that he belonged to the forces of the Constitutionalist Army, which at that time controlled the northern part of the Mexican Republic). (See *George W. Hopkins* case, Docket No. 39², paragraphs 11 and 12.) In the light of these vague facts it is impossible to fix precisely the degree of international delinquency of the respondent Government; but there remain at least the facts that Uriarte escaped and that Mexico had the obligation to answer for Uriarte until the termination of his sentence, and she is now unable to explain his disappearance. In such circumstances it can not be said that Mexico entirely fulfilled her international obligation to punish the murderer of Putnam, as Uriarte remained imprisoned only thirty months, more or less, and therefore Mexico is responsible for the denial of justice resulting from such conduct.”

The Commission entertained jurisdiction in this case, and while it was pointed out that there was some vagueness in the record, it seems to me to be clear that the facts are practically identical with those in the instant case, and that therefore the same principles of law are applicable to both. I am of the opinion that jurisdiction attached with the filing of the Memorial. At the present stage we are not concerned with matters of defense on the merits of the case pleaded in reply to allegations contained in the Memorial.

PETER KOCH (ALSO KNOWN AS HEINRICH KOCH) (U.S.A.) *v.*
UNITED MEXICAN STATES

(October 18, 1928. Pages 118-120.)

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.
—MISTREATMENT DURING ARREST. Mexican customs officials, without uniform, boarded American boat and brutally attacked claimant in course of arrest. Claim *allowed*.

DENIAL OF JUSTICE.—ILLEGAL ARREST. Though evidence as to whether there was probable cause for arrest of claimant was doubtful, *held*, no international delinquency established.

¹ See page 151.

² See page 41.

ILLEGAL DETENTION. Failure to release prisoner on bond *held* no international delinquency.

UNDUE DELAY IN JUDICIAL PROCEEDINGS.—DETENTION OF ACCUSED BEYOND REASONABLE PERIOD. Claimant was arrested on or about July 13, 1912, for suspected theft of guano from Mexican territory. Investigation of his case was completed in September, when it was recommended he should be discharged for lack of evidence. Claimant was released on February, 1, 1913. Claim *allowed*.

Cross-references: Annual Digest, 1927-1928, p. 237.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On July 10, 1912, after darkness had fallen, the power boat *Ella*, on board of which were the owner, Peter Koch, a naturalized American citizen, and a sailor, Albert Lundquist, was boarded by a Mexican customs official and the rowing crew of this official's boat in the bay of Ensenada, Lower California, off the coast of Todos Santos Islands. The Mexicans wore no uniform and Koch and Lundquist—believing they were robbers, it is alleged—resisted them, trying to start the engine of the boat. As a result hereof the Mexicans treated Koch so brutally that severe wounds and bruises were still to be seen nine days after. On board the *Ella* the Mexicans found a small quantity of guano.

The *Ella* was taken into the harbor of Ensenada. Koch was charged with having resisted the authorities and with having stolen guano from Todos Santos Islands, Lundquist with having resisted the authorities. They were detained under arrest until February 1, 1913, when they were released because of insufficient evidence.

Claim is now made against the United Mexican States by the United States of America on behalf of Peter Koch for damages in the sum of \$10,000, U. S. currency. The claim is based upon the allegations that (1) the brutal manner in which the claimant was treated when his boat was searched by the customs official constitutes an international delinquency, that (2) the arrest was illegal, that (3) the Mexican authorities illegally refused to grant the claimant his liberty on bond pending trial, and that (4) the rights guaranteed an accused by Mexican law were not granted the claimant.

The Commission is of opinion that there can be no doubt that the brutal manner in which the claimant was treated when the *Ella* was searched constitutes a delinquency for which Mexico must be responsible under international law.

Whether or not there was probable cause for the arrest of the claimant, is somewhat doubtful. With regard to the charge of resistance of the authorities the explanation of the claimant that he had no reason to believe that the persons boarding the *Ella* on July 10, 1912, were officials, seems probable. With regard to the charge of theft, his explanation was that he had taken the guano from the San Clementine Island, which belongs to the United States, and that his boat had drifted to the bay of Ensenada because the engine was disabled. This explanation was not believed. It appears that the Mexican authorities—wrongly—believed that there was no guano on the San Clementine Island. On the other hand, the American Consul at Ensenada states in a dispatch of August 8, 1912, that it "is probable that Koch will be convicted, at least on the charge of resisting the officers." And, on appeal, the formal order of

imprisonment of the judge of the First Court of the District of Lower California was confirmed by the Third Circuit Court. Under those circumstances, the Commission would not feel justified in basing an award on the supposition that the arrest in itself was illegal because of lack of probable cause.

Also the refusal of releasing Koch under bond pending trial was ratified by the Third Circuit Court, and the Commission is of the opinion that this refusal can hardly be said to constitute an international delinquency.

With regard to the question whether or not the rights guaranteed an accused by Mexican law have been granted the claimant, it has been argued by Counsel for the United States, that he was held under arrest for three days, namely from July 10 to July 13, before his case was presented to a Court for preliminary consideration, and that the formal order of imprisonment was not issued until July 16, while the Mexican Constitution of 1857 prescribed that a preliminary examination should take place within forty-eight hours from the time the accused was placed at the disposition of the judge, and that no detention should exceed three days unless warranted by a formal order of imprisonment. It seems doubtful, however, whether the arrest of the person of the claimant took place before July 13. Counsel for the United States has further pointed to the long period of time during which the claimant was detained, and the Commission is of opinion that in this respect a wrong has been inflicted upon the claimant, and that Mexico must be responsible for that wrong. It is argued by Counsel for Mexico that the time-limit fixed by Mexican law has not been exceeded. But this argument cannot be conclusive, since the meaning of provisions fixing a time-limit for the duration of a detention is to establish a guarantee for the accused, but not to authorize detention during the maximum period of time in any case, even in the smallest.

Now, the case in question was not very complicated and no evidence whatever has been produced to show what kind of investigations have been carried on during the detention of the claimant. It further positively appears from the record that the investigations before the Court were finished in September, and that at that time recommendation was made to the Mexican Government that the claimant should be discharged because of lack of evidence.

The Commission is of opinion that the amount to be awarded the claimant can be properly fixed at seven thousand dollars.

Nielsen, Commissioner:

I concur in the conclusion with respect to liability in this case.

Decision

The United Mexican States shall pay to the United States of America on behalf of Peter Koch (also known as Heinrich Koch) \$7000. (seven thousand dollars), without interest.

FRANCIS J. ACOSTA (U.S.A.) *v.* UNITED MEXICAN STATES

(October 18, 1928, concurring opinion by American Commissioner, October 18, 1928. Pages 121-123.)

OWNERSHIP OF CLAIM, PROOF OF.—IDENTITY OF CLAIMANT. Claim by Francis J. Acosta for non-payment of money orders issued to A. A. Acosta *allowed* in view of proof claimant had carried on business under trade name of A. A. Acosta.

APPLICATION OF DOMESTIC STATUTE OF LIMITATIONS. Domestic law requiring presentation of money orders within two years *held* inapplicable when such orders were not being paid by the Government when presented.

RESPONSIBILITY FOR ACTS OF *de facto* GOVERNMENT.—*Stare Decisis*. Claim for non-payment of money orders issued by Huerta regime *allowed* pursuant to prior rulings of tribunal.

CONTRACT CLAIMS.—NON-PAYMENT OF MONEY ORDERS.—COMPUTATION OF AWARD.—EFFECT OF DOMESTIC LAW GOVERNING PAYMENTS.—RATES OF EXCHANGE. Mexican law of payments of April 13, 1918, *held* inapplicable in computing the award. Award in claim for non-payment of money orders computed on basis of rate of exchange prevailing at time of their purchase.

(Text of decision omitted.)

SINGER SEWING MACHINE CO. (U.S.A.) *v.* UNITED MEXICAN STATES

(October 18, 1928, dissenting opinion (dissenting in part) by American Commissioner. October 18, 1928. Pages 123-126.)

RESPONSIBILITY FOR ACTS OF *de facto* GOVERNMENT.—*Stare decisis*. Claim for non-payment of money orders *allowed* pursuant to prior rulings of tribunal.

CONTRACT CLAIMS.—NON-PAYMENT OF MONEY ORDERS.—COMPUTATION OF AWARD.—RATES OF EXCHANGE. Award in claim for non-payment of money orders computed on basis of rate of exchange prevailing at time of their issuance.

(Text of decision omitted.)

L. J. KALKLOSCH (U.S.A.) *v.* UNITED MEXICAN STATES

(October 18, 1928. Pages 126-130.)

DENIAL OF JUSTICE.—ILLEGAL ARREST.—CRUEL AND INHUMANE IMPRISONMENT. Without warrant or other legal authority, and without evidence indicating claimant may have been guilty of crime, claimant was arrested and, allegedly, imprisoned in filthy jail cell without bed, blanket or even a rag. *Held*, responsibility of respondent Government established as to illegal arrest.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—BURDEN OF PROOF.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT. Where evidence is conflicting but evidence by claimant includes affidavits based on personal knowledge and corroborating report of American consul, while respondent Government has, without explanation, failed to produce official records presumably in its custody which would clarify the disputed facts, *held*, claim established by the evidence.

Cross-reference: British Yearbook, Vol. 11, 1930, p. 225.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$12,500.00 is made in this case by the United States of America against the United Mexican States in behalf of L. J. Kalklosch. The claim is grounded on complaints made by the claimant that he was illegally arrested and imprisoned by Mexican authorities, and that he was mistreated in connection with his arrest.

The Memorial contains in substance the following allegations with respect to the occurrences out of which the claim arises:

On July 16, 1912, the claimant was arrested at Columbus, Tamaulipas, Mexico, by a lieutenant of the Mexican Army in command of Mexican forces. Without warrant or other legal authority and without just cause, the claimant was taken first to Los Esteros, Tamaulipas. He was 58 years old at the time and in delicate health, one of his legs being infirm from paralysis. Nevertheless he was required to march at a greater speed than was proper or necessary and was otherwise mistreated and humiliated by the soldiers. From Los Esteros he was taken to the town of Altamira, where he was imprisoned in a jail for three days and nights, in a filthy cell where he had to sleep on a cement floor without bed, blanket or even a rag. Although the claimant was arrested only 400 feet from his home at Columbus, he was refused permission to go there to provide himself with proper clothing for the confinement that he was to undergo. From Altamira he was taken to Tampico, where he was confined in jail for four days and nights, whereupon he was released upon order by the Court of First Instance, there being no evidence against him. It is understood that the claimant was suspected of participation in a mock or feint lynching of one J. W. Lindsay, a citizen of the United States, which took place at Columbus, Tamaulipas, on the night of July 15, 1912, an act with which the claimant had nothing to do.

The claimant, as a result of the treatment accorded him, was humiliated and was greatly injured in body and mind by unjust and unwarranted arrest and imprisonment.

Evidence accompanying the Memorial of the United States includes the following:

A lengthy despatch under date of July 25, 1912, sent by the American Consul at Tampico to the Department of State at Washington, regarding the arrest at Columbus, Tamaulipas, of seven Americans, including the claimant, Kalklosch; an affidavit made by the claimant on November 1, 1912, which he formulated at that time with respect to a claim against the Government of Mexico; an affidavit made on June 16, 1913 by C. R. Chase, who was a resident at Columbus, and one of the men arrested; an affidavit made on June 27, 1913, by J. T. Moore, a clergyman resident in Columbus, who was also arrested; an affidavit made on September 24, 1926, by F. B. Parker, who was engaged to act as interpreter for the arrested Americans by their lawyer in Tampico in 1912; a letter, under date of September 9, 1912, addressed by I. R. Clark, one of the men arrested, to the American Consul at Tampico, with respect to the occurrences out of which the claim arose.

In the Mexican Government's Answer denial is made of all the allegations in the American Memorial, and it is asserted that none of these allegations has been proved.

Accompanying the Answer is a statement of the Municipal President of Villa de Altamira in which it is stated that a Municipal Judge of the town who acted as Secretary of the Municipal Government and Director of Courts in the year 1912, made a sworn declaration that it was untrue that Louis J. Kalklosch was a prisoner in that year, or that he had been in that town, or in Columbus; and furthermore, that Kalklosch was never molested by Mexican authorities; that there were no police books or records to confirm his statements which could be proven, however, by testimony of well-known residents of the town of Altamira; and that the files of the town were burned by revolutionary forces which were quartered there during the last days of 1912. Pursuant to stipulations between the Agents, the Mexican Government further produced statements obtained from persons at Altamira in the month of March, 1927, to the effect that the claimant was never under arrest at that place.

The report of the American Consul and other evidence accompanying the American Memorial contain detailed information in relation to the occurrences out of which the claim arises. It appears that there was at Columbus an American settlement known as the American Colony, consisting of approximately 500 people. These people evidently entertained intensely religious views and were strongly opposed to intoxicating drinks or to the sale thereof in their midst. The presence in this colony of an American citizen by the name of J. W. Lindsay was very obnoxious to the other residents. Lindsay, it appears, made his living by begging to a large extent, and maintained or attempted to maintain a saloon and a house of vice.

In July, 1912, a masked party, consisting probably of seven or eight persons went to Lindsay's house, blindfolded him and conducted him to a tree where they put a rope around his neck and went through the motions of hanging him, evidently with the purpose of frightening him and causing him to leave the town. Doubtless he suffered some injury.

On the morning of July 16, 1912, the news of this outrage having been brought to the attention of the authorities of Altamira, a party of soldiers came from that town to the station of Los Esteros and proceeded to Columbus and there arrested seven men who were taken to Altamira

on the afternoon of that day and there confined in jail. At the end of three days they were committed to the Court of First Instance at Tampico, where they were again confined in a jail. Four days later Kalklosch and three other men were unconditionally released from that jail.

Obviously it was proper to take appropriate steps looking to the punishment of the perpetrators of the outrage on Lindsay. However, from the evidence in the record it appears that Kalklosch did not participate in the mock lynching; that he was in his home when this outrage occurred; and that Lindsay on more than one occasion made it known to Mexican authorities that Kalklosch had no part in this affair.

Unless the evidence accompanying the Memorial is to be rejected practically in its entirety, it must be concluded that Kalklosch was arrested without a warrant and without any cause. The statements that Kalklosch was not arrested and was not molested can only be accepted if the view is taken that in the affidavits accompanying the Memorial the affiants stated a mass of amazing falsehoods, and that the American Consul in 1912, produced out of his imagination, a lengthy report concerning arrests of Americans which never took place. Of course such things did not occur.

In the Mexican Brief it is said that of course the only evidence that could establish the disputed allegations in this case would be the court and police records, and that unfortunately, due to revolutionary troubles, the archives of the town of Altamira were destroyed in 1914. This is not a satisfactory explanation of the absence of evidence of this kind. The prisoners were taken from Altamira to Tampico, and there an investigation was conducted and formal imprisonment of the arrested men was decreed. Some, and perhaps all, of the official records relating to the arrest of the seven men were therefore in Tampico. There is nothing in the record with respect to the destruction of records at that place.

Counsel for the United States in argument called attention to Article 16 of the Mexican Constitution of 1857, in force in 1912, which provided that no one shall be molested in respect of his person, family, domicile, papers or possessions, except by virtue of an order in writing of the competent authority, setting forth the legal grounds upon which the arrest is made, an exception being made of course with respect to the arrest of persons taken in *flagrante delicto*. In the absence of official records the non-production of which has not been satisfactorily explained, records contradicting evidence accompanying the Memorial respecting wrongful treatment of the claimant, the Commission can not properly reject that evidence. The treatment of questions of evidence similar to those raised in the instant case was discussed in the case of *William A. Parker*, Docket No. 127,¹ and in the case of *Edgar A. Hatton*, Docket No. 3246.²

While the claim for damages in the sum of \$12,500.00 must be rejected, an award may be made in the sum of \$300.00.

Decision.

The United Mexican States shall pay to the United States of America in behalf of L. J. Kalklosch the sum of \$300.00 (three hundred dollars), without interest.

¹ See page 35.

² See page 329.

I. R. CLARK (U.S.A.) *v.* UNITED MEXICAN STATES

(October 18, 1928, Pages 131-132.)

DENIAL OF JUSTICE.—ILLEGAL ARREST. Claim arose under same circumstances as those in *L. J. Kalklosch* claim *supra*, except that there may have been probable grounds for arrest. Claim *allowed*.

DAMAGES, PROOF OF.—PROXIMATE CAUSE. Where claimant was attacked by another prisoner during course of illegal imprisonment but medical testimony did not clearly establish that claimant's impairment of hearing resulted from such attack, evidence of injury *held* insufficient.

Cross-reference : Annual Digest, 1927-1928, p. 227.

Commissioner Nielsen, for the Commission :

Claim in the amount of \$25,000.00 is made in this case by the United States of America against the United Mexican States in behalf of I. R. Clark. The claim is grounded on complaints made by the claimant that he was illegally arrested and imprisoned by Mexican authorities, and that he was mistreated in connection with his arrest.

The occurrences upon which this claim is grounded are the same as those stated in the opinion rendered in the case of *L. J. Kalklosch*, Docket No. 708.¹

Although it was contended in the instant case that Clark was the victim of an illegal arrest without a warrant and of gross mistreatment in jail, the case was, to some extent, differentiated by counsel for the United States from the *Kalklosch* case, in that it was said that possibly there may have been some cause for the arrest of Clark.

An important point is raised in the instant case with respect to damages suffered by the claimant. It is alleged in the Memorial and there is evidence to support the allegation that when the claimant was in jail at Altamira, a drunken Mexican was placed in the cell with the claimant, and that the former, without provocation, and under encouragement of Mexican soldiers, dealt the claimant a very severe blow on the head which produced great pain and resulted in a permanent condition of deafness in both ears. Whatever may be the facts with respect to this particular matter, careful consideration must be given in connection therewith to what may be called expert testimony accompanying the Memorial. That is an affidavit of a physician made on May 18, 1921, in which he states that on April 28 of that year he made a thorough examination of the claimant Clark and found his hearing decidedly impaired and the tympanic membranes dull and retracted but otherwise apparently normal. He further says that he can not definitely state the exact cause of this condition which "might have occurred from a number of causes", but could have resulted from a sudden and violent blow on the ear.

There is not before the Commission evidence upon which to base a definite conclusion with respect to this particular item of damage claimed by the claimant. An award of \$200.00 may be rendered in his favor.

¹ See page 412.

Decision.

The United Mexican States shall pay to the United States of America the sum of \$200.00 (two hundred dollars) in behalf of I. R. Clark, without interest.

ALEXANDER ST. J. CORRIE (U.S.A.) *v.* UNITED MEXICAN STATES

(*March 5, 1929. Pages 133-135.*)

RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS.—DIRECT RESPONSIBILITY.—WRONGFUL DEATH.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. A Mexican Chief of Police, out of uniform, shot dead two American seamen during course of his efforts to quell a street disturbance. An investigation was promptly begun by the authorities and the police officer was arrested. Three days after his arrest he was released and resumed his duties as Chief of Police. A year later he was deported from the State of Sonora and was thereafter arrested in the United States. An American consul in Mexico suggested he be turned over to the Mexican Government for trial and possible punishment. Instead he was released. Claim *disallowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$50,000.00, United States currency, is made against the United Mexican States by the United States of America on behalf of Alexander St. J. Corrie, alleged to be the father and the heir or next of kin of William Wallace Corrie, a seaman of the United States Navy, who, on April 9, 1913, was shot by Cipriano Lucero, the Chief of Police of Guaymas, Sonora, Mexico. The claim is predicated, first, on the act of Cipriano Lucero, and secondly, on the alleged failure of the Mexican authorities properly to prosecute and punish Lucero for having shot Corrie.

It is contended by counsel for Mexico that neither the American nationality of Alexander St. J. Corrie nor his kinship to the deceased, William Wallace Corrie, has been adequately established by the proofs submitted by counsel for the United States. With regard to the question of nationality it is stated in an affidavit of the claimant himself that he is a citizen of the United States by birth, and this statement has been corroborated by affidavits of several of his relatives or acquaintances. Likewise, the kinship of the claimant to the deceased has been asserted by affidavit of the claimant himself, and corroborated by affidavits of several other persons as well as by the enlistment record of the deceased in the United States Navy, in which the claimant is mentioned as the "beneficiary or next of kin" of the deceased. The commission is of the opinion that the evidence thus submitted should be considered as sufficient.

With regard to the circumstances surrounding the shooting of William Wallace Corrie the following appears from the record:

On April 9, 1913, a liberty party from the *U. S. S. California*, including Corrie, went ashore at Guaymas. A number of the men visited saloons and

came under the influence of intoxicating liquor. They caused some disorder in the streets, and Cipriano Lucero interfered. He wore no uniform, but his capacity of policeman was known at any rate to some of the seamen. A struggle broke out between Corrie and Cipriano Lucero, the latter trying to take from Corrie a beer bottle which he had in his possession. During the struggle a number of beer bottles were thrown in the direction of the fighters by some of the seamen. At least one of those bottles hit Cipriano Lucero but without doing him any serious harm. Another bottle hit Corrie, who staggered back and was seized by the right arm by a member of the ship's patrol just reaching the scene of the disorder. Cipriano Lucero then drew his revolver and shot Corrie, and as some of the seamen and one Schlenther, belonging to the ship's patrol, attempted to disarm Lucero, the latter fired another shot which instantly killed one Klesow, master-at-arms, United States Navy, who was trying to push back sailors from the scene of the fighting.

The Commission does not think it proper, on the facts thus established, to regard the act of Cipriano Lucero in shooting Corrie as an act for which Mexico must be directly responsible under international law. On the other hand the event that had taken place certainly was of such a nature as to make it the duty of Mexico to institute a thorough investigation. What has been done in this respect is not quite clear. It appears that Lucero was arrested on April 10, 1913, the day after the killing of Corrie, and that the testimony of a number of witnesses, citizens of Guaymas, as well as persons from the *California*, was taken by the competent Mexican court. On April 13, however, Lucero was released and resumed his duties as Chief of Police of Guaymas. Certain court records are alleged to have been lost, which may be due to the disturbed conditions known to have existed in Sonora during the time subsequent to the killing of Corrie. The American Consular Agent at Guaymas reported to the State Department on April 10, 1913, that the proper authorities were making the strictest investigation, but he does not appear to have made any comment on the release of Lucero on April 13, nor does any action by American authorities appear to have been occasioned thereby. In 1914 Lucero was deported from Sonora, and it appears that he was arrested by the American authorities in Nogales, Arizona, and that the American Consul at Nogales, Mexico, suggested to the Arizona authorities the detention of Lucero until he, when a Mexican Government had been established, might be turned over to that Government for trial and possible punishment. However, this course of action was not adopted by the American authorities, but Lucero was released. In view of those circumstances, the Commission would not feel justified in giving an award in the present case, although, of course, a serious doubt remains as to the appropriateness of the procedure in question of the Mexican court.

Decision

The claim of the United States of America on behalf of Alexander St. J. Corrie is disallowed.

PARSONS TRADING COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.*(March 5, 1929. Pages 135-137.)*

CONTRACT CLAIMS.—RESPONSIBILITY FOR ACTS OF *de facto* GOVERNMENT.—EFFECT OF DOMESTIC STATUTE OF LIMITATIONS.—*Stare Decisis*. Claim for goods sold and delivered to respondent Government during Huerta regime *allowed* pursuant to prior rulings. Defence based upon Mexican law requiring presentation of such claims to Mexican Government within fixed period *overruled* pursuant to prior rulings.

*(Text of decision omitted.)*WALTER J. N. McCURDY (U.S.A.) *v.* UNITED MEXICAN STATES.*(March 21, 1929, concurring opinion by American Commissioner, March 21, 1929. Pages 137-150.)*

DENIAL OF JUSTICE.—MISCONDUCT OF OFFICIALS.—MISCONDUCT OF AUTHORITIES DUE TO UNDUE INFLUENCE.—EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—QUANTUM OF PROOF. When charge of misconduct of officials due to undue influence is made, *held*, evidence of the highest and most conclusive character must be furnished to establish such a charge.

IRREGULARITIES IN JUDICIAL PROCEEDINGS.—FAILURE TO PROVIDE COUNSEL TO ACCUSED. Claim based on irregularities in judicial proceedings must rely on matters of substance rather than matters of form. Basic irregularities, including trial of accused without counsel, *held* not established.

TRIAL WITHOUT PROBABLE CAUSE. Evidence before Mexican authorities *held* sufficient to justify trial.

UNDUE DELAY IN JUDICIAL PROCEEDINGS. Eight months *held* not undue period in the circumstances for investigation of claimant's guilt by the courts.

CRUEL AND INHUMANE IMPRISONMENT. Claim that claimant received inadequate living allowance during imprisonment *held* not established by the evidence.

Cross-references: Annual Digest, 1929-1930, p. 165; British Yearbook, Vol. 11, 1930, p. 225.

Commissioner MacGregor, for the Commission:

Claim in the sum of \$50,000.00, United States currency, is made in this case by the United States of America against the United Mexican States on behalf of Walter J. N. McCurdy, a citizen of the United States, a victim, it is alleged, of illegal acts of the Governor and the Secretary of State of the State of Sonora, as well as of the courts of said State, in com-

mitting a denial of justice, and of the authorities that subjected him to maltreatment while he was in prison.

The American Agency states that McCurdy was a lawyer who for several years represented the Yaqui Copper Company, an American corporation, which owned mining properties in the districts of Sahuaripa and Ures, in the State of Sonora, Republic of Mexico. The President of the said Company, one W. P. Harlow, in the year 1902, presented to Rafael Izabal, Governor of Sonora, as a gift, 5,000 shares of the Yaqui Copper Company. During that same year of 1902, McCurdy denounced one thousand (1,000) mining claims in the District of Sahuaripa, adjoining the property of the Yaqui Copper Company, for which reason Harlow tried to purchase them from McCurdy. Both, discussed the matter during a trip especially planned by Harlow in that same year, and upon McCurdy's refusal to sell, bitter and violent discussions ensued. McCurdy returned to the United States, Nogales, Arizona, where he remained from November, 1902, to March, 1903, on which date he returned to the mines upon Harlow's request, in order to discuss further the sale of the mining claims. On his arrival at the mines he did not meet Harlow, and continued his journey to Hermosillo, Sonora, hoping to find him there. When he arrived at a small village called Suagui de Batuc he was arrested at the instance of Harlow who had complained that he (McCurdy) had made threats against him. The Court dismissed the case for lack of evidence; but following his discharge McCurdy was rearrested upon a warrant issued by the Court of First Instance at Hermosillo, Sonora, on the charge of an attempt to murder W. E. Pomeroy at the "Rancho de Calaveras" four months before, that is to say, on November 10, 1902. Consequently, McCurdy was conveyed to Hermosillo and confined in jail there.

It is alleged that the attempted murder did not take place and that the facts occurred as follows:

On the 10th of November, 1902, when Harlow and his companions visited the mines, the party stopped at the "Rancho de Calaveras" for a dinner that had been prepared by W. E. Pomeroy, who was Superintendent of the Yaqui Copper Company. Someone asked McCurdy to demonstrate his skill as a marksman; he drew his pistol and started to shoot against a wall in the patio. At that time Pomeroy entered; McCurdy ceased firing saying to the newly arrived: "What do you want, Bill?" Pomeroy replied: "Nothing now" and left; McCurdy resumed his shooting exercise. It is alleged that while McCurdy was in jail he was visited by one Charles R. Miles, agent and broker of Harlow, who told him, that he (McCurdy) would be liberated at once and paid \$5,000.00, if he would sign a deed to the mining properties. McCurdy refused the proposition. Soon afterwards, McCurdy, against whom, as it appears, jail regulations were not strictly enforced, accompanied the jailer to the railroad station. The following day, McCurdy was visited by Francisco Muñoz, Secretary of State of the State of Sonora, who, after reproaching him for having gone to the station, also offered to release him if he would comply with the terms submitted by Miles. Furthermore, after this alleged interview, it is said, McCurdy was conveyed by a Mexican Captain to the offices of Miles. Miles insisted in his offer and received another refusal from McCurdy. That same afternoon McCurdy was compelled to enter the jail proper, when he was informed by the jailer, that the Secretary of State of the State of Sonora, Muñoz, had ordered that he be held *incomunicado*, as Miles had complained that he (McCurdy) had threatened his life.

McCurdy was in jail from March 22, 1903 to January 22, 1904, during which time, he was subjected to several trials. McCurdy alleges that during the time the proceedings were conducted against him, the rights and privileges that the Mexican law grants were not accorded to him, and that he was maltreated during the entire time of his imprisonment, all due to the illegal influence exercised by the Governor and Secretary of State of the State of Sonora, instigated by Harlow.

The American Agency grounds its conclusions as to the responsibility of the Mexican Government for the aforementioned facts on the following considerations:

(a) There was collusion on the part of Harlow and the Mexican officials to entice McCurdy into Mexico and have him arrested making various unjustified charges against him for the purpose of forcing him to sell his mining properties. The participation of the Governor and Secretary of State of the State of Sonora in this conspiracy is an official act for which the Mexican Government must respond.

(b) The court proceedings instituted to elucidate the charges preferred were characterized by repeated acts of injustice and impropriety.

(c) The failure of the Mexican courts to try McCurdy promptly constitutes a denial of justice according to international law.

(d) McCurdy was ill-treated during his imprisonment.

The American Agency grounds the first assertion on the following evidence:

(1) An affidavit of the claimant himself, in which he states that the Governor of Sonora was presented by Harlow with a gift of 5,000 shares of the Yaqui Copper Company, and that Muñoz, Secretary of State of the State of Sonora, visited McCurdy at the jail in Hermosillo offering to release him if he would agree to sell his mining properties; in the same affidavit the claimant affirms that Harlow told him that the influence of the Governor and Secretary of State of Sonora had been secured, and that the former had full control over all other officials of the State of Sonora.

(2) An affidavit of one Starr K. Williams asserting that it was generally known that Harlow had important business with the Governor and Secretary of State and that they had full control over the actions of the Courts and judges of the State of Sonora; that several Mexican officials told him that McCurdy would be released as soon as he would sign the necessary papers for the sale of his mines; that he had been informed and believes that the Governor as well as the Secretary of State of Sonora were stockholders of the Yaqui Copper Company.

(3) Another affidavit made by Bim Smith who asserts more or less the same as stated by Starr K. Williams.

(4) An affidavit of one Win Wylie in which he affirms that Harlow was a man that would stop at nothing and had boasted of having considerable influence with the authorities of Sonora, which affiant believes to be true.

(5) An affidavit of W. E. Pomeroy in which affiant states that Harlow had a great deal of influence with Izabal and Muñoz.

(6) An affidavit of Marshall P. Wright in which he asserts that it was generally rumored at that time, that the Governor of the State of Sonora and other officials were interested in the Yaqui Copper Company and that the said Harlow had influence with the Mexican authorities of the aforementioned State of Sonora.

Regarding such an important point as this there is no other proof.

In view of the foregoing evidence in the record, the Commission can not attribute any undue influence to the Mexican authorities. Although, in other cases, (*William A. Parker*, Docket No. 127¹, and *G. L. Solis*, Docket No. 3245)², the Commission has stated that it would consider certain facts as proved, even if they were only supported by affidavits, it declared likewise, that in each case the value attached to such affidavits would be estimated in accordance with the circumstances surrounding the fact under consideration. In this case it is endeavored to prove misconduct, in a grave degree, of Mexican officials and therefore the Agency advancing the charge should submit evidence of the highest and most conclusive character. In the judgment of the Commission it is not proven that the Governor of Sonora received the 5,000 shares referred to by McCurdy.

McCurdy asserts in his affidavit that he wrote the letter dictated by Harlow, in which the latter presented Governor Izabal with the shares in question. Even though this fact might, for the sake of argument, be considered as established, it has not been proven before the Commission that said letter was received by its addressee, or if he received it, that he accepted the donation of the shares. Furthermore, even in the supposition that the shares might have been accepted by the Governor, it has not been fully established that such gift induced him to unduly intervene in the proceedings that McCurdy's associates started against him. The rest of the affidavits submitted by the American Agency for the purpose of corroborating McCurdy's assertion, only contain statements that the affiants heard a rumor to the effect that the Governor was a stockholder of the Yaqui Copper Company and that he had great influence over the authorities of Sonora. Affidavits constitute full proof either when stating acts of the affiant or acts that said affiant knew directly, but when they contain hearsay evidence or only refer to rumors, their value diminishes considerably, at times to such an extent as to become void. It must be presumed that in the books and other documents of the Yaqui Copper Company, the names of the stockholders appeared; copies or transcripts of these books' contents might have had great probative value before this Commission. But such proof has not been submitted and the vague considerations as to the possible loss of such books and documents due to the long time elapsed since the facts referred to took place, are not sufficient to justify its absence. In view of the foregoing, and, as the trial record submitted by the Mexican Agency as proof, as will be shown hereafter, does not substantiate the alleged undue influence of the Mexican authorities against McCurdy, the Commission rejects this phase of the claim.

In order to judge as to the propriety or impropriety of the proceedings instituted against McCurdy by the Mexican authorities, it should be borne in mind that in the present instance the case under consideration was decided in the first instance by a judge at Hermosillo, and reviewed on appeal by the Supreme Court of Sonora, whose decision must be considered, according to Mexican law as *res judicata*. The Commission in considering the alleged denial of justice must rely upon matters of substance rather than on matters of form, inasmuch as the existence of some irregularities in the proceedings against an offender does not necessarily constitute sufficient ground in itself to justify a declaration of such denial of justice.

¹ See page 35.

² See page 358.

The Commission on various occasions has expressed its opinion in this respect, following the well established international jurisprudence.

Briefly, three charges were preferred against McCurdy:

(a) Attempted homicide on the person of W. E. Pomeroy. (Proceedings initiated March 19, 1903.)

(b) Forgery of Harlow's signature on certain telegrams. (Proceedings initiated March 25 of the same year.)

(c) Fraud committed against Harlow, by means of a money order. (Proceeding initiated March 27 of the same year.)

The version of the claimant as to the charge of attempted homicide, has been hereinbefore set out. The facts established before the Judge differ from such version, as Pomeroy himself appeared accusing McCurdy of attempting to murder him at the "Rancho de Calaveras", after insulting him and firing at him four times with his pistol without hitting him. The eye witnesses that were duly examined by the Judge in the case corroborated the testimony of Pomeroy and though afterwards some of them modified their declarations to the effect that they did not believe that it was the intention of McCurdy to kill Pomeroy, inasmuch as they had later seen both to be on friendly terms, and even sleep together, but such assertion in regard to the opinion that the witnesses had as to McCurdy's action would not change the existence of the facts. The Judge ordered the examination of the witnesses introduced by McCurdy, among them two Americans who seemed important, residing in Washington, D. C., who were examined through letters rogatory, and these also, in general, corroborated the charges made by Pomeroy. The latter, in an affidavit now before the Commission affirms that the charge of attempted murder against McCurdy was false, that he and McCurdy never had any disagreement, that no bad feelings existed between them at any time, and that the said McCurdy did not, at the time stated, or at any other time ever make any malicious assault upon him. This surprising declaration was made in October 1926, and consequently it was never known by the Judge who was trying McCurdy.

In view of these facts, it appears that the Judge had sufficient grounds to try the claimant.

The same may be said as to the second charge, forgery. Upon receipt of Harlow's complaint the Judge ordered that the necessary investigations be made, requesting also an expert's report on the signature attributed to Harlow affixed to the two telegrams alleged to have been forged. The penmanship experts were both of the opinion that the signature was not Harlow's, but could not ascertain whether it was written by McCurdy. However, two employees of the telegraph office where the telegram had been deposited testified that McCurdy personally had delivered the telegrams in question.

With regard to the charge of fraud, it appears from the court records submitted by Mexico, that Charles R. Miles filed complaint before the Court of First Instance of Hermosillo accusing McCurdy of having addressed to him a telegram in November, 1902, stating that he had drawn against the said Miles, under instructions and on account of Harlow, for a certain amount of money, and in favor of the Banco de Sonora; that an employee of said Bank presented to Miles said draft for \$200.00 which was immediately paid, in the belief that Harlow had given instructions to McCurdy for that purpose. Thereafter, upon settling his accounts with Miles, Harlow denied having instructed McCurdy to pay the sum in question for his

account. McCurdy did not deny having sent the telegram. Harlow on his part declared that he had never authorized McCurdy to draw either in favor or against any person in his name, and with this information the Judge instituted the proceedings and rendered final judgment.

In the light of the foregoing facts, the Commission is of the opinion that the Mexican judicial authorities had probable or sufficient cause to prosecute McCurdy in view of the charges preferred against him by his associates.

The American Agency contended that according to Mexican laws, even if there were cause for the provisional detention of McCurdy, there were no grounds for his formal detention, as for such action it is required that the *corpus delicti* be established. In this respect, reference is made to Article 233 of the Code of Criminal Procedure of the Federal District, which reads:

“The formal or temporary arrest can only be decreed in the presence of the following requisites:

“1. That the existence of an illicit act deserving corporal punishment be fully established.”

The Commission does not feel justified in accepting this argument, because as admitted by both Agencies, the Code of Criminal Procedure of the Federal District of Mexico is not applicable to a case tried in Sonora; besides, it considers that probably there is a difference between *establishing the Corpus Delicti* and “*proving the existence of an illicit act*”, a consideration which is corroborated by the fact that it frequently occurs that the *corpus delicti* cannot be established at the outset of the preliminary judicial investigation, but only in the course of the trial, and in many cases not until the conclusion of it. If for the arrest of a criminal there were a requisite to the effect that the *corpus delicti* should be established from the very beginning, many crimes would perhaps remain unpunished, and furthermore, it could perhaps be said that a legislation containing such a provision would possibly violate international law, inasmuch as it would hinder the State in complying with its foremost duty of administering justice. In the judgment of the Commission the facts in the instant case as known by the Judge were sufficient to hold McCurdy guilty, even if the further actions and depositions of his associates, especially as are now known by the Commission, may give rise to a doubt as to the latter's culpability, and suggest the belief that perhaps McCurdy was a victim of the contrivances of his own associates.

The American Agency asserts that McCurdy was denied the right to appoint counsel during the trial and that the Judge accepted Miles as interpreter, though he appeared as McCurdy's accuser.

With respect to the lack of counsel, the fact does not appear sufficiently proved. After the initiation of the proceedings, (April 22, 1903), McCurdy applied for the examination of some witnesses in his favor, which is granted by the Judge; McCurdy writes in Spanish a petition to the Judge, quoting provisions of Mexican laws, which suggests that either he had a legal advisor who drafted such documents in his favor, or that he conducted his own defense in Spanish knowing also the Mexican laws; nothing else is required by the Mexican Constitution of 1857. (Art. 20, Par. V.) Furthermore, in the diplomatic and consular correspondence submitted by the American Agency, the following documents may be found: Note from the Chargé d'Affaires *ad interim* of the United States of America in Mexico addressed to the Consul of the United States in Nogales, dated April 14, 1903, acknowledging receipt of a representation *made by McCurdy and his attorneys* regarding his confinement in jail at Hermosillo; a note from the

Consul of the United States in Nogales, to the Assistant Secretary of State of the United States, dated April 18 of the same year, in which it is stated that McCurdy is not held *incomunicado*, and further that "able counsel has been employed in his behalf." The fact that it does not appear from the court record that counsel for McCurdy was not appointed until September 17, 1903, does not contradict the aforementioned trustworthy testimony of consular agents of the United States.

Regarding the fact that Miles was admitted as interpreter in the proceedings instituted against McCurdy, notwithstanding that Miles was his accuser, the Commission finds that Miles was introduced first by Pomeroy as his own interpreter, on preferring the charge of attempted homicide against McCurdy, and then by the latter when he rendered his preliminary depositions, in two of the proceedings instituted against him. The Commission is surprised by the act of the Judge accepting Miles as interpreter even though presented, as he was, by two of the parties in the proceedings, but does not consider such action of the Judge as seriously defective. It also bears in mind that when the Judge himself had to name an interpreter he appointed persons not interested in the cases referred to.

The American Agency also contends that after McCurdy's attorney had been appointed, the Judge ordered that the records be kept in the safe of the Court, disregarding the disposition of the Mexican Constitution providing that all proceedings must be public. The Commission observes that the translation made into English of the expression "reservado del Juzgado" as "safe of the Court", is not precise and may lead to a misinterpretation. But aside from this the Commission conceives that there may be periods in a proceeding during which the records cannot be delivered to the public, even if they are at the disposal of the interested parties; such action would not be contrary to international law, especially, bearing in mind that several countries follow in matter of criminal procedure, the so-called inquisitorial or secret method such as was established in the State of Sonora, no one having ever pretended to consider such procedure as below the normal standards of civilization. The Mexican Judge gave the order in question basing it on certain provisions of the Code of Criminal Procedure of the State of Sonora, and as the American Agency has not submitted the wording of such provisions in order to enable the Commission to ascertain whether the Judge disregarded them, it cannot consider that the Mexican authorities were in default on this account.

The American Agency also alleges that the decisions themselves rendered by the courts of Sonora show a defective judicial procedure. The judicial record submitted by the Mexican Agency as evidence reveals the following:

On November 5, 1903 the Judge declared that there were grounds for dismissal in connection with the charge of fraud, in view of the fact that the offended party, that is to say, Miles, did not ratify his accusation, which meant a condonation in favor of McCurdy. On the 11th of the same month and year the Judge rendered his sentence in regard to the other two offenses attributed to McCurdy, finding him guilty for the crime of attempted homicide and sentencing him to 10 months, imprisonment, effective from March 27, 1903; and acquitting him, on the contrary, of the charge of falsification of telegrams.

McCurdy appealed and the Supreme Court of Sonora declared that the lower court had unduly discontinued the charge of fraud, as it was not clearly shown that the accuser of McCurdy, Miles, had condoned the offense. Miles had been summoned without observing the formalities

required by Mexican law and the Supreme Court decided that under the circumstances the sole absence of Miles could not signify a condonation of the offense. Therefore, and as McCurdy, was being prosecuted for three offenses whose proceedings were consolidated, the Supreme Court considered inopportune the sentences that the lower court had rendered on the other two offences of attempted homicide and falsification of telegrams, and ordered the said lower court to restore the proceedings, that is to say, to summon Miles with the corresponding formalities in order to inquire of him, whether he would uphold his complaint against McCurdy or not. The Commission does not find any violation in this procedure which has been objected to by the American Agency, alleging that it signifies that McCurdy was tried two times for the same offense, in disregard of the provisions of the Mexican Constitution. There was not a new trial; the Judge of First Instance merely limited himself to perform a requirement that had been omitted; therefore he summoned Miles, and as said Miles withdrew his complaint; the lower court, on the 8th of January, 1904, rendered a second sentence, imposing on the defendant, for the crime of attempted homicide only, the penalty of ten months imprisonment, acquitting him of the charge of forgery as this offense had been pardoned by the offended Miles, and of the charge of falsification of telegrams, as the Judge declared: "though it is true that the circumstances of the proceedings create an indication and a very strong presumption against the innocence of McCurdy, but not in so plain and irrefutable a manner as to constitute the proof required by Article 210 of the law cited in order to render an impartial decision finding the defendant guilty." The defendant appealed again from this sentence and the Supreme Court of Sonora rendered its final judgment on March 5, 1904, declaring McCurdy guilty of an attempted crime, but without declaring whether this crime was attempted homicide or attempted assault, as it could not be ascertained which had been the intention of McCurdy in firing upon Pomeroy; thus the legal ground of the previous sentence was modified, but did not change the penalty imposed. However, as to the forgery of signatures, the Supreme Court not only found that it existed, but that there existed also a falsification of telegrams, deserving, according to the Penal Code of Sonora, a year's imprisonment. In view of this, the Court sentenced McCurdy to the penalty of 2 years' imprisonment for the crime attempted and for falsification of a telegraphic dispatch.

There is not sufficient proof to establish that either of the two tribunals misrepresented the facts brought before them, nor that they maliciously applied the Mexican law.

The attempted homicide on the person of Pomeroy was reasonably substantiated by the depositions of said Pomeroy and seven witnesses. The offense consisting of falsification of telegrams was also reasonably established through the accusation of Harlow, by the expert's report stating that the signatures appearing thereon were not affixed by Harlow, and by the testimony of two of the telegraph office employees who saw McCurdy when he deposited same.

It has not been alleged that, considering the offenses attributed to McCurdy, the corresponding penalties for the punishment thereof, as provided for by the Mexican laws, had not been applied; it has only been alleged that the offenses did not exist, but the Commission is of the opinion, that such offenses at least as they were known to the courts of Sonora, were reasonably established.

The American Agency alleges, that at any rate the trial was subjected to undue delays and that the Mexican courts could have rendered a decision sooner than they did. The American Agency has not referred to any adequate Mexican provisions that might have been violated in this respect. In other instances the Commission has deemed it appropriate to guide itself by provisions of domestic laws that may exist in this regard. Now, from a general viewpoint it considers that, even though it deems that the investigation of the charges preferred against McCurdy could have been carried out with more promptness, the time spent by the Mexican Judge (eight months) is not so much out of proportion as to constitute a denial of justice. Judging the case in general, it does not appear under the circumstances that the Mexican Courts can be charged with bad faith, negligence or gross injustice, and this opinion is corroborated by those of the American Consular authorities expressed at the time of the occurrences. It appears from the documents submitted by the American Agency as part of its evidence, that said authorities had intervened on behalf of McCurdy from the first days of the month of April. From the outset, the same authorities transmitted to the Embassy in Mexico, as well as to the Department of State McCurdy's complaints, and also from the outset said Consular authorities as well as the Mexican authorities, gave assurances to the effect that the proceedings were being conducted in accordance with the law and that all guarantees were being granted to McCurdy. The American Consul, Morawets, telegraphed to the American Embassy in Mexico as follows: "McCurdy having fair and speedy trial. Is not *incomunicado*. Have made him a personal visit." He further stated in a communication, confirming said telegram, that: ". . . his trial is progressing in due form under Mexican law. Able Counsel has been employed in his behalf and the executive officers of Sonora assure me that his trial shall be absolutely fair and speedy." (Note dated April 18, 1903.)

The last charge preferred against the Mexican Government is to the effect that its authorities treated McCurdy inhumanly during the time of his imprisonment. In this regard it is stated in paragraph 18 of the American Memorial that during the entire period of McCurdy's confinement in the prison at Hermosillo he received only twenty "centavos" daily for his support, equivalent to about eight cents U. S. currency, and that had he not received private assistance, he would not have had enough for his sustenance, so as to avoid serious impairment of his health. This assertion is supported only by the statement of the claimant himself. It is not shown that McCurdy filed such complaint with the American authorities at the time of his confinement and in the light of the opinions rendered by this Commission in similar cases, this charge cannot be considered as proven.

Nielsen, Commissioner:

I concur in the conclusions reached in Commissioner MacGregor's opinion that the record does not justify the Commission in predicating a denial of justice on the decision of the court in the conviction of McCurdy. However, in forming my opinion it is not necessary to reach the conclusion that McCurdy was clearly guilty of the charges brought against him by his associates. Indeed there is little doubt in my mind that he was the victim of a conspiracy on the part of those associates with whom he was at odds.

Pomeroy, who is said to have made the most serious charge against McCurdy before the court, has furnished for use in the case before the Commission an affidavit in which he states that Harlow "caused the arrest

of the said W. J. N. McCurdy" on a charge of assault with a deadly weapon with intent to commit murder on Pomeroy, and that "said charge was false." I am inclined to believe that Pomeroy is now telling the truth. He evidently desires to fix on Harlow the blame of making a false charge.

It was contended by the United States that it was doubtful that Pomeroy made a charge of attempted homicide before the court, and that possibly Miles, who was unfriendly to him and who served as interpreter before the court, misinterpreted Pomeroy. In my opinion the evidence does not warrant a definite conclusion to this effect. Of course the court had not before it the statement that Pomeroy now makes branding as false the charge the record shows he made against McCurdy.

It seems to me that it can scarcely be said that the testimony furnished by men of standing such as Thurston and Brown corroborates testimony of others given against McCurdy. But in any event, the testimony of these two Americans did not help McCurdy.

At this time the Commission can not, in my opinion, in the light of the record, reconstruct the numerous, varied and strange occurrences that enter into the difficulties between these Americans and into the trial of McCurdy in Mexico. In the main, if not entirely, we must be governed in reaching conclusions by the court record. In my opinion it seems odd and unfortunate that the judge who pronounced sentence on McCurdy had before him only that record. The judge who saw and probably questioned witnesses was supplanted before sentence was pronounced on McCurdy. Evidently the judge who sentenced McCurdy neither heard the testimony nor saw the witnesses, and in a serious case was guided merely by the meagre, summarized record which had been laid before him. If McCurdy attempted to kill Pomeroy, it is indeed strange that the latter should defer four months making his charge and in the meantime freely associate with the former. There is evidence that the two were frequently together; that they stayed in the same hotel; and some evidence that they slept together in this interval between the shooting and the time that the charge was preferred against McCurdy.

I do not understand that the United States undertakes to predicate a violation of international law or a denial of justice on any single, specific act, but rather that it is contended that a combination of improper acts resulted in a denial of justice. I presume that denials of justice growing out of judicial proceedings for the most part occur in that way.

Decision

The claim of the United States of America on behalf of Walter J. N. McCurdy is disallowed.

ETHEL MORTON (U.S.A.) *v.* UNITED MEXICAN STATES

(April 2, 1929, concurring opinion by Mexican Commissioner, April 2, 1929.
Pages 151-161.¹)

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY. While off duty and drunk a Mexican army officer, without cause or provocation, fired upon and killed an American subject. *Held*, no direct responsibility of respondent Government will arise from such act.

DENIAL OF JUSTICE.—FAILURE OF AUTHORITIES TO CALL EYE-WITNESSES OF MURDER. Failure of authorities to call known eye-witnesses of murder *held* an improper discharge of judicial function.

FAILURE ADEQUATELY TO PUNISH. Sentencing to four years' imprisonment an officer who, while drunk and without provocation, killed American subject, no part of which sentence was ever served, since officer was allowed his freedom, *held* to justify award.

Commissioner Nielsen, for the Commission :

Claim in the amount of \$50,000.00 with interest thereon is made in this case by the United States of America against the United Mexican States in behalf of Ethel Morton, widow of Genaro W. Morton, an American citizen, who was killed in Mexico City in the year 1916. The claim is grounded on contentions to the effect that Mexican authorities conducted an improper prosecution of the person who killed Morton resulting in the imposition of an inadequate punishment on the murderer. The Memorial contains allegations with respect to the killing of Morton and the prosecution of his slayer, in substance as follows:

During and previous to the month of September, 1916, Genaro W. Morton resided at *Calle Mesones* No. 83, Mexico City, with his brother and an American named J. E. Landon. A *cantina* known as "La Hoja de Lata" was located in the immediate vicinity of Morton's home. Morton at times went to this place to play dominoes. During the early evening of September 20, 1916, he proceeded to the *cantina* and engaged in a game of dominoes with several friends or acquaintances. At the time Morton was thus quietly enjoying himself there were in the same *cantina* several Mexican army officers, including Lt. Col. Arnulfo Uzeta, a member of the staff of General Francisco Serrano, the latter being Chief of Staff of Gen. Alvaro Obregon, Minister of War. About 7:30 p. m. on the day just mentioned, J. E. Landon, with whom Morton was then living, entered the *cantina* to inform Morton that supper was ready. After conveying this message, Landon started to leave the *cantina* for his home, unaccompanied by Morton, who apparently tarried to finish the game of dominoes before proceeding to supper. Lt. Col. Uzeta, who was in a state of intoxication, thereupon ran to the door and dragged Landon back into the *cantina*, stating that he must take a drink

¹ References to page numbers herein are to the original report referred to on the title page of this section.

with him and his companions. Landon courteously asked to be excused, but Lt. Col. Uzeta insisted and Landon was obliged to drink with the Mexican officer and his party and took a glass of lemonade. Previous to this occurrence Landon had spoken to Morton in English, the latter's native tongue. Landon succeeded in leaving Lt. Col. Uzeta and his friends and thereupon proceeded to his home for supper. Within a few moments after the departure of Landon, Lt. Col. Uzeta approached the table where Morton was seated playing dominoes, and without cause or provocation deliberately fired upon and instantly killed Morton, the bullet penetrating the chin and neck, and also wounding one of Morton's companions.

The local police authorities entered upon the scene of the murder and took Uzeta into custody. He was subsequently brought to trial before the Fourth Court of Instruction in Mexico City. On or about February 6, 1917, the judge of that court found Uzeta guilty of the crime of homicide and imposed upon him the wholly inadequate sentence of four years. This sentence was affirmed by the Fifth *Sala* of the Superior Court of the Federal District of Mexico on March 17, 1917.

Notwithstanding the lenient and inadequate sentence thus imposed upon the murderer by the aforesaid Court of Mexico, it appears that the criminal did not serve such sentence, but on the contrary was allowed his freedom.

Allegations to the effect that the accused did not serve his sentence were not made in the American brief nor in the oral argument of counsel for the United States. They were supported solely by a statement contained in a letter written by the brother of Genaro W. Morton to the American Agency under date of October 30, 1926, and by a statement made by Balbino Arias, a Spaniard, who was an eye-witness of the killing of Morton made on January 18, 1917, this statement being to the effect that Arias heard that the assassin of Morton was free. This point may therefore be dismissed from consideration in formulating an award. The same is true of allegations contained in the American brief with respect to undue influence brought to bear on the court by Mexican military authorities. These allegations apparently are based solely on a letter written by a friend of Uzeta from which it appears that the former was interested in assisting the latter. Evidence adduced in regard to this point does not warrant a conclusion with respect to improper conduct such as is charged. But the Commission, in the light of the record before it, is constrained to sustain the contention of the United States that there was an improper prosecution of Uzeta culminating in a manifestly inadequate sentence.

In behalf of Mexico it was contended that Mexican authorities fulfilled all duties imposed on them by the penal laws of Mexico in prosecuting the person responsible for the crime in strict conformity with those laws. Denial was made of all allegations in the Memorial purporting to establish responsibility on the part of the Mexican Government.

It is unnecessary to discuss the principles of international law applicable to this case. The responsibility of a nation under international law for failure of authorities adequately to punish wrongdoers has frequently been discussed by this Commission. See the *Neer* case, *Opinions of the Commissioners*, U. S. Government Printing Office, Washington, 1927, p. 71; the *Swinney* case *ibid.* p. 131; the *Youmans* case, *ibid.* p. 150; and the *Roper* case, *ibid.* p. 205. And, specifically, the question of an inadequate sentence was discussed in the *Kennedy* case, *ibid.* p. 289. The failure to summon witnesses, a point which is given prominence in the record in the instant case, was considered

by the Commission in the *Chattin* case, *ibid.* p. 422, and in the *Swinney* case, *ibid.* p. 131.

Attention may briefly be called to portions of the evidence accompanying the Memorial. If it be considered that this evidence contains accurate information respecting the details of the killing of Morton, then the crime must be regarded as an utterly unprovoked murder.

Under date of September 26, 1916, Emilio Fernandez, proprietor of the saloon in which Morton was killed, made a statement before an American representative in Mexico City. Fernandez said in his statement that Morton and three other gentlemen were playing in a quiet and peaceful manner and that suddenly without any notice Uzeta left the counter in the saloon and when about a meter and a half from the table where the game of dominoes was being played pulled out his gun and shot, wounding one of the men, a Spaniard, and instantly killing Morton. Fernandez asserted that he considered it his duty to make it known that there was no motive for the killing. He explained that Morton spoke to a companion, J. E. Landon by name, but that Uzeta should not have been offended on this account, as the tragedy occurred some time after Morton had spoken in English. Fernandez closed his statement with the declaration that the killing of Morton was cold-blooded assassination and that there was absolutely no cause for the deed.

Under date of September 28, 1916, Daniel Sosa, a clerk in the saloon, also made a statement before the American representative. He confirmed the assertions contained in the statement made by Fernandez. He stated that one of Morton's companions (evidently Landon) left the saloon when Uzeta and his companions entered, and that Uzeta, possibly thinking that the Americans had talked about him, without meditation or saying a word, pulled his pistol, shot Morton and wounded one of his associates. He further asserted that he considered it his duty to say that from his own free will he made his statement concerning the tragedy, which appeared to him to be one of extreme criminality.

Another statement was made on January 18, 1917, by Balbino Arias, a Spaniard who was playing dominoes with the Americans when Morton was killed. Arias, who it appears was wounded by the bullet which killed Morton, stated that the persons engaged in playing dominoes were insulted in violent language by the officers; that he saw Morton, while seated, lift up his hands imploringly when he saw that a gun was pointed at him.

Under date of September 21, 1916, J. E. Landon made an affidavit containing allegations substantially the same as those made in the Memorial. Landon stated that when he re-entered the saloon he saw there ten or twelve policemen and that Morton was lying on the floor by the side of his chair; that he had been sitting in a chair behind a table in a little corner or nook in the wall with a man on each side of him, and the table over which he had been shot, in front; and that obviously there had been no struggle or encounter of any kind. He further stated that about an hour after the policemen took Morton's body away he went to the police station in company with a lawyer to view the remains of Morton, and at this time the authorities asked the two men to sign a statement of identification of the body of Morton, which they did.

The evidence which has been briefly described is not part of the record of the trial of Uzeta, except the statement made by Fernandez which after having been sent to the Mexican Foreign Office was from there sent to the Mexican judge and incorporated into the judicial record in the case.

Irrespective of the question of the accuracy of this and other evidence accompanying the Memorial, and irrespective of any question as to the conclusions which the Commission may be justified in drawing from it, the evidence has, as argued by counsel for the United States, an important bearing on the contention that an improper prosecution resulted in an obviously inadequate penalty. Statements embraced by this evidence emanate from persons who were eye-witnesses either to all or to some of the occurrences surrounding the tragedy. Yet the testimony of several such persons was not obtained by the *Ministerio Público* in court, nor were these persons summoned by any judicial officer. José F. Morton, J. E. Landon, Alejandro Anguiano and Balbino Arias did not testify. The record reveals that a summons was issued for Anguiano, but that he was not found.

It is contended in the American brief that the failure to summon eye-witnesses to the killing of Morton is responsible for an inadequate punishment of the murderer. Even though assertions to this effect may involve an element of speculation, assuredly the failure to take any steps to obtain the testimony of such witnesses justifies the conclusion that the appropriate authorities were wanting in a proper discharge of their solemn duties with respect to the tragic occurrences with which they were called upon to deal in their official capacity.

It need not be observed that obviously the argument made in behalf of Mexico to the effect that friends of Morton should have presented themselves spontaneously, and that the Mexican authorities can not be blamed for their non-appearance, is untenable. The authorities were charged with the prosecution of a grave crime which was an offense against the State as well as against the victim. Likewise the failure to summon these witnesses can not be explained by speculations such as are contained in the Mexican brief with respect to the uselessness of the evidence that might have been obtained from these witnesses. It can not be plausibly conjectured that testimony of eye-witnesses to a homicide would be useless. Even Landon who was present shortly before the shooting and shortly thereafter might have furnished very important evidence not only on the point whether Morton was, as stated in the sentence of the accused, the aggressor by word or by deed, but also on the important point of the location of the body immediately after the shooting, a fact from which important deductions might be drawn respecting the question whether Morton was the aggressor in a fight.

It is proper to give particular consideration to some parts of the record of the evidence on which the trial judge based his sentence of four years.

Sosa, the man who made a statement before an American representative, presented himself to the police authorities on September 20, and said among other things "that at one of the tables several men were seated playing dominoes, and Uzeta went toward them, and without the occurrence of any squabble pulled out his pistol and without the speaker noticing his act he heard a shot and saw an individual fall to the floor whom he afterwards learned was named Genaro Morton."

Sosa later appeared in court and ratified the statement given at the Commissary of Police, and further stated: "When Uzeta finished his drink he went to the table where Genaro Morton was seated and without any reason Uzeta pulled out his pistol and shot him in the forehead; that the declarant is not informed as to the reasons which Uzeta had for shooting Morton, but he believes that it was done without any reason whatever."

Subsequently, on November 27, in a military hospital in the presence of Uzeta and before a judicial officer, Sosa said: "When he gave his first

declaration he was very much excited, but that now he changes it and agrees to what Lopez Uzeta has stated, because the American certainly insulted Uzeta, laughing at him, together with his companions, and joking in English." He also stated that the men playing dominoes approached Uzeta who, when he saw he was about to be attacked, fired. He further stated that Morton was "very hot-tempered" because whenever he was playing he ended with a quarrel with those with whom he played. With respect to this last statement it may be of interest to note that Fernandez, the owner of the saloon, stated in court that Morton was not a customer of the saloon and had been there only two or three times.

Fernandez, who made a statement out of court before an American representative, which was later incorporated into the judicial record, appeared on November 21, and acknowledged this statement as his declaration, but changed it by adding the following:

"That he did not state that Lieut. Col. Uzeta was in an incomplete state of intoxication because he does not know what would be a complete or incomplete state of intoxication; that he also changes the statement which the American Legation makes to the effect that he had said that the act was a murder without any motive; because the truth of the affair is that Morton was speaking in English, a thing which the declarant did not understand, but that one of the companions of Uzeta did understand him, who told him what Morton had said and that then Uzeta, indignant, got up and fired at Morton; that the Spaniard who was wounded received the same bullet since Uzeta only fired once; that the Spaniard was called Arias whose residence the declarant does not know."

On December 11, Fernandez stated before a judicial officer that he did not see whether the attackers of Uzeta got up before or after the shooting and did not notice whether the men were quarreling. On December 16, Fernandez in court stated that the declaration which he had made before an American representative and which was incorporated into the judicial record was presented to him by a relative of Morton and that he (Fernandez) signed it without knowing what was stated in it. This last statement was made by Fernandez in response to an interrogatory submitted to him at the request of counsel for Uzeta. On November 21, Fernandez, as has been mentioned, acknowledged as his declaration the statement which he now repudiated.

Major Augustin Lopez, who accompanied Uzeta in the saloon, testified in court on December 9, 1916. He mentioned the men playing dominoes, observing that they were speaking English, and further said: "Uzeta assumed that they were talking of him and their companions, and going up to the table asked them why they did not talk Spanish. Mr. Anguiano got mixed up in the question as he spoke English, and he told Uzeta what they were saying; Uzeta became angry and pulled out his pistol and an individual of the four who were seated at the table stood up in an aggressive attitude, rolled up his sleeves and approached Uzeta, grabbing him by one hand; the other three individuals who were with the first mentioned stood up in the same attitude; Uzeta fired his gun, wounding two of his assailants".

On September 20, Uzeta stated before police authorities that he remembered absolutely nothing of what occurred in the saloon, being entirely intoxicated; that one of his friends committed the crime; and that they desired to make him appear as guilty, since he was the most intoxicated.

On September 23, the personnel of the court went to the district jail, and a statement was taken from Uzeta. Uzeta ratified his statement

made before the police authorities and he further said that he did not yet "recall killing any one, but if it was so that it must have been done because the latter said something to him". He remembered that he had been drinking a great deal on the day that he shot Morton, but he remembered nothing he said of acts which were said to have taken place in the saloon "La Hoja de Lata".

The personnel of the court again went to the district jail on October 2, 1916, and Uzeta amplified his previous statement. He then stated that he remembered "more clearly how the acts occurred at the saloon 'La Hoja de Lata' and that he will now relate the facts". During the course of his statement he said:

"that these parties were speaking in English and were casting glances at the table at which the declarant and his friends were seated, and particularly at the declarant; that for this reason the latter asked them what was the matter and why they were directing their glances towards him and his friends and if there was anything they had against the declarant and his friends, that they should repeat it in Spanish in order to receive an answer; that the individuals in question paid no attention, as if in contempt for the words of the declarant; that the five men stood up at the same time in an attitude of striking the declarant, and a gringo rolled up his sleeves as if about to throw himself upon the declarant; that all of them assumed the same attitude, and the declarant pulled out the pistol, at which moment his friends Anguiano and Lopez went away, that the declarant, with the pistol in his hand, and before giving time for them to strike him, since they were proceeding toward him, fired the pistol, killing a gringo; that the same bullet wounded another of those who accompanied him, that is to say, the gringo; that he does not know why the wounded person did not present himself; that the victim struck the declarant a blow and the latter faintly remembers that he grappled with him and for that reason he pulled out the gun and fired; but that when the gringo advanced upon him he gave the declarant a 'riñazo' on the little finger of his left hand, which wound is now healing."

On November 27, the personnel of the court went to a military hospital where there was a confrontation between Sosa and Uzeta. Uzeta then stated that "if he fired upon the American he did so because the latter addressed insulting remarks to him in English". Uzeta proceeded to state that he was about to be attacked and he therefore shot Morton. In one breath he stated that *if* he shot Morton it was because the latter made insulting remarks; in the next breath he explains that he shot because he was attacked. Uzeta could himself not understand English, and although other witnesses make reference to insulting remarks, nowhere does the record contain any specific information as to the nature of the remarks attributed to Morton.

On December 11, Uzeta, before the personnel of the court which had gone to the military hospital, stated that *if* he fired his pistol it was because the dead man had grabbed him by his left hand. Previously he had testified that "If he fired upon the American he did so because the latter addressed insulting remarks to him (Uzeta) in English."

The judge in sentencing Uzeta evidently accepted the latter's testimony. He found and declared that Uzeta was the person attacked. When the conflicting and vague record of testimony upon which the judge based his sentence is considered, it becomes obvious how important it was that eye-witnesses to the tragedy should have been summoned.

Even if we disregard the failure of the authorities to obtain important, available evidence, and even if the view be taken that the act of Uzeta was

not unprovoked, cold-blooded murder, as contended by the United States, punishable under Mexican law by death, and even if full credence is given to Uzeta's testimony and to all other testimony that could be considered most favorable to him, clearly the punishment inflicted on him must be considered to have been inadequate under Mexican law. If Uzeta was told that offensive remarks concerning him had been made by Morton or by his companions, the proper form of redress for any such offense would have been a resort to a civil or criminal action and not to homicide. And under Mexican law all acts of aggression do not justify the killing of an aggressor. With respect to this point attention may be called to the following provisions of the Mexican Criminal Code of 1871:

“Murder or Homicide:

ART. 560. *Homicidio calificado* is one committed with premeditation, with advantage, by stealth or by treachery.

ART. 561. Intentional homicide shall be punished by the death penalty in the following cases:

I. When executed with premeditation and not in a fight. If committed during a fight the penalty shall be twelve years of imprisonment.

II. When executed with advantage to the extent that the person committing the homicide does not incur any risk whatever of being killed or wounded by his adversary and when he is not acting in legitimate self-defense.

III. When executed by stealth.

IV. When executed by treachery.”

In the light of the most favorable view that may be taken of Uzeta's act it appears that the sentence should have been considerably in excess of four years.

Having in mind the principles asserted by the Commission dealing with cases involving charges of improper prosecution and particularly the *Kennedy* case, *supra*, an award in favor of the claimant can properly be made in the sum of \$8,000.00.

Fernández MacGregor, Commissioner:

I concur with Commissioner Nielsen's opinion that in this case an award must be granted. Although I think that in some cases in which very important witnesses have not been summoned and examined a denial of justice can be predicated, my decision in this case is based, rather than in the failure of the Judge to receive some testimonies, in the consideration that the facts that the Mexican Judge considered as proven did not sustain his legal conclusions, which, I think, were widely at variance with the provisions of the Penal Code of the Federal District of Mexico.

As a matter of fact, in the decision rendered by the Court of Fourth Instruction of Mexico City, the Judge summarized the facts concerning the murder of Morton in the following manner:

“Whereas, Third: From the declarations of the accused and of Major Agustín Lopez, it appears that the facts in substance took place as follows: Morton made some remarks in English, addressed to Uzeta and his companions; Alejandro Anguiano informed Uzeta in Spanish what Morton had said, this being somewhat offensive to Uzeta; Uzeta requested Morton to state in Spanish what he had been saying in English. Morton instead of doing so, stood up in an aggressive attitude, rolling up his sleeves and advancing upon Uzeta, caught him by the left hand, and at the same time the companions of Morton assumed a similar aggressive attitude; Uzeta by reason of these

acts fired the pistol which he had shortly before pulled out and so killed Morton....”

On the basis of these facts, the Judge states in the Fourth whereas (*considerando*) :

“... There was, therefore, on the part of both individuals acts of mutual contention, first by words and afterwards by deeds, aggressive acts on the part of Morton which Uzeta accepted and aided in assuming greater proportion, which constitutes the fight, which is defined in the latter part of article 553 of the Penal Code....”

The provision of the Penal Code to which the Judge refers in his last paragraph reads as follows:

“By fight is understood, the combat, the engagement or the physical struggle and not one of words between two or more persons.”

There is no doubt that the Penal Code of the Federal District requires a real struggle or in other words physical acts of aggression or defense between the two combatants. I do not think that either the aggressive attitude of Morton, to which the Judge refers, in rolling up of his sleeves and advancing towards Uzeta, or his holding him by the left hand, can be construed as a real struggle and therefore I do not think that Article 553 of the said Code should be applied. The assumption of a fight, on the part of the Judge, changed completely the aspect of the homicide perpetrated by Uzeta and, consequently, the penalty to which he was sentenced was widely and unwarrantedly different from the penalty he deserved for his brutal aggression on Morton. No appeal was entered against this decision by the Attorney for the State.

In view of the foregoing, I am of the opinion that an award should be made on behalf of the claimant in the sum of \$8,000.00 without interest.

Decision

The United Mexican States shall pay to the United States of America on behalf of Ethel Morton the sum of \$8,000.00 (eight thousand dollars) without interest.

AMERICAN BOTTLE COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(*April 2, 1929, concurring opinion by American Commissioner, April 2, 1929. Pages 162-167.*)

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION. Fact that claim had been filed with Special Claims Commission, United States and Mexico, will not preclude the tribunal from exercising jurisdiction it possesses under the *compromis*. Since claim is a contract claim in nature rather than based on a revolutionary seizure, *held*, tribunal has jurisdiction.

CONTRACT CLAIMS.—CONTRACT WITH GOVERNMENT INTERVENTOR OR CUSTODIAN OF SEIZED PROPERTY. A brewery was seized by Carranza

Government and a Government interventor placed in charge. Latter, in his capacity as interventor, ordered and received from claimant a number of beer bottles for which payment was never made. Claim *allowed*.

INTEREST, RATE OF. Fact that claimant stated five per cent. interest would be charged on unpaid account for which claim is made will not preclude tribunal from allowing interest at the customary rate of six per cent.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

After the Constitutionalist forces of General Venustiano Carranza had captured Monterrey in April, 1914, a brewery in this town, the Cervceria Cuauhtemoc, S.A., was seized and taken over by the government of Carranza, and one Antonio Elosua was placed in charge of the brewery as "El Interventor del Gobierno Constitucionalista". It was alleged that the brewery was seized for the reason that it had taken sides against the Constitutionalist, and that it had failed to pay a fine of \$500,000, Mexican currency, imposed upon it as a punishment for its alleged crime. At the instance of an American citizen, who was a large shareholder in the brewery, the authorities of the United States interposed, but not until December 6, 1914, was the brewery turned back to its owner. The brewery company states that its property was in a depleted state at that time.

On July 2, 1914, Antonio Elosua ordered one million two hundred thousand beer bottles of The American Bottle Company, an American corporation, which for several years had been selling beer bottles in large quantities to Cervceria Cuauhtemoc, S.A. The American Bottle Company offered to deliver the bottles ordered on condition that a balance due from the brewery company, amounting to \$6,263.89, United States currency, first be paid, and that the bottles ordered be paid for before shipment. With regard to the matter of the balance due from the brewery company, Elosua answered that he needed only the approval of the brewery company, wherefore he asked The American Bottle Company to correspond with the brewery company about the question. The American Bottle Company acted accordingly, and was informed by the brewery company that it would receive the balance due from Elosua. Subsequently Elosua remitted the balance in question to The American Bottle Company. He further remitted to The American Bottle Company \$10,100.00, United States currency, this being about half the purchase price of the bottles ordered by him, and he promised to send the balance, \$10,020.00, United States currency, within a few days. At the same time he asked for immediate shipment of the bottles ordered. Accordingly the bottles were shipped during the period from August 17 to September 4, 1914. The balance was, however, never paid by Elosua. From time to time he promised to pay, ascribing his failure to do so to the unsettled conditions existing in Mexico, and to his inability to make collection of accounts due him. Finally when the brewery property had been turned back to its owner, he informed The American Bottle Company that he had referred their last letter, urging payment, to the brewery company with instructions to give the most prompt attention thereto. The American Bottle Company requested the brewery company to pay the amount. The brewery company suggested, under date of December 24, 1914, that The American Bottle Company send a full statement of the amounts remitted and of the cars of bottles shipped, as accounts or other documents belonging to the brewery were not in the possession of the representatives of the brewery company. The

statement of accounts asked for was sent to the brewery company on December 29, 1914. On February 10, 1915, the brewery company acknowledged receipt of the statement of accounts and promised to forward this statement to the company's office in Monterrey for revision as soon as possible. The brewery company added that The American Bottle Company no doubt would understand that the brewery company had nothing to do with Elosua in connexion with his business or accounts with The American Bottle Company. The American Bottle Company urged payment by letters of February 13 and July 2, 1915, but the brewery company did not pay.

Claim is now made in the sum of \$9,985.62, United States currency, with interest thereon against the United Mexican States by the United States of America on behalf of The American Bottle Company. The amount claimed is the balance due for bottles delivered to Elosua minus the sum of \$34.48, which was paid by Elosua in excess of the actual amount due to the claimants at the time of the seizure of the brewery.

In view of the fact that the present claim has been filed by Memorial before the Special Claims Commission established under the Convention of September 10, 1923, between the United States and Mexico, prior to its having been brought before the General Claims Commission, Counsel for Mexico has submitted that the hearing of this case should be suspended until it be known whether or not the Special Claims Commission will be of the opinion that the present claim is within the jurisdiction of that Commission. There is, however, no rule in international law, nor no provision in the Conventions entered into between the United States and Mexico or in the rules of this Commission, that precludes the United States from presenting a claim to this Commission because of its having been previously filed by Memorial before the Special Claims Commission. And the Commission is of the opinion that the present claim is within its jurisdiction. Article I of the Convention of September 8, 1923, excludes from the scope of the Convention claims "arising from acts incident to the recent revolutions" in Mexico. Now, the seizure of the brewery may well be said to be an act incident to a revolution. This claim, however, is not for loss or damage arising out of the seizure of the brewery, but is made for the non-payment of an amount due under a contract entered into between Elosua and the claimants after the seizure of the brewery, and in the opinion of the Commission, such non-payment cannot be said to constitute an act incident to a revolution in the sense in which this term is used in the said Convention. In the Answer filed by the Mexican Agent with the Special Claims Commission it is also alleged that the claim is outside the scope of the Convention of September 10, 1923.

With regard to the merits of the claim it is contended by Counsel for Mexico that the claimants entered into a contract with the brewery and, therefore, should demand payment from the brewery company and not from the respondent Government. That the contract was entered into with the brewery, is correct. It appears from the record that Elosua signed letters to the claimants regarding the matter in his capacity of intervener of the Constitutionalist Government on behalf of the *Cerveceria Cuauhtemoc, S.A.*, and it further appears that the claimants, in a letter to a representative of the brewery company, dated July 17, 1914, state that it address him regarding the question of the old balance "as per the instructions of Mr. Antonio Elosua, Inspector of Constitutional Government, for and in behalf of *Cerveceria Cuauhtemoc.*" It cannot be assumed, however, that the claimants can recover from the brewery company the balance due

to it for the bottles delivered. The seizure of the brewery was a revolutionary measure and not a legal act that could give Elosua authority to enter into a contract on behalf of the brewery company. And the respondent Government has submitted no proof to show that the brewery company ever consented to undertake the responsibility according to the contract. Further, it must be assumed that Elosua's management of the brewery had in view the exaction of the fine imposed upon it by the Constitutionals and that the acquisition of the bottles has served this purpose. In these circumstances the Commission is of the opinion that the present claim should be allowed.

It appears that under date of December 29, 1914, the claimants informed the brewery company that it would charge the account with interest at the rate of five per centum per annum. Notwithstanding this fact the Commission is of the opinion that interest in this case as in similar cases already decided by the Commission should be awarded at the rate of six per centum per annum, as the present claim is against the United Mexican States, and not against the brewery company.

Nielsen, Commissioner :

I agree with the conclusion stated in the Presiding Commissioner's opinion that a pecuniary award should be rendered in this case, but I do not entirely concur in all the conclusions with respect to the law and the facts.

From the record in the case it appears that a revolutionary leader seized a brewery and certain other properties in Monterrey. It appears from evidence accompanying the Memorial that, when the brewery was first seized the purpose was to obtain a forced loan, but that subsequently the directors of the company were charged with having taken part in opposition to the so-called Constitutionalist cause and with maintaining armed forces. It further appears that it was explained to General Carranza that the so-called armed forces were a small guard of watchmen maintained on account of the existing disturbed condition.

I do not agree with the conclusion that the contract invoked in behalf of the claimant was a contract made with the brewery. When an insurgent leader seizes property and puts it in charge of some person acting under such leader's control I do not think that contracts made by such a person can properly be said to be contracts made by the Company whose property has been seized. In such a case the acts of the person placed in control of the property are not determined by the character of the stationery he may use, or by the title or designation given him, or by the fact that he may purport to act in behalf of the Company.

Responsibility is ultimately fixed on the Mexican Government in the instant case because the revolution initiated by General Carranza became successful, and an award can be made for unpaid contractual debts on the same principle that awards have been made in other cases for supplies furnished to the Mexican Government.

The point of jurisdiction raised in this case involves more difficult questions with respect to which there is in my opinion considerable uncertainty. In giving application to the principles of international law governing a claim growing out of contractual obligations an international tribunal is not concerned with a suit on a contract. There is no law of contracts in international law. In rendering an award in a case of this kind I think we must proceed on the theory that there has been a violation of property rights in the nature of a confiscation; it might be said either a

confiscation of the property purchased or of the purchase price. The claim does not grow out of the seizure of the brewery, a Mexican corporation, but it is nevertheless concerned with a complaint of a violation of property rights. It is therefore not altogether clear to me that the claim does not fall within that class of claims which is described in meagre and general language in Article I of the Convention of September 8, 1923, and more specifically described in Article III of the Convention of September 10, 1923. If a civilian acting under the express or implied authority of an insurgent leader commits some wrongful action, it is difficult to perceive that such action must be regarded exclusively as the acts of the civilian, particularly when responsibility for the act is fixed because the revolutionary leader ultimately becomes successful.

In considering the peculiar facts of this case, I think that the Commission may be justified in attaching considerable importance to the interpretation put upon both of the arbitration conventions by the two Governments in dealing with the particular case under consideration. The United States filed this claim before the Commission under the Convention of September 10, 1923. Mexico filed an answer before that Commission alleging among other things that the claim was not within the jurisdiction of the Commission. Thereupon the United States proceeded to bring the case to hearing before this Commission. Dr. Oppenheim, in a discussion of the interpretation of treaties, says:

“But it must be emphasized that the interpretation of treaties is, in the first instance, a matter of consent between the contracting parties. If they choose a certain interpretation, no other has any basis. It is only when they disagree, that an interpretation based on scientific grounds can ask a hearing.” *International Law*, Vol. I, p. 700.

Possibly the seemingly sound principle underlying these statements may not be absolutely controlling with respect to the facts in the instant case, yet I think it is not altogether irrelevant. Article I of the Convention of September 8, 1923, confers jurisdiction on this Commission over all outstanding claims since July 4, 1868, “except those arising from acts incident to the recent revolutions”. Claims incident to the recent revolutions are those more specifically described in Article III of the Convention of September 10, 1923. Mexico in a proceeding distinct from the instant case has contended that the claim is not within this jurisdictional Article of the Convention of September 10, 1923. The United States, by prosecuting the claim to a hearing before this Commission as the tribunal having jurisdiction instead of proceeding before the so-called Special Claims Commission, seems to have acquiesced in the Mexican Government’s contention, that the Special Commission has not jurisdiction, which therefore must be vested in the General Claims Commission.

Decision

The United Mexican States shall pay to the United States of America on behalf of The American Bottle Company \$9,985.62 (nine thousand nine hundred eighty-five dollars and sixty-two cents), United States currency, with interest thereon at the rate of six per centum per annum from September 4, 1914, to the date on which the last award is rendered by the Commission.

Laura A. Mecham and Lucian Mecham, Jr. (U.S.A.) v.
United Mexican States

(April 2, 1929, concurring opinion by American Commissioner, April 2, 1929.
Pages 168-173.)

DENIAL OF JUSTICE.—REFUSAL TO ARREST CRIMINALS. Claimant's store was robbed, the guilty parties were pursued and found, but authorities at such place refused aid, in absence of formal order of arrest, and ordered attempts to apprehend guilty parties to cease. Mexican constitution permitted arrest without such order in urgent cases. Claim *allowed*.

FAILURE TO APPREHEND OR PUNISH.—INTERNATIONAL STANDARD. Claimant's husband was killed by bandits. A posse was immediately organized and went in pursuit but bandits escaped in the mountains. Investigation was made and orders of arrest issued. No one was ever arrested for the crime, reports indicating that guilty parties lived in United States. *Held*, steps taken did not fall below the international standard.

PERSONAL LOANS OR PAYMENTS TO OFFICIALS AND SOLDIERS. Claim for unpaid loans made to examining judge and soldiers *allowed* but not payment to doctor. Such payments *held* not an outrage under international law so as to establish responsibility by mere fact of payment.

MEASURE OF DAMAGES, THEFT AND DESTRUCTION. Claim for articles stolen *allowed*. Claim for property destroyed *disallowed*, since failure to arrest persons responsible for robbery and destruction would not have resulted in recovery of destroyed property.

Cross-reference: Annual Digest, 1929-1930, p. 168.

Commissioner Fernández MacGregor, for the Commission:

In this case claim is made against the United Mexican States by the United States of America on behalf of Laura A. Mecham and Lucian Mecham, Jr., wife and son of Lucian M. Mecham, for the sum of \$26,955.70, U. S. currency, for injuries sustained by the claimants as the result of a robbery suffered by them and of the murder of the said Lucian M. Mecham, crimes which were not duly punished by the Mexican authorities.

The facts of the first case are as follows: On the night of February 11, 1921, two individuals broke into a store owned by Lucian M. Mecham in Colonia Juárez, Chihuahua, Mexico, stealing and destroying merchandise to the value of \$1,955.70. The claimants requested assistance from the appropriate authorities of the State of Chihuahua. The Municipal President of Colonia Juárez, Nicolás Reyes, started out, with several men, in pursuit of the guilty parties, found traces of the fugitives, and followed them to a ranch near the town of Janos, where they sought the aid of the municipal authorities. These authorities refused to help them stating that they did not have a formal order of arrest. Reyes and his men returned to Colonia Juárez and from there went to Casas Grandes where they also sought assistance. The Municipal President of the latter place furnished some soldiers, and the entire group returned to Janos. The Municipal President there again refused to aid in the search and threatened to arrest Reyes and his men if they persisted in continuing the chase without due warrant of

arrest. However, he informed the minor judge of the facts, who did nothing because the pursuers could give no information about the guilty parties. The Mexican authorities did nothing more.

The Mexican Agency presented as evidence the record of the proceeding instituted because of the robbery of Mecham's store. The said record corroborates in general the evidence presented by the American Agency. If it is true that a Mexican official, Reyes, did everything that he possibly could to bring about the capture of the robbers, it is equally true that another Mexican official, the Municipal President of Janos, decidedly prevented that capture. The Mexican evidence contains an explanation of the conduct of the Janos authorities; namely, that as the pursuers brought no formal warrant, arrest could not be permitted without violating Article 16 of the Constitution of the Mexican Republic, the pertinent part of which says:

"No one shall be molested in his person, family, domicile, papers or possessions, except by virtue of an order in writing of the competent authority, setting forth the legal ground and justification for the action taken."

If this provision were without exception, then the blame for preventing the pursuit would be upon Reyes, who did not take the steps necessary to comply with that important requirement; but the Commission cannot cast that reproach on this efficient officer in view of the fact that that same Article 16 contains the following exception, which in its opinion applies to the case:

"Only in urgent cases instituted by the public attorney without previous complaint or indictment and when there is no judicial authority available may the administrative authorities, on their strictest accountability, order the detention of the accused, placing him at the disposition of the judicial authorities...."

In any event, the failure to arrest is imputable to a Mexican official. The Municipal President of Janos could have done what is prescribed by Article 199 of the Code of Criminal Procedure of the State of Chihuahua¹ to take the steps necessary for the protection of the injured and the arrest of the guilty, placing, for example, police around the place where it was believed they could be found. Moreover, while a court record is not in many cases proof of the measures which are taken to arrest a criminal, that presented by Mexico reveals palpable negligence. The Judge of First Instance of Casas Grandes, about the middle of March, reported to the Governor of Chihuahua that no proceeding had been instituted against the robbers of Mecham's store, and stated that neither had it been instituted by the Minor Judge, as the Municipal President had not made the assignment which he was under obligation to make. Such proceedings were begun on June 23; and there they ended; and, as, in order to arrest a criminal in a case *non flagrante delicto*, a warrant of arrest is necessary, it is clear that none having been issued in all this time, said arrest could not even be attempted.

¹ "ART. 199. When the denunciation is made before authorities who do not have jurisdiction over the case, the latter shall notify the proper authorities immediately, taking at once under their strict responsibility adequate measures for the protection of the injured parties, the apprehension of the guilty parties or those parties presumed as such, and all other measures which might be necessary."

In view of the above, and although it is not incumbent on this Commission to examine every single step taken by the judicial or police authorities in the prosecution of a crime, the general facts set forth are sufficient, in its opinion, to warrant the assertion that the Mexican authorities fell short of their duty to protect the claimants by providing appropriate means to prosecute and punish the offenders.

With regard to the complaint of a denial of justice for not punishing the murderers of Mecham, the facts are as follows: On the night of March 18, 1922, at about 9 P. M. several bandits entered Mecham's house in the place already described, asking the occupants for what money they had. Mecham's wife was able to get away to ask for help. Meanwhile the bandits so brutally struck Mecham, who was in bed convalescing from pneumonia, that his skull was broken, leaving him unconscious and in such bad shape that he died eleven days afterwards. The bandits escaped. The facts were reported to the said Reyes, Municipal President of Colonia Juárez, and also to the Judge at Casas Grandes. The former immediately organized a group which went in search of the bandits, who had left, it appears, in a wagon, overtaking them at the hacienda of San Diego, and demanding their surrender. This was not obtained and several shots were exchanged, one horse drawing the wagon being killed by the shooting, and the other wounded. The bandits escaped into the fastnesses of the mountains. Meanwhile, at daybreak on the 19th of March, the Judge of Casas Grandes had come to the scene of the crime, and carried out the first investigations, taking note of the condition of the wounded man, appointing medical experts, taking statements of eye-witnesses, of Reyes and his companions in the chase, etc. He provided immediately for an examination of the wagon and the horses which had been left on the scene of the affray with the bandits. Having observed from the brands on the horses that they belonged to one Guillermo Bueno, the Judge went to his house, not finding him. There he interrogated his father-in-law and his wife; he asked these witnesses for a description of Bueno, and of one of his companions, and in view of the fact that every suspicion rested upon these individuals, he issued an order of arrest against them. The said order was communicated to the Municipal President and to the Chief of Social Defense. On the 20th the medical experts rendered their report. On the 22nd of March the President of Casas Grandes advised that he had already ordered that the guilty parties be sought. On the 31st of the said month letters requisitorial for arrest were issued to all the judges of the State. Afterwards the statements were again taken of witnesses already examined. On August 3, 1922, the judges of first instances of Chihuahua were asked if they had procured the arrest of the guilty parties. It is also of record that the Governor urged the Rural Police of the State to cooperate specially in the arrest, adding that he did not have reports indicating that they would be found in that vicinity, but probably in New Mexico, U.S., as Bueno and his accomplice had lived there many years.

The American Agency complains that the Judge who began the investigation was reluctant in fulfilling his duty; that he collected \$55.00 from Mrs. Mecham to go and examine the witnesses at the house of the suspected Buenos; that she had to pay \$10.00 to the doctor who was brought by the Judge to examine the wounded man; and that she likewise had to pay \$20.00 to the soldiers who came to give her protection after the assault. It alleges as another important aggravating circumstance that the judge had within his power in making his investigation in San Diego, two individuals,

father and son, who were very suspicious and who were given their freedom, in spite of the opposition of Reyes, the Municipal President; that the Judge had intentions of abandoning the case; that there are no indications in the record that any search was made at the home of the suspected Bueno.

The truth in regard to the payments made by Mrs. Mecham seems established by the statements of several eye-witnesses who gave many details concerning them. Such an act is vituperable and certainly contrary to the Constitution of Mexico (Art. 17); nevertheless, the Commission could not call it an outrage in the sense which the Law of Nations gives to that word. It seems, furthermore, that the intention of the Judge, from what can be seen, was to return the money, which appeared necessary to pay for the automobiles to go to the investigation. With regard to the sum collected by the doctor, there is the question that, besides his medico-legal services, he may have given the wounded man some professional attention.

It does not seem corroborated by the judicial record that the Judge freed two suspicious persons whom he had in his power. The declarations of the witnesses presented by the American Agency seem to refer to two individuals, who were father and son, and these, according to the record presented by Mexico, are the ones called Mora and Bueno, (the owner of the wagon). The first did not appear suspicious; the second never was before the Judge, who thereafter issued a warrant of arrest for him and his companions.

With regard to whether the judge had intentions of dropping the case, the proceedings show that he positively pursued it as far as possible.

The Commission must, in the present case, as in other cases, adhere to the substance of the facts. Even though more efficacious measures might perhaps have been employed to apprehend the murderers of Mecham, that is not the question, but rather whether what was done shows such a degree of negligence, defective administration of justice, or bad faith, that the procedure falls below the standards of international law. The Commission is not prepared to say such a thing in this case.

From the foregoing it follows that the Commission must give satisfaction only for the denial of justice and lack of protection to the property of the Mechams, implied in the case of robbery. To fix the amount of such indemnity the Commission deems it expedient to consider in this case the value of the effects stolen and which might have been recovered if the immediate arrest of the robbers had been obtained, as appeared imminent. The claimants in their affidavits give a list of the goods stolen and their prices, but in this list are included several entries for items which could not have been recovered even if the arrest had been procured and others for damages to the house and for expenses of the men who went after the robbers. The items which, for this reason should be deducted, are:

1 ton of flour emptied on the floor	\$100.00
Medicines taken and destroyed	90.00
10 small sacks of flour wasted	25.00
Face powder taken and destroyed	25.00
Damages to the building on entering it	25.00
Expenses to the men who went after the robbers, furnished in provisions and salaries	120.00
Total	<u>385.00</u>

There are three other items which include expenses charged by the doctor and by the Judge and the amount paid to the soldiers. Of these

items the two last should be paid, (30 and 20 dollars, respectively) as it seems that they were loans made, but not the first as there is doubt regarding the purpose for which the doctor collected it.

Nielsen, Commissioner:

I agree generally with the conclusions expressed in the opinion written by Commissioner Fernández MacGregor.

I do not concur entirely in the computation of the amount of indemnity awarded. Evidence has not been adduced to refute the evidence submitted by the United States to support the items set forth in the Memorial. The general rule of international law in a case of this kind is, in my opinion, that relied upon by the Commission in the case of *Coatesworth & Powell* (Moore, *International Arbitrations*, Vol. II, p. 2050) in which the Commission awarded an indemnity of \$50,000.00 for property losses, responsibility being based by the Commission solely on the non-punishment of wrongdoers.

Decision

The Commission decides that the Government of Mexico must pay to the United States of America, on behalf of Laura A. Mecham and Lucian M. Mecham, Jr., the sum of \$1,510.70, without interest, plus the sum of \$50.00, with interest at the rate of six per centum per annum from March 19, 1921 until the date of the last award of the Commission.

KATE A. HOFF, ADMINISTRATRIX OF THE ESTATE OF SAMUEL
B. ALLISON, DECEASED (U.S.A.) *v.* UNITED MEXICAN STATES

(April 2, 1929. Pages 174-180.)

IMMUNITY OF FOREIGN MERCHANT VESSELS FROM LOCAL JURISDICTION.—
VESSEL ENTERING PORT UNDER DISTRESS. The *Rebecca*, an American schooner, sailed from the United States in January, 1884, with cargo consigned for a Texan port and also for Tampico, Mexico. While offshore the Texan port a strong adverse wind drove the vessel to sea until it found itself off Tampico in a damaged and leaking condition. The vessel accordingly entered the latter port and lodged a protest of distress. The Mexican customs officials seized the cargo destined for Texas, without giving any receipt therefor, and arrested the master on a charge of attempt to smuggle. He was tried, acquitted and released but was rearrested and held under bond for over two months. The *Rebecca* and its cargo were sold by order of court, part of the proceeds being paid over to the Federal Treasury and the rest being distributed among certain customs employees. *Held*, facts vessel entered port under its own power and that such port was a port of call did not deprive vessel of right to immunity from local jurisdiction arising out of distress. Claim *allowed*.

DAMAGES, PROOF OF. Damages allowed for value of vessel but not for cargo and for loss and expense, when no evidence to substantiate latter items was furnished.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 860; Annual Digest, 1929-1930, p. 129; British Yearbook, Vol. 11, 1930, p. 221.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$10,000.00 with interest is made in this case by the United States of America in behalf of Kate Allison Hoff, Administratrix of the estate of Samuel B. Allison. The latter was the owner of a small American schooner called the *Rebecca*, which together with its cargo was seized by Mexican authorities at Tampico in 1884. Allegations with respect to the occurrences on which the claim is predicated are made in the Memorial in substance as follows:

The *Rebecca* was built in the United States and registered at Galveston, Texas. Its approximate value was \$5,000.00. In the month of January, 1884, Gilbert F. Dujay, the master of the vessel, loaded it at a small port called Patersonville, nine miles above Morgan City, in the State of Louisiana, with a cargo consisting of six cases of merchandise destined for Brazos Santiago, Texas, and of a consignment of lumber for Tampico, Mexico. The vessel cleared at Brashear City, now known as Morgan City, on the 30th day of January, 1884, bound for Santiago, Texas. When it reached a point off this port the wind and the tide were so high that it was unsafe to enter. While lying off Brazos Santiago, on the 13th of February, waiting for a favorable opportunity to enter the port, an adverse wind from the north became so strong and the sea so rough, that the vessel was driven to the southward before a furious wind and sea, and when the wind abated it was found that the vessel was in a disabled and unsafe condition off the port of Tampico. The master, realizing the dangerous condition of his vessel, entered the port of Tampico as the nearest place of safety for the vessel, cargo and crew. The crew concurred in and advised such action. When the *Rebecca* entered the port she was leaking badly. Her standing rigging had been torn away. The cabin windows were broken. The cooking stove was so badly broken it could not be used. While at sea the vessel began to leak so that the water reached the cases of merchandise, and the crew was compelled to break open the packages and store them so that they would not be ruined by the water.

When the *Rebecca* entered the port the master presented to the Mexican customs official a manifest for the goods destined for Tampico and a so-called "master's manifest" for the consignment for Brazos Santiago, Texas, which met the requirements of the law of the United States. As soon as the vessel reached Tampico, which was on Sunday afternoon, February 17th, it was anchored off the custom house and a protest of distress was immediately entered with A. J. Cassard, the American Consul at that port.

On the day following the arrival at Tampico, February 18, 1884, the Mexican custom house officials demanded from the master of the *Rebecca* the packages of merchandise on board the vessel. The demand was refused and thereupon the packages were taken by force and no receipt or other evidence of possession by the custom house authorities was given.

On the 21st of February the master was arrested on a charge of attempt to smuggle, was placed in the barracks with armed soldiers guarding him, was not permitted to speak to anyone, and was kept in close confinement until the day following, a period of 28 hours, when he was brought before the Judge of the District Court at Tampico, and without the privilege of having counsel, was tried and was acquitted and released. On the 23rd of February the master was again arrested by the Mexican authorities and

was required to give bond for his appearance before the Criminal Court at Tampico to answer a charge of bringing goods into a Mexican port without proper papers. While awaiting trial he remained under bond, but without permission to leave Mexico, until the 24th day of April, a period of over two months. On that date a decree was entered by the court which released the master from bail but assessed treble damages against the merchandise seized, and charged the master with the cost of revenue stamps used in the proceedings. Because of the refusal and inability of the master to pay the penalties thus assessed, the *Rebecca* and its cargo were sold by order of court, and the proceeds were applied to the Federal Treasury, a balance being distributed among certain customs employees.

On the 23rd of February, 1884, Dujay made before August J. Cassard, American Consul at Tampico, a protest against the action of the custom house officials in taking possession of the packages which the master of the *Rebecca* had engaged to deliver at Brazos, Texas, and on April 4, April 9, and April 16, 1884, other protests were made before the Consul against the acts of the Mexican officials.

In the light of the allegations briefly summarized above, the United States contends (1), that the decision of the judge in condemning the vessel and cargo was at variance with the Mexican law applicable to the case, and (2), that the vessel having entered Tampico in distress, was immune from the local jurisdiction as regards the administration of the local customs laws. On behalf of Mexico it was contended that the judge properly applied the local law, and that no fault can be found with his decision. With reliance on the opinion of the Mexican judge, it was argued that it could not be said that the law with respect to distress applied when a vessel entered the port for which it was bound, and that, in view of the character of the ship's papers, there was reason to suppose that the ship's voyage did not include the port of Brazos Santiago. It was also argued that evidence did not show the ship to be in such a condition that it could be considered to be a distress. It was further argued that, in the light of the evidence of international law, it could not be said that at the time of the seizure of this vessel there existed a rule of international law with respect to distress.

The Commission is fortunate in having before it an abundance of evidence from which it is possible to draw definite conclusions with respect to all pertinent considerations. The seizure of the vessel and the arrest of the captain were the subject of extended diplomatic correspondence between Mexico and the United States. Investigations were made by the authorities of both countries of these matters. Copies of the correspondence and records of the investigations have been produced as have also the ship's log and a copy of the court's decision upon which a denial of justice is predicated by the claimant Government.

It is of course well established that, when a merchant vessel belonging to one nation enters the territorial waters of another nation, it becomes amenable to the jurisdiction of the latter and is subject to its laws, except in so far as treaty stipulations may relieve the vessel from the operation of local laws. On the other hand, there appears to be general recognition among the nations of the world of what may doubtless be considered to be an exception, or perhaps it may be said two exceptions, to this general, fundamental rule of subjection to local jurisdiction over vessels in foreign ports.

Recognition has been given to the so-called right of "innocent passage" for vessels through the maritime belt in so far as it forms a part of the high seas for international traffic. Similarly, recognition has also been given—perhaps it may be said in a more concrete and emphatic manner—to the immunity of a ship whose presence in territorial waters is due to a superior force. The principles with respect to the status of a vessel in "distress" find recognition both in domestic laws and in international law. For numerous, interesting precedents of both domestic courts and international courts, see Moore, *Digest*, Vol. II, p. 339 *et seq*; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, p. 194. *et seq*.

Domestic courts have frequently considered pleas of distress in connection with charges of infringement of customs laws. Interesting cases in which pleas of distress were raised came before American courts in the cases of vessels charged with violation of the interesting American so-called "non-intercourse" acts forbidding trade with French and British possessions. 1 Stat. 565; 2 Stat. 308. In these cases it was endeavored in behalf of the vessels to seek immunity from prosecution under these laws by alleging that the vessels had entered forbidden ports as a result of *vis major*. A Mexican law of 1880 which was cited in the instant case appears to recognize in very comprehensive terms the principles of immunity from local jurisdiction which have so frequently been invoked. *Legislación Mexicana*, Dublán & Lozano, vol. 14, p. 619. *et seq*.

The enlightened principle of comity which exempts a merchant vessel, at least to a certain extent, from the operation of local laws has been generally stated to apply to vessels forced into port by storm, or compelled to seek refuge for vital repairs or for provisioning, or carried into port by mutineers. It has also been asserted in defense of a charge of attempted breach of blockade. It was asserted by as early a writer as Vattel, *The Law of Nations*, p. 128. In the instant case we are concerned simply with distress said to have been occasioned by violent weather.

While recognizing the general principle of immunity of vessels in distress, domestic courts and international courts have frequently given consideration to the question as to the degree of necessity prompting vessels to seek refuge. It has been said that the necessity must be urgent. It seems possible to formulate certain reasonably concrete criteria applicable and controlling in the instant case. Assuredly a ship floundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that it may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea is unjustifiable. If a captain delayed seeking refuge until his ship was wrecked, obviously he would not be using his best judgment with a view to the preservation of the ship, the cargo and the lives of people on board. Clearly an important consideration may be the determination of the question whether there is any evidence in a given case of a fraudulent attempt to circumvent local laws. And even in the absence of any such attempt, it can probably be correctly said that a mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation can not justify a disregard of local laws.

The *Rebecca* did sail into Tampico, as observed by the judge who condemned the vessel, under its own power. However, it did not enter the port until after it had for three days, in a crippled condition, been contending

with a storm in an attempt to enter the port at Brazos Santiago, Texas. It is therefore certain that the vessel did not by choice abandon its attempt to make port at that place, but only because according to the best judgment of the captain and his crew absolute necessity so required. In such a case a captain's judgment would scarcely seem subject to question. It may also be concluded from the evidence in the case that a well grounded apprehension of the loss of the vessel and cargo and persons on board prompted the captain to turn south towards Tampico. It was argued in behalf of the United States that under the conditions of the weather it could be assumed that no other port of refuge was available. And even if such were not the case, there would seem to be no reason why refuge should not have been sought at Tampico. The fact that the ship had cargo for that place in addition to that consigned to Brazos Santiago, did not make the former any less available as the port of refuge. It may be concluded from the evidence that the captain had no intent to perpetrate a fraud on Mexican customs laws. Indeed his acquittal on the criminal charge preferred against him appears to be conclusive on that point, even if there were no other evidence bearing on the matter which there is. It may also be concluded that the captain had no intent merely as a matter of convenience to flout Mexican laws. This very small vessel had been driven before a strong north wind; its cabin had been damaged; its pumps had been broken and repaired; the cooking stove on the vessel had been rendered useless; there were one and a half to two feet of water in the vessel; and it had been leaking.

It was argued by counsel for the United States forcefully and at considerable length that the Mexican judge in condemning the ship and cargo misapplied Mexican law. The nature of the ship's papers, provisions of Mexican customs laws, and their construction and application by the Mexican judge were discussed in detail. It was contended that there was no violation of those laws. Whatever may be the merits of the contentions advanced, it is unnecessary to discuss this aspect of the case in view of the conclusions reached by the Commission with respect to the conditions under which the vessel entered Tampico. The ship entered the port of Tampico in distress, and the seizure of both the vessel and cargo was wrongful.

Claim is made in the sum of \$10,000.00 with interest from April 24, 1884, until the date of payment of any award rendered in the case. The sum of \$10,000.00 is apparently made up of three items, namely, \$5,000.00 for the vessel; \$2,500.00 for the cargo; and the remainder, "the loss and expense incident" to the confiscation of the ship and cargo. The Memorial contains no allegations or proofs with respect to the ownership of the cargo, and no specific information or proof with respect to the vaguely stated item of "loss and expense incident" to the confiscation. In one place in the brief it is said that the owner of the vessel was also the owner of its cargo. The Mexican Answer contains no challenge with respect to the propriety of these items. However, since the ownership of the cargo is not even alleged in the Memorial and is not proven, and as no information is furnished with regard to the item of incidental losses, these two items must be rejected.

Decision

The United Mexican States shall pay to the United States of America on behalf of Kate A. Hoff the sum of \$5,000.00, with interest at the rate

of six per centum per annum from April 24, 1884, to the date on which the last award is rendered by the Commission.

FANNIE P. DUJAY, EXECUTRIX OF THE ESTATE OF GILBERT
F. DUJAY (U.S.A.) *v.* UNITED MEXICAN STATES

(April 8, 1929. Pages 180-192.)

DENIAL OF JUSTICE.—WRONGFUL IMPRISONMENT.—SURVIVAL OF CLAIMS FOR PERSONAL INJURIES. Claim for wrongful imprisonment of American master of vessel *Rebecca* under circumstances set forth in claim of *Kate A. Hoff, Administratrix of the Estate of Samuel B. Allison, supra*, presented by executrix of estate of such master, *allowed*.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 865; Annual Digest, 1929-1930, p. 174; British Yearbook, Vol. 11, 1930, p. 222.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$15,000.00 with interest is made in this case by the United States of America in behalf of Fannie P. Dujay, Executrix of the estate of Gilbert F. Dujay, an American citizen who was wrongfully imprisoned in Tampico, Mexico, in 1884. The occurrences underlying this claim are set forth in the opinion of the Commission in the case of *Kate A. Hoff*, Docket No. 331.¹

As was stated in that opinion, it appears that Dujay was kept in close confinement for a period of twenty-eight hours, subsequently released, and then re-arrested on February 23rd, and while awaiting the second trial was held under bond but without permission to leave Mexico until the 24th of April of that year.

In behalf of Mexico it was contended that there was probable cause for the arrest of Dujay. It was alleged that this was shown by the fact that the *Rebecca* anchored at Tampico with an irregular manifest, which did not cover certain commodities on board, by unverified statements made concerning the weather and the forced arrival of the ship, and by other matters disclosed by the record.

Even if it be considered that there was probable cause for the first arrest of Dujay, for reasons indicated in the *Hoff* case, the treatment accorded to Dujay was clearly unjustifiable. Counsel for Mexico explained that Dujay was detained pending his second trial under a process of Mexican law termed "arraigo." This appears to be a precautionary measure which may be taken incident to a civil action to secure redress against a person pending such action by detaining such person within the jurisdiction of the court and rendering him subject to penalties if he disobeys the order of detention, such penalties being those prescribed by the Penal Code with respect to the offense of disobedience to the legitimate order of the public authorities. See Book V, Title I, Chapter 11 of the Commercial Code of Mexico relating to mercantile tribunals.

The right of the United States to obtain compensation in behalf of Mrs. Dujay was denied by Mexico, it being contended that any wrongs

¹ See page 444.

suffered by Dujay were of a personal nature. It is said in the Mexican brief that the claimant "has no legal personality to appear and to ask an award for personal injuries which were suffered by Captain Dujay," and that "the right to seek compensation for personal injuries such as the arrest suffered by the deceased, complained of in the Memorandum, and made the foundation of the claim in the Memorial, are personal."

With respect to this point it was contended by the United States that a claim on behalf of the executor or personal representative of a decedent to recover indemnity for personal injuries suffered by the latter during his lifetime is clearly recognized by international law. The issue raised is governed exclusively, it was argued, by that law. It was further contended that, if the question whether a claim such as that presented in the instant case survived to the executrix should be considered to be governed by a rule of domestic law, and specifically, the law of the domicile of the injured person, then the claim did survive under the law of the State of Texas which was the domicile of Dujay at the time of his death. However, the fundamental contention on which counsel relied is that the issue presented is governed by international law, and that under that law a claim can be maintained on behalf of the executrix. He argued that this contention was clearly supported by numerous precedents of international tribunals, and that a proper decision on the issue raised must be reached in the light of precedents of that character.

In searching for evidence of international law on the point at issue comparatively little information will be found outside of the pronouncements of international tribunals before which questions of the character under consideration have been raised. It therefore becomes pertinent carefully to examine the opinions of such tribunals.

In the Mexican brief reference is made to the maxim of the common law *actio personalis moritur cum persona*. And in connection with this reference citation is made of three English cases, namely, *Chamberlain v. Williamson*, 2 M. & S. 408; *Finlay v. Chirney*, 20 Q. B. D. 494; and *Quirk v. Thomas* (1916) 2 K. B. (A. C.) 515. While these cases of course support a general principle of the common law that certain actions of a personal character do not survive, they throw little or no light even by way of analogy on the precise issue under consideration.

Chamberlain v. Williamson, decided in 1814, involved an action for a breach of promise of marriage alleged to have been made by the defendant to a person who died intestate. *Finlay v. Chirney*, decided in 1888, was a case in which it was held that an action for breach of promise of marriage where no special damage was alleged did not survive against the personal representative of the promissor. *Quirk v. Thomas*, decided in 1916, was a proceeding somewhat similar to the two cases just mentioned.

From the standpoint of international law, it was contended in the Mexican brief that a claim for wrongful imprisonment can not be maintained in behalf of the heir or legal representative of the person who suffered the injury. It was argued that although such a claim might be maintained in behalf of the injured person himself, it should be distinguished from one involving the wrongful killing of a person, which might result in a pecuniary loss to persons dependent on the victim. With respect to the applicable principle of international law, the following citations were made in the Mexican brief:

"Borchard, *Dipl. Protec.* p. 632; Underhill's case, *Ralston's Rep.* 45 *et seq.*; wherein it is stated that 'Underhill's death puts an end to any claim

that could arise from personal injuries, insults, or other offenses'; Metzger vs Venezuela, Ralston, 580; Plumer vs Mexico, Op. 182; see Reglas de Procedimiento, Art. 11, de la Comisión de Reclamaciones entre los Estados Unidos Mexicanos y la Gran Bretaña, México, 1928."

The case of *George F. Underhill*, a claim presented in 1903 by the United States against Venezuela, was decided by the Umpire Barge, the American Commissioner and the Venezuelan Commissioner having disagreed. Claim was made in behalf of Jennie Laura Underhill on account of "personal injuries, insults, abuses, and unjust imprisonment as well as for forced sacrifice of a property" suffered by George Freeman Underhill. The Umpire stated that "whatever may be the law or the opinion as to the transition of the right to claims that arise from personal injuries, insults or other offenses", no proof was found in the record that Jennie Laura Underhill was entitled to administer upon her late husband's estate. The Umpire declared that it did not appear whether Underhill left a will, and furthermore that there was uncertainty in the record with respect to rights that might have resulted from a previous marriage of Underhill. The claim was dismissed both as regards personal injuries and the so-called "forced sacrifice of a property". *Venezuelan Arbitrations of 1903*, Ralston's Report, p. 45. It will readily be seen that this opinion furnishes no authority with respect to the standing of a legal representative in relation to a claim growing out of personal injuries.

In the *Metzger* case claim was made in 1903 by Germany against Venezuela in behalf of the heirs of Metzger for an amount including indemnity for personal injuries inflicted on Metzger by Venezuelan military officers. Umpire Duffield, in an opinion by which a pecuniary award in the case was rendered, said:

"A right of action for damages for personal injuries is property. *A fortiori* is the claim in this case which had been presented and proved before the death of Metzger."

The Umpire asserted that, Metzger being domiciled at the time of his death in Venezuela, his heirs would take according to Venezuelan law. He stated that under the laws of Venezuela the right of action for personal injuries survived and passed to the heirs of the deceased in so far as damages for corporeal injuries were concerned, and for such injuries an award was made. No award could be made he declared for damages to the "feelings and reputation" of Metzger. *Op. cit.*, p. 578.

There are two interesting points in this opinion: (1) that an action for damages for personal injuries is property, particularly a claim presented and proved before the death of an injured person, and (2) that Venezuelan law was controlling with respect to the survival of the claim. Irrespective of the question of the correctness of this latter conclusion, it is pertinent to note that the Umpire rejected solely the item of damages for the injury to "feelings and reputation" and rendered an award in favor of the heirs on account of corporeal injuries inflicted on Metzger. It will readily be seen that this case in which a claim was successfully maintained by heirs for personal injuries to the deceased is not authority in support of any rule that claims can not be maintained by heirs or legal representatives in a case of this nature.

The *Plumer* case was decided by a Board of three American Commissioners established under an act of March 3, 1849, (9 Stat. 393) for the settlement of claims provided for in Article XV of the treaty concluded between

Mexico and the United States February 2, 1848. A claim was presented in behalf of Dorcas Ann Plumer, Administratrix of the estate of Robert Plumer. It arose out of a theft of personal property from Plumer in Mexico and personal injuries inflicted on him. The Board awarded damages for the loss of the personal property but rejected the item for personal injuries. The Board stated, evidently giving application to the principle of the old common law rule, that the "right of compensation in damage for personal injuries dies with the person and does not survive to the heir or administratrix", *Commissioners On Claims Against Mexico, Opinions*, Vol. I, p. 182.

Irrespective of the question as to the weight that should be given to this decision of a local tribunal when considered in connection with numerous other decisions of international tribunals, it is interesting to note that, shortly after the date of its rendition, on January 24, 1850, another award was rendered by the Board, on February 18, 1850, in which an indemnity of \$20,000.00 was made in favor of the Administratrix of George Hughes in satisfaction of a claim for damages for injuries inflicted on Hughes by troops under the command of General Santa Anna in Mexico. In the opinion in that case it is recited that Hughes was severely beaten and wounded and kept a prisoner for several weeks on a Mexican vessel, and that he was plundered of personal property. Moore, *International Arbitrations*, Vol. II, p. 1285; Vol. III, p. 2972. It would seem to be reasonably clear from the opinion that the common law rule that personal actions do not survive was not applied in this case the decision in which apparently was therefore at variance with that in the earlier case of *Plumer*.

The existence or non-existence of a rule of law is established by a process of inductive reasoning, so to speak; by marshalling the various forms of evidence of international law to determine whether or not such evidence reveals the general assent that is the foundation of the law of nations. It will be seen from an examination of the cases cited in the Mexican brief that, with the possible exception of the *Plumer* case, they furnish no authority in support of the contention that under international law claims can not be maintained in behalf of either representatives or heirs in cases growing out of personal injuries.

The rule in the Mexican-British arbitration to which reference is made in the Mexican brief reads as follows:

"Claims presented solely for the death of a British subject shall be filed on behalf of those British subjects considering themselves personally entitled to present them. Any claim presented for damage to a British subject already deceased at the time of filing said claim, if for damage to property, shall be filed on behalf of the estate and through his legal representative, who shall duly establish his legal capacity therefor." (Translation.)

Without discussion of the bearing of this rule on the question at issue, it may be observed that it does not seem necessarily to preclude the presentation of claims for personal injuries even though no specific reference is made to them.

Rule IV, paragraph 2, sub-section (i), prescribed by this Commission pursuant to Article III of the Convention of September 8, 1923, provides that a "claim arising from loss or damage alleged to have been suffered by a national who is dead may be filed on behalf of an heir or legal representative of the deceased". This rule appears to be in harmony with procedure sanctioned by international tribunals, numerous decisions of which are cited in the counter-brief of the United States. That this is so

can be shown by references to a few illustrative cases in which claims have been filed in behalf of heirs or legal representatives. Among the numerous cases cited are cases concerned with injuries that have resulted in death; cases in which it appears that injuries inflicted were of such a nature as to have contributed to death; cases involving both loss or destruction of property and physical injuries; and cases arising solely out of personal injuries. Reference may be made to a few of the last mentioned class of cases as most apposite to the instant case.

In the claim presented in behalf of V. Garcia, Administrator of the estate of Theodore Webster, Thornton, Umpire under the Convention of July 4, 1868, between the United States and Mexico, held that the Administrator had "a right to lay a claim before the Commission for injuries suffered by Webster." These injuries which severely impaired Webster's health resulted from a gunshot wound inflicted by a Mexican soldier. An award of \$10,000.00 was made in this case. The act of wounding Webster was, said the Umpire, a wanton outrage countenanced by an officer so that his Government became liable for it. Moore, *International Arbitrations*, Vol. III, p. 3004.

In the case of *De Luna*, which was decided under the Agreement of February 11-12, 1871, between the United States and Spain, the Umpire, Count Lewenhaupt, awarded \$3,000.00 in favor of the brother of the deceased as Administrator. In this case claim was made in behalf of the Administrator on account of the arrest of his brother in Cuba in 1880. *Op. cit.*, vol. IV, p. 3276.

In several interesting cases which came before the American-British Commission under the treaty of 1871, claims growing out of personal injuries were presented in favor of legal representatives. Demurrers filed by the American Agent in such cases setting forth that claims of this kind did not survive after death were overruled by a majority of the Commission who sustained the argument of British counsel that injuries to the person, whether resulting in death or not, were, in the diplomatic intercourse of civilized nations treated as a proper subject of international reclamation in behalf of the personal representatives of the person injured after his death. The same position was taken even when all connection between the injury alleged and the death of the intestate was disclaimed in the Memorial. See the claim of *Edward McHugh*, Administrator of the estate of James McHugh, arising out of imprisonment by American authorities; claim of *Elizabeth Sherman*, widow and Administratrix of Thomas Franklin Sherman, on account of injuries resulting from the forcible abduction of the latter by American authorities from Canada into the United States, and his imprisonment in Detroit; claim of *Elizabeth Brain*, widow of John Brain, for injuries sustained by the latter in connection with his imprisonment by American authorities in Washington. *British and American Claims Commission, Report of British Agent*, pp. 69-70; *Papers Relating to the Treaty of Washington*, Vol. VI, pp. 61-62; Ralston, *The Law and Procedure of International Tribunals*, p. 147.

In a reply filed by counsel for Great Britain to the demurrer of the United States, are found the following passages which are interesting, even though one may not agree with all details of the reasoning therein employed:

"This ground asserts a doctrine of the common law of England, which it is believed, is wholly unknown as a rule of international law, and is repugnant to those principles of equity and justice which underlie it. Even in the common

law this doctrine has been materially modified by statute both in England and this country, so that some actions which formerly died with the person, now survive to the widow or orphans.

"But it is not according to the common law that this Commission is to decide the questions brought before it, but according to the principles of equity and justice. This fourth ground of the demurrer is purely technical, and what is more, thoroughly repugnant to the public law, under which this claim arises, and by the principles of which it is to be decided....

"The widow and administratrix of the deceased claimant who, as she avers, left her nothing but this claim, presents it for satisfaction under the Treaty of Washington. The United States, who, under the rules of international law, had released the prisoner, and promised a consideration of his claim, which it never accorded, entered into a Treaty with Her Majesty's Government, which Treaty gave power to this International Tribunal to decide, according to the principles of equity and justice, 'all claims on the part of' British subjects and American citizens 'arising out of acts committed against their persons and property' between certain dates. The learned Agent and Counsel for the United States now seeks to turn away a claim manifestly within the Treaty by means of a maxim of the common law, which, if admitted to apply to such cases as this, limits and restricts the broad words of the Treaty so as to change their power and scope. But, apart from the fact that this maxim is opposed to the spirit of the public law, the reason which gives the maxim force in the common law does not exist in international proceedings.

"The injuries to the subjects or citizens of one State by the Government of another, out of which arises an international claim, demand a national satisfaction to be accorded to the injured nation by the wrongdoer. Thus the claim is not a personal action, but an international proceeding, in which one Government demands satisfaction of the other, by presenting the claim of its subject or citizen. Nor is this satisfaction accorded until an award be made, or a thorough investigation proves the claim to be invalid. Surely it cannot be maintained that the death of the claimant satisfies his Government for the outrage committed on its territory and its subject, or that the Government which had done these acts, in violation of international law, can, before an international tribunal, deny that satisfaction which it was bound to afford before the Treaty was made, and which, by the terms of the Treaty, it is pledged to afford here, on the ground that this claim, being a personal action, died with the claimant.

"Let us consider this point in another light. There are two divisions in this claim: 1st. Two thousand dollars' damage for the abduction of the claimant, 'the deprivation of his liberty, pain of imprisonment in itself, and the material immediate and continuing injury to his health, from which he never recuperated.' 2nd. Five hundred and eighty-five dollars for damages to his personal estate, the items being two hundred and twenty-five dollars actually paid out for prison expenses, and three hundred and sixty dollars for loss of earnings. The first of these divisions is a claim arising out of acts committed against the person of a subject of her Britannic Majesty; the second, a claim arising out of acts committed against his property.

"The claimant is dead; his claim is presented by his widow and administratrix. Now, by the decisions and practice of this Commission, as administratrix, the memorialist may claim indemnification for the injuries to the property of the deceased; but the United States now maintain that the claim for personal injuries, which would have been valid for presentation under the provisions of the Treaty, which provisions are the same for both classes of injuries, died with the claimant.

"Now, it is submitted that a claim growing out of a personal injury is as much, if not more, an international claim than one growing out of an injury to the property of the claimant. The Treaty makes no distinction between these two classes of claims. According to the letter and spirit of the Treaty they are to be dealt with in the same manner." *Report of British Agent*, pp. 557-559.

In an arbitration conducted between the two Governments many years later under an Agreement concluded August 18, 1910, the Government of Great Britain also proceeded on the theory that claims for personal injuries could be presented in behalf of a legal representative or an heir. See claim on behalf of *Glenna Thomas*, heir of Edward Bedford Thomas, based on complaints of illegal imprisonment and mistreatment of the latter during such imprisonment; claim on behalf of the *Representatives of L. J. Levy*, based on the same grounds. American Agent's Report, pp. 154, 157. No contention was made by the United States in this arbitration that a claim could not be filed in behalf of an heir or a legal representative in cases concerned with personal injuries.

In the case of *Lucile T. Bourgeois*, Administratrix, before the French and American Claims Commission of 1880, under the Convention of January 15, 1880, a claim was made for \$20,000.00 on account of an arrest and imprisonment effected by Colonel Reith of the United States Army. The Commission entered an award in favor of the Administratrix in the sum of \$1,025.00. *Boutwell's Report*, p. 60.

Citation was made by counsel for the United States of numerous cases decided by the Commission under the Agreement of August 10, 1922, between the United States and Germany. In these cases substantial awards were made in behalf of the estates of deceased persons who suffered physical injuries at the hands of German authorities. Among these cases were claims growing out of injuries suffered by American citizens who were on board the steamer *Lusitania* when it sank in 1915. See among others the *Knox* case, *Consolidated Edition of Decisions and Opinions, 1925, Mixed Claims Commission, United States and Germany*, p. 495; the *Foss* case, *ibid.*, p. 512.

Responsibility in the cases coming before the American-German Commission was determined not in accordance with rules and principles of international law but under treaty stipulations. However, these cases are interesting in that it is clearly shown, since awards have been made in favor of estates, that claims growing out of personal injuries were regarded by the Commission as having the character of property rights. As has been pointed out, Umpire Duffield stated in the *Metzger* case, *supra*, that a right of action for damages for personal injuries is property. The same principle with regard to the character of international claims has been enunciated by the Supreme Court of the United States, although it may be noted that the cases in which this principle was asserted related to claims growing out of injuries to property. *Comegys v. Vasse*, 1 Peters 193; *Phelps v. McDonald*, 99 U. S. 298.

It is observed by Mr. Ralston, *International Arbitral Law and Procedure*, p. 180, that in the *De Luna* case, *supra*, an administrator was allowed to recover for wrongful imprisonment of his intestate in harmony with the rule often followed in the civil law as to the right of survivorship for personal damages rather than the rule of the common law. In the *Metzger* case, Umpire Duffield awarded damages for personal injuries on the ground that under Venezuelan law such a claim passed to the heirs of a deceased person. The impropriety of giving application to any rule or principle of domestic law in relation to a subject of this kind is readily perceived. An international tribunal is concerned with the question whether there has been a failure on the part of a nation to fulfill the requirements of a rule of international law, or whether authorities have committed acts for which a nation is directly responsible under that law. The law of nations is of course the same for all members of the family of nations, and redress for

acts in derogation of that law is obviously not dependent upon provisions of domestic enactments. Domestic law can prescribe whether or not certain kinds of actions arising out of domestic law may be maintained by aliens or nationals under that law, but it is by its nature incompetent to prescribe what actions may be maintained before an international tribunal. If domestic law should be considered to be controlling on this point we should have the *reductio ad absurdum* that redress for personal injuries conformably to international law might be obtained in a country like Venezuela in which the principles of the civil law with respect to the survival of actions may obtain, and no redress for the same violation of international law could be obtained in another country where the principles of the common law obtained.

An examination of domestic law may often be useful in reaching a conclusion with regard to the existence or non-existence of a rule of international law with respect to a given subject. But analogous reasoning or comparisons of rules of law can also be misleading or entirely out of place when we are concerned with rules or principles relating entirely or primarily to the relations of States towards each other. International law recognizes the right of a nation to intervene to protect its nationals in foreign countries through diplomatic channels and through instrumentalities such as are afforded by international tribunals. The purpose of a proceeding before an international tribunal is to determine rights according to international law; to settle finally in accordance with that law controversies which diplomacy has failed to solve. That is the purpose of arbitration agreements such as that under which this Commission is functioning. It would be a strange and unfortunate decision which would have the effect of precluding an international tribunal from making a final pronouncement upon the merits of any such controversy, because some rule of a particular system of local jurisprudence puts certain limitations on rights of action under domestic law. Arbitration as the substitute for further diplomatic exchanges or force would fail in its purpose. The unfortunate delays incident to the redress of wrongs by international arbitration are notorious. Injured persons often die before any redress is vouchsafed to them. A decision of this kind would seem to put a premium on such delays which would be conducive to the nullification of just claims.

It is unnecessary for the Commission in holding, as it does, that it may properly pass upon the merits of the instant claim presented by the Administratrix who is also the widow of Gilbert F. Dujay, to enter upon the entire, broad field of discussion covered by the briefs and oral arguments of counsel for each Government. This claim, that arose and was presented to Mexico many years ago, may well be regarded as a "property right". Had it been settled when presented, Dujay or his estate would have had the benefit of it. It is competent for this Commission to pass upon the merits of the claim in the light of the terms of submission stated in the Convention of September 8, 1923. It is a claim within the jurisdictional article of the Convention which provides among other things for the adjudication of claims for losses or damages suffered by persons or their properties, and in the language of the Convention, of "claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice, and which claims may have been presented to either Government for its interposition with the other since the signing of the Claims Convention concluded between the two countries July 4, 1868, and which have remained unsettled".

In the case of *Fennie L. Underhill*, in which claim was made by the United States against Venezuela in 1903, "for personal injuries, insults, abuse, and false imprisonment", Umpire Barge dismissed the claim as regards unlawful arrest and imprisonment, but with respect to the detention of the claimant for a month and a half in Venezuela, the Umpire awarded an indemnity of \$3,000.00, saying with regard to this item:

"But as, furthermore, claimant claims award for damages on the charge of detention of her person;

"And whereas, without any arrest and imprisonment, detention takes place when a person is prevented from leaving a certain place, be it a house, town, province, country, or whatever else determined upon; and

"Whereas it is shown in the evidence that claimant wished to leave the country which she could not do without a passport being delivered to her by the Venezuelan authorities; and that from August 14 till September 27 such a passport was refused to her by General Hernandez, then chief of the Government of Ciudad Bolívar, the fact that claimant was detained by the Venezuelan authorities seems proved; and

"Whereas, whatever reason may or might have been proved to exist for refusing a passport to claimant's husband, no reason was proved to exist to withhold this passport from claimant; and

"Whereas the alleged reason that it would not be safe for the Underhills to leave on one of Mr. Mathison's steamers can not be said to be a legal reason, for if it be true that there existed any danger at that time, a warning from the Government would have been praiseworthy and sufficient. But this danger could not give the Government a right to prevent Mrs. Underhill from freely moving out of the country if she wished to risk the danger; whilst on the other hand it might have been said that the steamer being a public means of transfer, it would have been the duty of the Government to protect the passengers from such danger on the steamers when existing.

"Whereas, therefore, it is shown that Mrs. Underhill was unjustly prevented by Venezuelan authorities from leaving the country during about a month and a half, the claim for unlawful detention has to be recognized.

"And whereas for this detention the sum of \$2,000 a month—making \$3,000 for a month and a half—seems a fair award, this sum is hereby granted." (*Venezuelan Arbitrations of 1903. Ralston's Report*, pp. 49, 51.)

An indemnity of \$2,200.00 was paid by the United States to the Government of Norway on account of the detention of three seamen at Jersey City, New Jersey, for a few days in excess of a month in the year 1911. The men were detained as witnesses in connection with legal proceedings growing out of an explosion in the harbor which caused damage to a Norwegian vessel called *Ingrid*. In connection with the payment of this indemnity it was stated that it was made "without reference to the question of liability therefor" (42 Stat. 610).

In the instant case the claim of \$15,000.00 with interest must be rejected, but an award may properly be made in the sum of \$500.00.

Decision

The United Mexican States shall pay to the United States of America on behalf of Fannie P. Dujay \$500.00 (five hundred dollars) without interest.

CLYDE DYCHES (U.S.A.) *v.* UNITED MEXICAN STATES

(April 9, 1929, concurring opinion by American Commissioner, April 9, 1929.
Pages 193-198.)

NATIONALITY, PROOF OF. Affidavits of mother and older sister of claimant testifying as to his birth in the United States *held* sufficient proof of American nationality.

DENIAL OF JUSTICE.—DEFECTIVE ADMINISTRATION OF JUSTICE.—CORRECTION OF ERRORS OF LOWER COURTS BY COURT OF LAST RESORT. When any illegality of claimant's trial for theft and defects in administration of justice suffered by claimant in lower courts were finally corrected by the highest court of the nation, *held*, denial of justice not established.

UNDUE DELAY IN JUDICIAL PROCEEDINGS.—IMPRISONMENT BEYOND REASONABLE PERIOD.—ILLEGAL IMPRISONMENT. Claimant was imprisoned for over two years and seven months, when only crime committed by him was subject to maximum penalty of two months' to one year's imprisonment. *Held*, long and unjustified delay constituted a denial of justice. Claim *allowed*.

Cross-references: Annual Digest, 1929-1930, p. 159; British Yearbook, Vol. 11, 1930, p. 224.

Commissioner Fernández MacGregor, for the Commission:

The United States of America, on behalf of Clyde Dyches, an American citizen, claims from the Government of the United Mexican States the amount of \$25,000.00, United States currency, alleging that the claimant was subjected to undue, harsh and oppressive treatment while he was a prisoner in Mexico; that he was not accorded an impartial trial; that the latter was delayed for no cause whatsoever, and that such facts, together with the atmosphere of prejudice and of personal animosity existing against the claimant, resulted in a denial of justice against him.

The facts upon which the Government of the United States grounds its contentions are, briefly, as follows:

In February 1910 Dyches took to Monterrey, Nuevo León, Mexico, a blooded horse worth \$1,500.00, United States currency. In March of the same year the claimant entered into an agreement with a Mexican named Bruno Lozano, under which the latter agreed to pay for Dyches' board and lodging, as well as for the keeping of the horse, and to allow the said Dyches half of the profits obtained from the races in which the horse would enter. The horse lost all the races in which it ran, and Lozano had difficulty with Dyches, alleging that the latter had agreed to pay half of the losses on the races. Therefore, Dyches considered the agreement terminated and sold the horse to two men named Sepúlveda and Aguilar, stipulating, in addition, that he would retain the horse in order to continue racing it.

Lozano brought suit against Dyches in August, for the amount of \$1,500.00, Mexican currency, and the Judge who tried the case ordered the attachment of the animal, appointing as depositary a brother of Lozano who lived in a ranch called "Rinconada". It appears that Dyches finally won the suit; but before then, and while the horse was still in deposit, he wanted to get it back; the Judge allowed him only to go to see it in the

ranch where it was. In one of the inspections Dyches made of the horse—on May 8, 1911—he met Bruno Lozano and as he told Dyches that he would never again get the horse back, Dyches clandestinely returned during the night, seized the horse and rode him away with the intention of taking it to the United States. Three days later Dyches was arrested to answer the charge of theft of which he had been accused by Lozano.

The criminal procedure was carried out slowly, and finally Dyches was sentenced on May 31st, 1912, to the penalty of imprisonment for six years and nine months and to a fine of 1,000.00 pesos, as guilty of the theft of the animal. The claimant appealed from such a decision, and thus it was reviewed by the Supreme Court of the State of Nuevo León, which in April 28, 1913, affirmed the decision of the lower Judge but increased the penalty of imprisonment to eight years and five months, which should be counted from May 17, 1911. Dyches having appealed for protection (*amparo*) against this decision, the Supreme Court of Justice of Mexico, in the month of November, 1913, protected the claimant, stating that his act in having taken the horse from Lozano's stable did not constitute the crime of theft. In view of this decision, the Supreme Court of the State of Nuevo León amended its decision, finding Dyches guilty only of having entered the premises without the consent of the owner, and adding that the incarceration already suffered by Dyches was sufficient penalty for the offense he had committed.

It is alleged that, in being arrested by five Mexican rural guards, Dyches was beaten and abused, and that the rural guards enticed him to escape in order to kill him under that pretext; that he was firmly tied with his hands behind him while being taken to Monterrey by railroad, this causing him pain and discomfort; that on his arrival at the jail in Monterrey upon request of Lozano, the jailkeeper confined him in a dark cell where he was for 72 hours, without a bed, *incomunicado*, and suffering from a toothache which was driving him mad, without being given medical attention. It is alleged further that the Judge of First Instance at Monterrey and the police authorities were influenced by the Lozano brothers whose political connections were powerful.

As regards the judicial procedure, several rights granted by the Mexican Constitution were violated, it is alleged, to the prejudice of the accused; the formal commitment was decreed without the *corpus delicti* having been established, as required by the criminal laws of Mexico; several persons, incompetent and untrustworthy, were used as interpreters for Dyches, among them, two individuals who had been or were accused of some crime before the same Judge; and above all, the fact is emphasized that the period of investigation took longer than the Mexican law permits adding further that the proceedings of the criminal action resulted in the claimant, who, at the most, was liable of a slight offense, being imprisoned for more than two and one-half years, which fact constitutes a denial of justice.

The Mexican Agency, in defense of this claim, alleged: that the nationality of the claimant was not proved; that the Mexican law considers equal to theft the unlawful taking of a movable thing, even though executed by the owner himself, if the thing is in the possession of another as a deposit decreed by an authority, as happened with the horse in question, which had been taken from Dyches in order to turn it over to Lozano by virtue of the attachment decreed by the Judge; that although Dyches alleged the attachment of the horse was illegally decreed—since the horse no longer belonged to him but to Sepúlveda and Aguilar,—and furthermore, that

the attachment had already been lifted, the horse continued deposited under the law, in view of the fact that the decree of the Judge lifting the attachment was pending on appeal entered by Lozano; that the courts of the State of Nuevo León had reason to consider Dyches guilty; and finally that there is no proof of bad treatment inflicted on the claimant.

As regards the question of nationality, in the opinion of the Commission, there is sufficient evidence to prove that Dyches was a citizen of the United States. In the record there is an affidavit by the mother of Dyches stating that he was born in the city of Granger, Williamson County, Texas, on June 28, 1888; another affidavit by an older sister of the said claimant stating the same facts, and the statement of Dyches himself in this respect. Since the perfectly definite facts of date and place of the claimant's birth are established in these affidavits by persons who are in the best position to know them through their ties of relationship, and as there is no circumstance contradicting the same, the Commission adheres to its previous opinions with respect to the probative weight of affidavits and to the matter of nationality.

Moreover, in this case of an alleged illegal trial and defective administration of justice, the Commission finds itself confronted with a decision of the Supreme Court of Justice of Mexico,—the highest court in the nation, and in fact one of the three branches into which its Government is divided,—in which decision final justice is granted correcting the error that the local lower Courts may have made in finding the claimant guilty. Bearing this in mind, it might be said that there is no denial of justice in this case, but on the contrary, a meting out and fulfillment of justice. If the term within which all proceedings against Dyches were effected had been a reasonable one, it would be necessary to apply hereto the principle establishing the non-responsibility of a State for the trial and imprisonment of an alien, even though he is innocent, provided there has been probable cause for following such procedure. In this case, considering the facts stated, and since Article 349 of the Criminal Code of the State of Nuevo León considers equal to theft the unlawful taking of a thing, even though executed by the owner himself, if the said thing is in the possession of another as a deposit decreed by an authority, it appears that there was sufficient cause for proceeding against Dyches. The Supreme Court of Justice of the Mexican nation finally applied the law, conscientiously examining the charges made against Dyches and found him innocent, for which reason he would have no right to ask for indemnification for the deplorable error of the local courts which injured him. All the defects of procedure of which the claimant complains were, so to say, erased by the last decision which rendered justice to him. Thus, there is no need to consider the propriety or impropriety of the interpreters employed not meeting the requirements prescribed by the law, nor of taking into account that this or that legal step was not taken.

But the fact remains that the procedure was delayed longer than what it should reasonably have been, in view of the simple nature of the case. Counsel for the American Agency has pertinently observed that Dyches remained deprived of his liberty for a period of two years and seven months, having committed no other offense than that of entering into the house of a person without his consent, an offense which the Mexican law punishes with a maximum penalty of from two months, to one year's imprisonment; that the Supreme Court of the State of Nuevo León, in complying with the final decree of the Supreme Court of Justice of Mexico, stated that the

term of imprisonment which the claimant had suffered was sufficient penalty for the only offense of which Dyches was liable, therefore setting him free. The American Agency observed also that under the Code of Criminal Procedure of the State of Nuevo León the preliminary investigation in a criminal cause should be concluded, *at the latest*, within the term of three months, when dealing, as is the case here, with offenses which should be tried by minor judges, (Article 103 of the Code of Criminal Procedure), and that the preliminary investigation in this case undoubtedly exceeded this term.

The evidence submitted by both parties before the Commission is not sufficient for it to obtain an exact idea of the term in which such preliminary investigation was effected, but all the evidence, reasonably construed, shows that this term was exceeded; it readily appears that the decision in first instance was dictated on the 31st of May, 1912, that is, one year after Dyches was apprehended. In other cases the Commission has expressed its opinion that there is no rule of international law fixing the period in which an alien accused of an offense may be detained in order to investigate the charges made against him, adding that it was deemed convenient to consider the local laws in order to decide this question. Applying that test to the present case, and considering that the only offense attributable to Dyches, according to his own confession, merited a maximum penalty of one year, in case it had been of the most serious character, it seems reasonable to believe that within that period, or a little longer, the claimant should have been finally sentenced, thus resulting that he was unduly imprisoned for nearly 18 months. This long and unjustified delay constitutes a denial of justice, and taking into consideration the precedents established for these cases by other arbitral Commissions, as well as by this Commission, it appears that Dyches may be granted an award of \$8,000.00.

Nielsen, Commissioner:

Unfortunately the records before the Commission are so meagre that it is impossible to obtain satisfactory information regarding the strange proceedings in this case which resulted in the imprisonment for a period in excess of two and a half years for what at most was a very trifling offense, namely, entering premises without the consent of the owner.

No doubt it is a general rule that a denial of justice can not be predicated upon the decision of a court of last resort with which no grave fault can be found. It seems to me, however, that there may be an exception, where during the course of legal proceedings a person may be the victim of action which in no sense can ultimately be redressed by a final decision, and that an illustration of such an exception may be found in proceedings which are delayed beyond all reason and beyond periods prescribed by provisions of constitutional law. In my opinion that principle would be applicable in a case like the one before the Commission in which clearly unjustifiable delays took place in the proceedings before State courts which finally terminated with a sentence of eight years and five months for robbery of which Dyches was not guilty, following which sentence Dyches sought redress from the Supreme Court of the Nation by *amparo* proceedings.

Decision

The United Mexican States shall pay to the United States of America, on behalf of Clyde Dyches, the amount of \$8,000.00, (eight thousand dollars), United States currency, without interest.

W. C. GREENSTREET, RECEIVER OF THE BURROWES RAPID
TRANSIT COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(April 10, 1929, concurring opinion by American Commissioner, April 10, 1929.
Pages 199-208.)

CORPORATE CLAIMS.—NATIONALITY, PROOF OF.—EFFECT OF CONFLICTING INSOLVENCY PROCEEDINGS UPON RIGHT TO CLAIM. Claim was filed by a receiver of a Delaware corporation appointed under the laws of Texas while bankruptcy proceedings in Mexico against such corporation were pending. *Held*, (i) while it is doubtful whether the Texan receiver is the proper party claimant, claim may be considered by tribunal since it was presented and espoused by the United States Government, (ii) nationality of receiver or of creditors of corporation need not be established, and (iii) pendency of Mexican bankruptcy proceedings does not *per se* preclude tribunal from exercising jurisdiction.

CONTRACT CLAIMS. Claim for hauling services under contract with National Railways of Mexico *disallowed* on ground such services were to be free of charge under the terms of the contract. Claim for undue delays by National Railways of Mexico in performing repair services under contract *disallowed* on ground it was not shown such delays were unreasonable under the unsettled conditions prevailing.

Cross-references: Annual Digest, 1929-1930, pp. 187, 452.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$92,179.68, United States currency, is made against the United Mexican States by the United States of America on behalf of W. C. Greenstreet, Receiver of the Burrowes Rapid Transit Company, an American corporation. The claim is made up of two items, namely \$52,800.00 for services alleged to have been rendered by the Burrowes Rapid Transit Company to the National Railways of Mexico in 1921, when the said Railways were operated by the Mexican Government, and \$39,379.68 for loss alleged to have been suffered by the Burrowes Rapid Transit Company from wilful and negligent failure of the National Railways of Mexico to fulfill certain contractual obligations.

The Burrowes Rapid Transit Company was organized and incorporated under the laws of Delaware, United States of America, in January, 1921, for the prime purpose of carrying on the business of "the rapid receiving, handling, shipping, forwarding and transporting of goods, wares, merchandise and all classes of freight and express over the railroads of the Republic of Mexico and elsewhere". It established various offices in Mexico as well as in the United States. In the United States its main office was in Laredo, Texas. On September 1, 1921, the company was decreed in a state of receivership by the District Court of the 49th Judicial District of Texas, and W. C. Greenstreet was appointed Receiver. Sixteen days later the company was declared bankrupt by the Civil Court of First Instance at Monterrey, Mexico.

The respondent Government contends that the claim should be dismissed, as the American nationality neither of W. C. Greenstreet nor of the creditors of the insolvent company has been established. The Commission is, however,

of the opinion that the question as to whether the claim presented in this case comes within its jurisdiction does not depend on the nationality of Greenstreet or of the creditors, Greenstreet being only a representative of the insolvent corporation, and the nationality of the creditors being just as immaterial as is that of the stockholders in case of a solvent company.

The respondent Government further contends that Greenstreet has no standing before this Commission, as, according to American law, his authority as a Receiver appointed by a Texas court is limited to the State of Texas. However, even if it be considered as doubtful whether, according to American law, Greenstreet has the authority to dispose of the present claim on behalf of the Burrowes Rapid Transit Company, which, from a legal point of view must be considered as still existing as a going concern in the State of Delaware, where it is incorporated, the Commission is of the opinion that from the point of view of international law the claim, as having been espoused and presented by the Government of the United States, is duly presented.

It is further argued by the respondent Government that the claim should be dismissed because of the bankruptcy proceedings that have been instituted against the Burrowes Rapid Transit Company at Monterrey, Mexico, and which are still pending. This argument would have been well founded, if the Mexican trustee in bankruptcy had tried to enforce the claim by bringing it before the Mexican courts. If that had been done, and even if the claim had been disallowed by the Mexican courts, no claim could have been made before this Commission, unless predicated upon a denial of justice. But no steps with a view to bringing the claim before a Mexican court have been taken by the Mexican trustee in bankruptcy. In view hereof, and in view of Article V of the Convention of September 8, 1923, between the United States and Mexico, the Commission is of the opinion that the present claim cannot properly be dismissed on the ground here mentioned.

With regard to the merits of the claim the following appears from the record:

Owing to a scarcity of rolling stock as well as of motive power a great congestion of unmoved freight had developed in Mexico during the year 1921 and the years immediately preceding. This led to a practice, on the part of the National Railways of Mexico, of concluding what were termed private freight contracts, according to which private companies were permitted to operate transportation business on the lines of the National Railways of Mexico by means of engines and other rolling stock to be imported into Mexico by the companies. Among the companies undertaking this kind of business was the Burrowes Rapid Transit Company.

The Burrowes Rapid Transit Company put its first engine into service in Mexico on February 19, 1921. In the course of the following months a number of other engines were put into service by the company. At first there was no written contract, but on April 13, 1921, a contract in writing was made. This contract was signed by F. Perez, the General Director of the National Railways of Mexico, on behalf of the National Railways of Mexico and connecting lines under Government control, and by a duly authorized attorney on behalf of E. S. Burrowes. The latter was President of the Burrowes Rapid Transit Company, but there was nothing in the contract to indicate that it was made by or on behalf of that company. That the signature of E. S. Burrowes was attached to the contract on behalf of the Burrowes Rapid Transit Company, was not indicated. Referring to this

fact, the respondent Government contends that no contractual relations have ever existed between the National Railways of Mexico and the Burrowes Rapid Transit Company. There is, however, ample evidence to show that the transportation business really was carried on by the Burrowes Rapid Transit Company, and that this fact was perfectly well known to representatives of the National Railways of Mexico. It must therefore be assumed that the contract entered into was intended to be a contract between the National Railways of Mexico and the Burrowes Rapid Transit Company.

According to the contract the National Railways of Mexico undertook (1) to furnish, free of cost, crews for the trains of the Burrowes Rapid Transit Company, certain overtime only to be paid for by the company, (2) to provide, free of charge, fuel, water, grease, lubricants and light fixtures for the service of the trains or to reimburse the charges incurred on account of the purchase of said articles, (3) to provide, free of charge, the services of the round houses to the locomotives, and (4) to give to engines and cars minor repairs, the company to pay only for overtime in certain cases and for replacements of parts to be made in the shops of the Railways. The Burrowes Rapid Transit Company undertook to pay to the National Railways of Mexico freight and other expenses for all shipments in accordance with the prevailing Mexican tariffs. When the company was unable to make up a train with 85% of the total capacity tonnage of the engine on a 1½% grade, a five hours, notice in writing should be given to the Railways prior to the departure of the train and the Railways should then have the right to complete the train with loaded or empty cars.

In the prosecution of its business the Burrowes Rapid Transit Company required private shippers to pay an extra charge in addition to the amount to be paid by the company to the National Railways of Mexico. This extra charge was at the rate of \$200.00 or more per car on shipments other than oil between Tampico and Monterrey or points north of Monterrey, with a minimum of \$2,000.00 per train, and double those amounts on oil shipments.

The services alleged to have been rendered to the National Railways of Mexico by the Burrowes Rapid Transit Company and the amounts claimed in consideration of these services are as follows:

Hauling from Tampico to Monterrey or to the boundary line of the United States during the period from May to August, 1921, 19 trains and parts of trains containing a total of 211 empty cars at \$200 each	\$42,200
Hauling on March 26 and May 10, 1921, from Tampico to Monterrey five cars loaded with miscellaneous freight at \$200 each	1,000
Hauling on various dates on or after March 1, 1921, from Tampico to Monterrey 14 cars of oil at \$400 each	5,600
Hauling on June 13 and June 14, 1921, from Tampico to Monterrey two trains of oil at \$2,000 each	4,000
Total	52,800

Except for a few cars, there is evidence to show, and it is admitted by the respondent Government, that the alleged services have been actually rendered. The question is whether they should be paid for. The respondent Government points to the provision in the contract according to which the Railways should have the right to complete, with empty and loaded cars, every train containing less than 85% of the total capacity tonnage of the

engine on a $1\frac{1}{2}\%$ grade, and, referring to a memorandum by the Chief Dispatcher of trains of the Railways at Monterrey, alleges that all the services rendered by the Burrowes Rapid Transit Company to the Railways have been pursuant to this provision. Counsel for the claimant argued that it was not the duty of the Burrowes Rapid Transit Company under the said provision of the contract to haul the cars of the Railways free of charge, but as the contract gives the Railways the right to have cars hauled without mentioning any payment to be made therefor, the Commission is of the opinion that the contract can only be construed to mean that the right to have cars hauled, together with other rights under the contract, was stipulated by the Railways in consideration of the rights accorded the Burrowes Rapid Transit Company. Counsel for the claimant further argues that the hauling of the cars of the Railways took place although freight of private shippers was available, and only on the order and demand of the officials of the Railways, and with the expectation that the services rendered would be paid for. Affidavits to this effect of the general traffic manager of the Burrowes Rapid Transit Company, of the manager and one of the employees of the Merchants Transfer & Storage Company, S. A. of Tampico, Mexico, which company had close business relations with the Burrowes Rapid Transit Company, and of one other person, have been submitted. On the other hand, the Chief Dispatcher of the Railways declares that the Burrowes Rapid Transit Company generally operated carrying freight to Tampico, but that there was not much return freight in that port. The Commission is of the opinion that it is not sufficiently proven that the Burrowes Rapid Transit Company has been ordered to haul cars in cases where no obligation so to do existed under the contract. In view of the period of time during which the hauling was done, the total number of cars hauled—211 empty and 27 loaded cars—would not seem exceedingly great. The large amount claimed is arrived at by charging for the hauling of an empty car the same extra charge as charged by the Burrowes Rapid Transit Company on shipments. Some correspondence had between the Burrowes Rapid Transit Company and the Merchants Transfer & Storage Company shows that in a number of cases the former company had agreed to haul cars for the Railways, and there is nothing in the correspondence to indicate that the company had the right to assume that the hauling would be paid for, it appearing on the contrary that at a certain time the company made an offer to the Railways to haul empty cars from Tampico to the border of the United States at a rate of \$50 per car, and that this offer was not accepted by the Railways. Finally, great weight must be attached to the fact, invoked by the respondent Government, that at no time during its business operations in Mexico did the Burrowes Rapid Transit Company present any claims for services rendered or any bill covering such services to the National Railways of Mexico, so that the Railways had no reason to secure evidence to show in detail that the services rendered were within the obligations of the company under the contract.

With regard to the second item of the present claim it is alleged that the locomotives of the Burrowes Rapid Transit Company lost 484 days, counted as for one locomotive, or more than 25% of all the time they were in Mexico, through various delays on the part of the Railways in fulfilling their duties of providing Round House service, including minor repairs, as well as furnishing crews and supplies, and the fact of these delays is, save for a few of them, admitted by the respondent Government. It is

further alleged that 70 locomotive-days would be a reasonable allowance of time for the services in question, and that, consequently, Mexico should be held responsible for a loss of 414 locomotive-days at a rate of \$95.12 a day, which, according to the accounts of the Burrowes Rapid Transit Company, was the average earning power of a locomotive per day. The Commission is of the opinion that there is not sufficient evidence to establish that the delays were due to such failure on the part of the Railways in fulfilling their duties as to make Mexico responsible. The Burrowes Rapid Transit Company could not reasonably expect, when entering into the contract, that repairs could be completed within such time as would be possible in countries where conditions are more settled than they were in Mexico at the time. From the above mentioned correspondence between the Burrowes Rapid Transit Company and the Merchants Transfer & Storage Company it also appears that the locomotives of the former company became "dead" more often than those of other companies, a fact which the general traffic manager of the company declares to be a mystery to him, and that the same general traffic manager, in a letter, dated May 17, 1921, expresses as his opinion that in case of presenting claims for delays "we will have to prove that the railroad company are holding our trains and delaying them, more than they are their own trains, which would be very hard to do, as I and everybody knows that their own trains suffer the same delays as those to which we are subjected, they of course being the losers in all cases." Finally, in this connection again great weight must be attached to the fact, that during their business operations in Mexico the Burrowes Rapid Transit Company never presented any claim for delays to the Railways, nor made any complaint when the delays occurred, so that the Railways have had no reason to secure evidence to show in detail what were the circumstances that led to each of the various delays that actually took place.

Nielsen, Commissioner:

I concur in the dismissal of the case, but not entirely in all the conclusions stated in the Presiding Commissioner's opinion.

I think that the claim should properly have been filed in the name of the Burrowes Rapid Transit Company, an American corporation. I do not believe that a receivership in Texas made it improper to file a claim in behalf of the corporation, which was created under the laws of the State of Delaware. There is involved in this question something more than a mere unimportant technicality. The status of claimants designated as the persons entitled to receive any pecuniary award that may be rendered is of course in every case an important matter. Greenstreet's appointment as Receiver by a local Texas court evidently conferred on him authority merely to take action to conserve assets of the company in Texas. I do not think it can be properly said that in that capacity he can be considered as standing in the shoes of the company, or as being in charge, under direction of a State court, of all the affairs of the Delaware corporation. A general receiver would have proper standing as a claimant. However, since evidently the company's affairs were substantially all transacted in Texas after operations in Mexico were abandoned, and in view of the control which the Government of the United States would have over any award rendered in the case, I do not believe that the Commission would be justified in dismissing the claim on the ground that it was not filed in a proper name.

Some issues raised in behalf of Mexico are not touched upon in the Presiding Commissioner's opinion, and it is my view that the interpretation of the contract upon which reliance is placed in this case, is the only important and difficult issue raised.

That the proceedings before the court at Monterrey which gave rise to the *Venable* claim, Docket No. 603, can in no way debar the United States from presenting the instant claim is, I think, very clear in the light of the nature of those proceedings as revealed by the opinions written in the *Venable* case. The contention that the real party in interest in the instant case is *Venable* who, through a disguise, is claiming once more what has already been granted by the Commission, is without foundation. The *Venable* case and the instant case are based on different and entirely unrelated facts. The *Venable* claim grew out of certain judicial proceedings in Monterrey; the instant case is based on an allegation of breach of contract.

I do not agree with the positive conclusion "that the contract can only be construed to mean that the right to have cars hauled, together with other rights under the contract, was stipulated by the Railways in consideration of the rights accorded the Burrowes Rapid Transit Company." In fact it seems to me to be a very plausible view that under the provisions of Article IX of the contract between the company and the Railways, the latter did not enjoy the very extensive privilege of having loaded or unloaded cars hauled for nothing. The company agreed to make up a "required tonnage" of 85% of the total capacity tonnage which the engines could drag. It was privileged under the contract to make certain charges on this required tonnage of 85% capacity. Sub-paragraph (c) of Article IX further provides that when the company "is unable to make up the required tonnage" notice should be given, and if a train did not make up the 85% tonnage the Railways might "complete the 85% tonnage". Nothing in the contract states that any portion of the required 85% tonnage shall be carried free.

However, I think that the provisions of the contract and the action taken by the contracting parties with reference thereto leave too much doubt to justify a pecuniary award in the light of the general principles which have governed the Commission's action in making such awards. The Commission is not concerned with a suit on a contract. It seems to me that in dealing with a case of this kind the Commission must be guided by the same general principles by which it is governed in other cases in determining whether or not authorities of a government can properly be charged with wrongful conduct.

It appears to me to be pertinent to consider the action of the parties to the contract which is touched upon in the opinion written by the Presiding Commissioner. It is not shown that the company treated tonnage carried in behalf of the Railways in the manner in which it dealt with other tonnage offered by private shippers. The company does not appear to have collected or attempted to collect accounts from the Railways as was done with respect to other tonnage hauled. There is no record of demands for freight charges or of presentation of accounts. To be sure, it is conceivable that difficult and delicate questions entered into the relations of the parties to the contract. But when the company has accepted tonnage from the Railways without asking compensation, it is difficult for the Commission to say that the hauling of such tonnage resulted in a breach of the contract, or that a breach was forced by the Railways.

An alternative claim which seems to have been presented in behalf of the claimant was based on a *quantum meruit* for services rendered, but such a claim was predicated only on an assumption that the Commission might find that the contract invoked in this case was a personal contract of Burrowes made with the Railways.

An item of the claim grows out of delays in making repairs and in furnishing supplies. Delays doubtless occurred, but it seems to be impossible to determine or to prescribe standards of efficiency by which negligence may be measured in the numerous instances asserted, and damages may be awarded for such negligence according to such standards. This item, therefore, in my opinion, presents too much uncertainty to be the basis of a pecuniary award.

The claim is well supported by convincing evidence which clarifies the facts and it was very forcefully presented in oral argument, but the language of the contract between the company and the Railways reveals uncertainties. These uncertainties, I think it may be said, are accentuated by the business relations of the parties which the Commission can not now reconstruct.

Decision

The claim of the United States of America on behalf of W. C. Greenstreet, Receiver of the Burrowes Rapid Transit Company, is disallowed.

F. M. SMITH (U.S.A.) *v.* UNITED MEXICAN STATES

(April 10, 1929. Pages 208-210.)

FAILURE TO PROTECT. Although disorders had previously taken place at mine where two American subjects were murdered, since no request for protection was made and authorities took prompt measures of protection after the murders, *held*, responsibility of respondent Government not established.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—DUTY TO PROTECT IN REMOTE TERRITORY. Delays in efforts to apprehend murderer of American subject, murder having taken place in a sparsely settled territory *held* not sufficient to establish a denial of justice.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

At about five o'clock in the afternoon of September 24, 1921, George D. Kislingbury, who was employed as master mechanic at the Dolores mine, Chihuahua, Mexico, and Harry G. Smith, who was employed as superintendent of the milling plant at the mine, were working on some filters at the mine, together with two assistants. They were approached by a laborer, Eulalio Quezada, who asked Kislingbury for an increase in wages. Kislingbury refused his request. Quezada then drew his pistol and shot first Kislingbury, and then Smith. Both of them died instantly.

Claim in the sum of \$25,000, United States currency, is now made against the United Mexican States by the United States of America on behalf of F. M. Smith, an American citizen, the father of the deceased Harry G. Smith, for failure of the Mexican authorities (1) to afford protection to the people working at the Dolores mine, and (2) to apprehend and punish Quezada.

With regard to the question of lack of protection it is alleged by Counsel for the United States that the double murder was the climax of a series of disorders at the Dolores mine due in part to labor agitators, one of whom was an alderman of the municipality, and that in the course of these disorders an American employee at the mine on two occasions had been assaulted and beaten by Mexicans. There is, however, no evidence to show that any request for protection had been made to the Mexican authorities prior to the killing of Kislingbury and Smith. And it appears from the record that after the murders a special detachment of *rurales* was formed for the purpose of affording protection at Dolores, that certain agitators including the alderman were expelled, and that the General Manager of the mining corporation expressed himself as being fairly well satisfied with the measures thus taken. In view hereof, the Commission is of the opinion that no responsibility for lack of affording proper protection can be placed upon Mexico in the present case.

As to what was done in order to apprehend Quezada the evidence submitted is vague. The murder was immediately reported to the Municipal President at Dolores, and within half an hour he was on the scene. He took the testimony of four witnesses, each of whom testified that Quezada was the murderer. The mining company itself sent out armed men to capture Quezada. But it seems that several days elapsed—about six or eight days, it is alleged—before a detachment of *rurales* was formed and undertook the pursuit of the murderer. Once formed, it searched the district surrounding the place where the murder had been committed, and having done so, it returned, reporting that the criminal had fled to Sonora. The Governor of Chihuahua then sent descriptions of the murderer to the Sonora authorities, and it appears that later search was made at various points in Sonora. In a dispatch of August 31, 1922, the American Consul at Chihuahua states that while at the time of the murder he was informed that the local authorities at Dolores did not take the proper steps to apprehend the criminal, it is his belief that since then the officials have used all of the limited means at their command to locate Quezada. In view hereof, and taking into consideration the sparsely settled character of the region where the murder was committed, the Commission is of the opinion that the evidence submitted is insufficient to establish an international delinquency on the part of Mexico in the present case. That a record of some proceedings had at the Court of First Instance at Chihuahua submitted by Counsel for Mexico shows long delays in taking the testimony of witnesses to the murder and in issuing a court warrant for the arrest of Quezada as well as in other particulars, to a great extent in contravention of Mexican law, is in the opinion of the Commission not conclusive with regard to the international responsibility of Mexico, as it was perfectly well known who the murderer was, so that the question of the responsibility of Mexico in the present case must depend upon what was actually done in order to apprehend Quezada.

Nielsen, Commissioner:

I agree with the conclusion stated in the Presiding Commissioner's opinion with respect to the non-liability of Mexico, but do not concur entirely in

the reasoning on which the conclusion is based. In my opinion the fact that a request for protection is not revealed in the record of a case involving a complaint of lack of protection can have no important bearing on the merits of such a complaint under international law. The fact that a request for protection has not been made does not relieve the authorities of a government from protecting inhabitants. Protection is a function of a State, and the discharge of that function should not be contingent on requests of the members of a community. On the other hand, in determining whether adequate protection has been afforded in a given case, evidence of a request for protection may be very pertinent in showing on the one hand that there was necessity for protection and on the other hand that warning of possible injury was given to the authorities. Of course such warning may also come in other ways as through information with respect to illegal acts.

Decision

The claim of the United States of America on behalf of F. M. Smith is disallowed.

HAZEL M. CORCORAN (U.S.A.) *v.* UNITED MEXICAN STATES

(April 13, 1929, concurring opinion by American Commissioner, April 13, 1929. Pages 211-213.)

JURISDICTION. CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.

Fact that murderer of American subject escaped from jail at a time when revolutionary forces were approaching did not render claim based on failure to apprehend or punish him one within jurisdiction of Special Claims Commission, United States and Mexico.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—ESCAPE OF GUILTY PARTY FROM JAIL. Murderer of American subject escaped from jail on May 7, 1920, an order to arrest him was not made until on or about May 20, 1920, information as to his whereabouts was not acted on for a month, and he was never reapprehended. Claim *allowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$50,000.00, United States currency, is made against the United Mexican States by the United States of America on behalf of Hazel M. Corcoran, an American citizen, for alleged failure of the Mexican authorities duly to prosecute one Alfredo Ibarra, who on February 28, 1920, shot and killed the husband of the claimant, Raymond A. Corcoran.

The murder took place at the Santa Gertrudis Mine in the State of Hidalgo, Mexico. The deceased was the superintendent of the Santa Gertrudis Mining Company, and the murderer was an employee of that company. Immediately after the murder Ibarra was seized by the guards of the company and delivered to the appropriate Mexican authorities. He was committed to jail at Pachuca, Hidalgo, Mexico, and criminal proceedings were instituted against him. In the morning of May 7, 1920, however, all

the prisoners of the jail at Pachuca, some 150 men, including Ibarra, escaped. It is alleged that the Obregón revolutionary forces were approaching the town at that time, and that they entered the town on the same day. The warden of the jail has testified that the guard of the prison withdrew in the morning of the said day, that he then organised his employees into a guard and requested aid of the mining companies, but that he could not prevent the prisoners, who had broken some of the padlocks, from escaping. The personnel of Court at Pachuca also testified that the padlocks were broken by the prisoners. In the course of the following months some of the prisoners were reapprehended, but Ibarra was never reapprehended.

The respondent Government argues that the present case is not within the jurisdiction of this Commission, the release of Ibarra being due to the activity of the Obregón revolutionary forces. As it is not even alleged, however, that the release of Ibarra was due to a direct act of the Obregón forces, and as no connection between the failure to reapprehend Ibarra and revolutionary movements in Mexico has been shown, the Commission is of the opinion that the case is within its jurisdiction.

The circumstances surrounding the release of Ibarra would hardly justify the Commission in giving an award in the present case. But in view of the failure to reapprehend Ibarra the Commission is of the opinion that an award should be given. It appears that an order to arrest Ibarra was not issued until May 20, 1920, or one of the immediately preceding days. It further appears that on September 8, the American Chargé d'Affaires in Mexico City informed the Mexican authorities that the murderer was in Pachuca, but this communication was not brought to the knowledge of the local Mexican authorities until a month afterwards, and there is no evidence to show that steps, with a view to reapprehend Ibarra, were actually taken, although it would seem reasonable to assume that if serious efforts had been made, some report regarding the result thereof would have been given to the American Embassy, which made inquiries several times, and was promised information about the result of the proceedings.

The Commission is of the opinion that the amount to be awarded can be properly fixed at \$6,000.00, United States currency.

Nielsen, Commissioner :

I concur in the award of \$6,000.00. I should not want to be understood to take the view that the release of Ibarra is an immaterial point in the case. In my opinion that release and the absence of action to reapprehend and punish the murderer clearly revealed a situation with respect to the administration of justice that is below the standards prescribed by international law.

From records before the Commission it appears that some eighteen prisoners were reapprehended and tried on a charge of escape. The general tenor of the evidence given by these persons is that they walked out of jail freely, the doors being opened and there being no impediment to their departure. It appears that on motion of the *Ministerio Publico* persons who thus left the jail were acquitted by a judge of the charge of escape on the ground that they simply without restriction left jail.

For example, one prisoner, serving a sentence for the crime of homicide, testified that the vice president of the prison caused all the prisoners to enter into formation in the court yard and stated that orders had been received to open the doors of the jail for the purpose of releasing every one. He further testified that all the prisoners, leaving in an orderly manner,

passed through the warden's office where they found the warden who said nothing.

Decision

The United Mexican States shall pay to the United States of America on behalf of Hazel M. Corcoran \$6,000 (six thousand dollars) United States currency, without interest.

ADOLPH DEUTZ and CHARLES DEUTZ (A CO-PARTNERSHIP)
(U.S.A.) *v.* UNITED MEXICAN STATES

(April 17, 1929. Pages 213-216.)

NATIONALITY, PROOF OF. Evidence of birth, residence, voting and jury service in the United States *held* sufficient proof of American nationality.

CONTRACT CLAIMS.—NECESSITY OF TENDER OF DELIVERY. Refusal of delivery of part of order of goods by Mexican Government *held* sufficient basis for claim for refusal to accept entire order. When, however, no tender of delivery whatever of any part of an order of goods was shown, claim *disallowed*.

MEASURE OF DAMAGES. LOSS OF PROFITS. Claimants contracted to deliver certain merchandise to the Mexican Government and, although partial delivery was tendered, the latter refused to accept the same. Claimants thereafter sold such goods for less than cost and ceased further deliveries under the contract. *Held*, as to the delivered goods, claimants are entitled to the difference between the contract price and cost price of the goods plus the losses sustained on resale, and, as to the undelivered goods, their loss of profits measured by contract price less cost price less overhead.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$103,540.32, United States currency, with interest thereon, is made against the United Mexican States on behalf of Adolph Deutz and Charles Deutz, a copartnership, doing business under the firm name of A. Deutz and Brother, for alleged failure of the Mexican Government to fulfill obligations arising out of four orders for textile merchandise placed with the claimants in 1920 by departments of the Mexican Government.

Both of the claimants stated in affidavits that they were born in the United States, and there is further evidence to show that during a long period of time they have been residents of the United States and that they have exercised the privilege of voting at various elections and of serving on several juries. The Commission is of the opinion that this sufficiently establishes the American citizenship of the claimants.

The orders placed were as follows:

Order No. 202

50,000 meters gray khaki at \$1.09 per meter	\$54,500.00
25,000 meters Oceanic duck at \$2.398 per meter	59,950.00
15,000 meters white duck at \$1.09 per meter	16,350.00

Order No. 1951.2506

30,000 yards navy blue twill at \$1.20 per yard	\$36,000.00
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Order No. 261

50,000 meters gray khaki at \$1.09 per meter	\$54,500.00
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Order No. 263

25,000 meters dyed duck at \$2.616 per meter	\$65,400.00
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The merchandise, being of a special character, could not be purchased in the open market, but had to be manufactured. Partial delivery was made in the latter part of April and the first part of May 1920 of the orders for gray khaki, Oceanic duck and navy blue twill, by placing the goods, in accordance with the terms of the orders, at the disposal of the Mexican Government at Laredo, Texas, the proper authorities being informed of such delivery. They did not, however, receive the merchandise, and after several months they formally refused to accept it. The claimants themselves then disposed of the goods so delivered. None of the merchandise ordered has been paid for by the respondent Government and no reason justifying the cancellation of the orders has been given.

As the merchandise delivered, referred to in the preceding paragraph, was not accepted by the Mexican Government, the Commission is of the opinion that the claimants were justified in assuming that no merchandise of this character would be accepted and that, therefore, the claimants are entitled to recover the losses sustained by them in respect to both the delivered and undelivered goods of this character. In the case of that portion of the above-mentioned merchandise which was actually delivered, the loss may be computed by taking the difference between the contract price, (\$81,003.60), and the total cost of such goods to the claimants, (\$43,976.99), which is \$37,026.61, and adding thereto the loss sustained by the claimants in reselling the goods at a price below the cost price, which amounts to \$7,875.96, making a total loss of \$44,902.57 on this portion of the transaction.

As regards the undelivered portion of orders for merchandise of the above character the claimants' loss may be regarded as the loss of profits suffered by them as a result of the failure of Mexico to complete its contract. This loss of profits may be regarded as the difference between the contract price and the total amount which the claimants would have expended had they made delivery of the merchandise. In computing the loss of profits the Commission must therefore take into account an item of overhead expense of 18.49 per cent of the contract price, an item of expense which the claimants would have incurred had they made delivery of the merchandise. The total contract price of the undelivered portions of the orders for goods of the above-mentioned classes is \$123,970.38, from which must be deducted the claimants' cost price of \$64,283.65, and also an overhead expense of 18.49 per cent of the contract price, or \$22,922.13, leaving a balance of \$36,764.60, which represents the loss of profits on the undelivered portion of these goods. It should be stated that in making claim before this

Commission, the claimants, in computing their losses, deducted the overhead expenses from the amount of their claim.

With reference to the remaining goods covered by the orders, that is, the white duck and dyed duck, it appears that the claimants made no delivery of any merchandise of this character. Neither did they inquire of the Mexican Government whether it would accept delivery of merchandise of this character. The Commission is of the opinion that consequently the claimants are not entitled to be reimbursed on account of any loss sustained by them on this class of merchandise.

Decision

The United Mexican States shall pay to the United States of America on behalf of Adolph Deutz and Charles Deutz the sum of \$81,667.17 (eighty-one thousand six hundred sixty-seven dollars and seventeen cents) United States currency, with interest at the rate of six per centum per annum on the specifically stated loss of \$7,875.96 (seven thousand eight hundred seventy-five dollars and ninety-six cents) from May 1, 1920, to the date on which the last award is rendered by the Commission.

LOTTIE SEVEY (U.S.A.) *v.* UNITED MEXICAN STATES

(April 17, 1929. Pages 216-218.)

NATIONALITY, PROOF OF.—**EFFECT OF CLAIMANT'S STATEMENTS CONCERNING HIS NATIONALITY.** Fact that decedent testified he was born in Mexico *held* not sufficient to overcome other proof of American nationality.

FAILURE TO PROTECT. Fact that local authorities showed partiality to labourers in mine, of which decedent was superintendent, *held* not sufficient to establish a failure to protect against murder of decedent for which claim is made.

DENIAL OF JUSTICE.—**FAILURE TO APPREHEND OR PUNISH.**—**UNDUE DELAY IN INVESTIGATION.** Fact that authorities did not arrive on the scene of murder of American subject for approximately four hours *held* not to involve undue delay. Claim *disallowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$25,000, United States currency, is made against the United Mexican States by the United States of America on behalf of Lottie Sevey, an American citizen, for alleged failure to give adequate protection to Mose T. Sevey, the husband of the claimant, who on October 20, 1920, was shot and killed by one Ramon Navarro, and for alleged failure to take appropriate steps to apprehend and punish the murderer.

During oral argument Counsel for Mexico called attention to the fact that the American nationality of the deceased is not clearly established by the evidence before the Commission. He was registered as a voter in Arizona in 1916, and according to the entry on the register his place of birth was Utah. Before his death, however, he testified that he was born at Colonia

Juárez, Chihuahua, Mexico, and it appears that he had informed the company in the service of which he was at the time of his death to the same effect. In view hereof, some information regarding the nationality of his father ought to have been presented. Nevertheless, as there was submitted with the Memorial affidavits of four persons asserting that they knew that the deceased was an American citizen, and as his American nationality was expressly admitted in the Answer, the Commission is of the opinion that the present claim should not be rejected because of lack of proof with regard to the question here under consideration.

At the time of the murder Mose T. Sevey was superintendent of the Cananea-Duluth mine of the Cananea Consolidated Copper Company, State of Sonora, Mexico. The murderer had been an employee of the company until the day before the murder, when he applied to Sevey in order to obtain a new place to work, and, on being told that he could not have that immediately, declared that he would quit the work. There appears to have been troubles between the company and its laborers during the time preceding the murder, and the charge that the Mexican authorities failed to give proper protection to Sevey is based upon the contention that the Municipal President at Cananea was a weak character who in an improper manner took sides with the laborers, thereby causing the belief to arise among them that they did not need to fear the authorities, even if they behaved improperly. In this respect it is especially alleged that on October 6, 1920, representatives of the company were haled to the city hall, and in the presence of some 200 laborers were forced to sign an agreement for shorter hours of night work, the Municipal President and members of the town council taking part in the coercion. However, even if it be assumed that the officials of the town in an improper manner took sides with the laborers in questions regarding wages and working hours and the like, that would not justify the Commission in holding that the Mexican authorities were deficient in giving protection to the deceased so as to make them responsible for his death.

With regard to the failure to apprehend the murderer the following appears from the record:

The murder took place about 7.15 A. M. The local authorities were notified within a short time after the crime had been committed. The police arrived at the scene at 11 A. M. Judicial proceedings were instituted at Cananea, and in the course of these a suspected person was arrested, but he proved not to be the murderer. The Governor of Sonora was notified by the company shortly after the murder, and he immediately instructed the appropriate authorities of the State to try to apprehend the murderer. He further instructed the Municipal President at Cananea to send out descriptions of the murderer. Later, when the company heard that the murderer was in Chihuahua, President Obregón was requested to have the suspected person arrested. President Obregón also took action, and the suspected person was arrested, but he proved not to be Navarro.

No charge for failure to apprehend the murderer is made against the higher Mexican authorities. But it is contended that the local authorities were dilatory, and special attention is called to the fact that no police officer arrived at the scene of the crime until 11 A. M. on the day when the murder took place, although the police were notified immediately. The Commission, however, is of the opinion that no international delinquency on the part of the Mexican authorities can be established on the facts as above set forth.

Decision

The claim of the United States of America on behalf of Lottie Sevey is disallowed.

VICTOR A. ERMERINS (U.S.A.) *v.* UNITED MEXICAN STATES

(April 18, 1929. Pages 219-220.)

DENIAL OF JUSTICE.—FAILURE TO PROTECT.—DUTY TO PROTECT CONSULAR OFFICERS.—DIRECT RESPONSIBILITY.—RESPONSIBILITY FOR ACTS OF MINOR OFFICIALS. Claimant was American consular agent as well as customs inspector at Puerto Mexico, State of Vera Cruz, Mexico. At time of occupation of Vera Cruz by American naval forces, he was by cablegram instructed by the Department of State to proceed home with his family. A Mexican censor refused to permit delivery of cablegram but claimant was otherwise informed of its contents and he left. The next day his house was found looted of property for which claim was made. The claimant's house was situated just across the street from police headquarters and the Alcalde. Some evidence placed responsibility for the looting with the Alcalde and members of the police force but the grounds upon which such assertions were made were not stated. Claim *allowed* without interest.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In April, 1914, when the city of Veracruz was occupied by American naval forces, Victor A. Ermerins, an American citizen, was acting American Consular Agent as well as United States Customs Inspector at Puerto Mexico, State of Veracruz, Mexico. A hostile attitude on the part of the Mexicans towards Americans arose in the town and on April 23 the Department of State of the United States sent Ermerins a cablegram instructing him to proceed home with his family at his discretion. This cablegram was not delivered to Ermerins, because a censor who had been placed in the offices of the telegraph company of the town by the Mexican Government would not let it pass. In the afternoon of April 23, however, a friend of Ermerins, who had learned of the cablegram, urged him to leave the town, with his family, by one of the American vessels that were in the port about to depart, and Ermerins acted accordingly. The next day his house was found looted of property of the alleged value of \$1,464.05, United States currency.

In this case claim in the said sum, with interest thereon, is made against the United Mexican States by the United States of America on behalf of Victor A. Ermerins. The claim is predicated on the contention that not only did the Mexican authorities entirely fail to afford proper protection to the interests of Ermerins and to take appropriate steps to apprehend and punish the perpetrators of the robbery, but that the Alcalde and members of the police force of the town were themselves the robbers.

The contention that the Alcalde and members of the police force perpetrated the crime is based upon letters to Ermerins from the British Vice-Consul and the Agent of the Hamburg-America line at Puerto

Mexico, by which Ermerins was informed of the looting. It is mentioned in these letters that the authorities searched both the house and the office of Ermerins. The Agent of the Hamburg-America line mentions that he was present when the search of the office took place, and that the Alcalde took a map of Mexico from the office. Neither the British Vice-Consul nor the agent of the Hamburg-America line was present when the house was searched, and neither of them states the grounds upon which they base their belief that the authorities committed the robbery. The contention that the authorities did so must therefore be considered as unproven.

From the inventory of the articles stolen from Ermerins' house it appears that a regular looting took place. Especially in view of the fact that the house was situated just across the street from police headquarters and the Alcalde's office, the Commission is of the opinion that a crime of this nature could not have taken place, if the authorities of the town had properly fulfilled their duty to afford protection to the property of Ermerins, which they must have known would be exposed to danger under the circumstances prevailing at the time. An award in the sum claimed without interest should therefore be given in this case.

Decision

The United Mexican States shall pay to the United States of America on behalf of Victor A. Ermerins the sum of \$1,464.05 (one thousand four hundred sixty-four dollars and five cents), United States currency, without interest.

GEORGE M. WATERHOUSE and ANNIE B. WATERHOUSE (U.S.A.)
v. UNITED MEXICAN STATES

(April 18, 1929. Page 221.)

DENIAL OF JUSTICE.—FAILURE TO PROSECUTE.—FAILURE TO PUNISH
ADEQUATELY. Claim arising under circumstances set forth in *Norman
T. Connolly and Myrtle H. Connolly* claim *supra* allowed.

(Text of decision omitted)

HENRY W. PEABODY AND COMPANY (U.S.A.) v. UNITED MEXI-
CAN STATES

(April 18, 1929. Pages 222-223.)

TAXES UNLAWFULLY ASSESSED AND PAID UNDER PROTEST. Claim for taxes
paid under protest, the decree under which such tax was assessed later
being held unconstitutional by Mexican Supreme Court, *allowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$84,625.00, Mexican currency, or its equivalent in United States currency, with interest thereon, is made against the United Mexican States by the United States of America on behalf of Henry W. Peabody and Company, an American corporation.

On March 2, 1922, the claimant company, which had a branch office at Merida, State of Yucatan, Mexico, and which had in storage at Progreso 8903 bales of henequen awaiting shipment to the United States, made payment to the Treasury of the State of Yucatan which covered all taxes and imposts assessed on henequen under the laws then in force, and received permits to export 8200 bales of the said henequen. Nevertheless, when the henequen was to be embarked, the representative of the claimant company was informed by the authorities of the State that pursuant to a decree of the Legislature of the State of March 7, 1922, an additional tax would have to be paid. On March 9, the claimant company then paid under protest \$84,625.00, Mexican currency. Later, the said decree was declared unconstitutional by the Supreme Court of Mexico, but the amount paid under protest has never been returned.

In the Answer the Mexican Agent agrees that this claim be passed upon in accordance with the petition contained in the Memorial. An award in the sum claimed with interest thereon from March 9, 1922, should therefore be given.

Decision

The United Mexican States shall pay to the United States of America on behalf of Henry W. Peabody and Company \$42,185.56 (forty-two thousand one hundred eighty-five dollars and fifty-six cents), United States currency, with interest thereon at the rate of six per centum per annum from March 9, 1922, to the date on which the last award is rendered by the Commission.

JOHN O'BYRNE (U.S.A.) *v.* UNITED MEXICAN STATES

(April 20, 1929. Pages 223-224.)

MISTREATMENT DURING ARREST AND IMPRISONMENT.—EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—Claim for beating and mistreatment during arrest and imprisonment, with but slight evidence to support claimant's statement, *disallowed*.

(Text of decision omitted.)

S. J. STALLINGS (U.S.A.) *v.* UNITED MEXICAN STATES

(April 22, 1929. Pages 224-226.)

DENIAL OF JUSTICE.—FAILURE TO PROTECT.—FAILURE TO APPREHEND OR PUNISH. Claimant was kidnapped by armed Mexican force, robbed of

personal property to value of \$120.00, United States currency, and held for ransom for one day, when he was released on payment of \$10,000.00, Mexican currency, by his employer. Federal troops had been withdrawn from vicinity to quell a revolution. Other instances of criminal activities took place on day of claimant's abduction but not prior thereto. No action was taken by ordinary judicial or police authorities. About fifty mounted members of auxiliary military forces were about to start in pursuit when their Colonel refused them permission to do so. Claim *allowed*, on ground of failure to apprehend and punish, in sum of \$400.00, United States currency.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$10,120.00, United States currency, is made against the United Mexican States by the United States of America on behalf of S. J. Stallings, an American citizen. The facts out of which the claim arises are as follows:

At about 5 P. M. on January 11, 1924, the claimant, who was employed by the American Smelting and Refining Company in the vicinity of Parral, Chihuahua, Mexico, was traveling in an automobile on the mainroad between the Veta Grande property and the Parral Consolidated property of the said company. He was then held up by a band of approximately twenty mounted and armed Mexicans. He was ordered out of the car, robbed of personal property of the alleged value of \$120.00, United States currency, forced to sign a note demanding the company by which he was employed to pay \$15,000, Mexican currency, for his release, and ordered to the nearby hills, where he was detained until the following morning when a messenger from the company arrived with \$10,000, Mexican currency.

The United States contends that Mexico is responsible for the hardship suffered by the claimant, first, because of failure properly to protect the residents of the district where the event took place, secondly because of failure to apprehend and punish the criminals.

The Commission is of the opinion that there is not sufficient evidence to establish a responsibility on the part of Mexico for failure to afford proper protection. It appears that Federal troops were withdrawn from the State of Chihuahua some time before the abduction took place, but, as mentioned in the opinion of the Commission in the case of *Charles S. Stephens and Bowman Stephens*, Docket No. 148,¹ this took place because the troops were needed farther south for the purpose of quelling the Adolfo de la Huerta revolution. Other instances of criminal activity are recorded to have taken place on the same day when the abduction occurred, but not prior to that day.

With regard to the question of failure to apprehend and punish the criminals the following appears: The local authorities of Parral were informed of what had taken place when Stallings had been released. No action was taken by the ordinary judicial or police authorities. Federal forces were, as stated above, withdrawn from Chihuahua. Auxiliary forces had been formed in Parral, and the day after the abduction the President of Mexico and the Secretary of War and Navy were informed by the Chief of Military Operations at Chihuahua that orders for the pursuit of the criminals had already been given by Col. Ortega of the auxiliary forces, and that it was expected that the criminals would be captured at any moment. It appears,

¹ See page 265.

however, that on January 17, 1924, when some fifty mounted men were ready to start in pursuit of the bandits, the Colonel refused them permission to do so. In view hereof, and since no other action to apprehend the criminals appears to have been taken, the Commission is of the opinion that a failure to take proper steps to apprehend the bandits such as to make Mexico responsible has been established in this case, and that therefore an award should be made in the sum of \$400, United States currency.

Decision.

The United Mexican States shall pay to the United States of America on behalf of S. J. Stallings, \$400 (four hundred dollars), United States currency, without interest.

DARDEN BLOUNT (U.S.A.) *v.* UNITED MEXICAN STATES

(April 22, 1929. Pages 226-228.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. On day following the discovery of the body of a murdered American subject the Mexican authorities began an investigation at the spot where the body lay and thereafter apprehended three suspects who were later released for lack of evidence. American Agent contended a more thorough investigation should have been had. Claim *disallowed*.

Commissioner Fernández MacGregor, for the Commission:

On February 13, 1918, there was found in the neighborhood of a ranch called Klein Ranch, situated in the vicinity of Ciudad Juárez, Chihuahua, Mexico, the body of John D. Blount, an American citizen, with indications of his having been murdered a few days previous thereto.

The Mexican authorities were notified, and on the day following the discovery, the corresponding investigation was initiated, the Court personnel proceeding to the spot where the body lay. Several proceedings were carried out; three men who appeared suspicious were apprehended, but they were later released for want of evidence of responsibility against them. After this, the Mexican authorities took no further steps to obtain the punishment of this crime.

The United States of America, on behalf of Adele Darden Blount, mother of the deceased, now claims from the United Mexican States, the amount of \$25,000.00, United States currency, alleging that the Mexican authorities refused or failed to apprehend the murderer or murderers of Blount, for which reason the claimant sustained a denial of justice on the part of the Government of Mexico.

The evidence produced by both Governments regarding the facts is very meagre; the American Agency presented only a few notes from the American Consul having jurisdiction at the place of the occurrence, reporting the facts and transmitting correspondence which contained promises made to him by Mexican judicial officials to investigate the matter with due care.

The Mexican Agent produced the judicial record compiled as a result of the investigation undertaken to ascertain who were responsible for the

crime, and the said record shows that the Mexican judges complied in general with the law, proceeding to examine all the witnesses who could furnish any information, and arresting three men who appeared suspicious, principally one named Santa María Carrasco, who was said to be resentful toward Blount, because the latter wanted to eject him from a house which he had built on the land in the ranch where Blount was working. It appears that the Mexican judge released the three men for want of evidence against them, and that after this, judicial action ceased. The American Agent stated during the hearing of the case that, in view of the mystery surrounding the crime, he did not think there was a deficiency in the proceedings carried out by the Mexican judge during the initial investigations, he contending only that the judge abandoned too soon, and without making careful investigations, the clues or suspicions existing against Santa María Carrasco. He stated that if the latter had been shadowed by a detective, or some other adequate means had been adopted, it would perhaps have been discovered that this man was really guilty, and it is mainly on the lack of such investigation, that he bases his conclusions of defective administration of justice on the part of Mexico.

In view of the foregoing facts, the meagreness of the evidence, and taking into account the Commission's previous opinions on the subject of denial of justice brought about by defective administration thereof, the Commission is unable to conclude that there is an international delinquency on which to ground the granting of an award.

Decision

The claim of the United States of America on behalf of Adele Darden Blount is disallowed.

MELCZER MINING COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929. Pages 228-234.)

CORPORATE CLAIMS.—PROOF OF EXISTENCE OF CLAIMANT CORPORATION.—
PROOF OF RIGHT TO DO BUSINESS IN MEXICO. A copy of certificate of incorporation and a certificate of Secretary of State of State of incorporation *held* sufficient proof of existence of claimant corporation. Fact that it had ceased to do business *held* not to operate as a dissolution of corporation or prevent its bringing claim.

ESPOUSAL OF CLAIM BY GOVERNMENT.—PROOF OF CLAIMANT GOVERNMENT'S AUTHORITY TO PRESENT CLAIM. Proof that claimant Government was authorized by claimant to present claim on its behalf *held* not necessary.

FAILURE TO PROTECT.—LOOTING.—HOSTILITY OF MEXICAN AUTHORITIES. Evidence *held* insufficient to establish charges of failure to furnish protection, looting, and hostility of authorities.

CONFISCATION OF PROPERTY. Claimant's pipe line and pumping system was confiscated by the government of the State of Sonora. Claim *allowed*.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—REQUIREMENT OF PROOF BY CLAIMANT GOVERNMENT.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT.—MEASURE OF DAMAGES, SEIZURE OF PROPERTY. Claimant Government must produce concrete and convincing evidence and is not relieved of such requirement by fact that evidence submitted by respondent Government is meagre. In this instance evidence of claimant Government as to value of property taken is unsatisfactory but respondent Government could have furnished evidence as to amount and value of property taken and failed to do so. The measure of damages is the value of the property seized. Since such property would have depreciated considerably in value, award in sum of \$15,000.00 held justified in the circumstances.

Cross-references: Annual Digest, 1929-1930, pp. 193, 197.

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of the Melczer Mining Company, an American corporation, in the sum of \$395,883.00, said to be the value of property some of which was stolen by Mexican private citizens and some of which was seized by Mexican authorities. The substance of the allegations in the Memorial is as follows:

Between January 22, 1900 and May 29, 1903, the claimant acquired title to a group of mining properties known as the Copete Mines which are located about thirty-five miles east of the town of Carbo, Sonora, Mexico. To carry out the plan of exploiting the mines, which were considered to be valuable elaborate preparations were made involving the expenditure of large sums of money. Buildings, smelters, necessary outhouses and sheds were constructed, tracks were laid and a water pipe line and a pumping equipment were installed to bring water from the San Miguel river over a mountainous stretch of territory which was approximately four and one-half miles in length and which in places rose to a height of eighteen hundred feet. These improvements cost the claimant in excess of \$375,684.00.

The mines were ready for operation and in good condition during the early part of 1912. The necessary equipment, machinery and supplies were on hand, and an extensive amount of underground work had been completed. Dr. Francis C. Nicholas was in charge of operations under a general power of attorney to act as the claimant's representative. About the end of January 1913, Mexican marauders in the neighborhood of the Copete mines began a series of lootings. Complaint was at once made to Manuel L. Canes, Commissary of Police, and protection was requested. The civil and judicial authorities refused to recognize the claimant's local representative because of a technical deficiency said to exist in the power of attorney issued to him. As a result of the public knowledge that the claimant was unable to resort to court action for redress and protection, the thefts and lootings increased. Detailed statements regarding these matters are set forth in the Memorial, and charges are made against both police and military authorities.

There was not sufficient water on or near the claimant's plant to operate the company's equipment, and this fact necessitated the construction of a pipe line from the San Miguel river about four and one-half miles distant from the plant. The intervening territory was mountainous, and high pressure pumping machinery was required to force the water through the three or four inch pipes. The installation of this expensive system costing \$176,283.25 was absolutely necessary for the operation of the plant. On

December 31, 1917, while the claimant's representative was in the United States on business he received word from Franco Tapia, the claimant's foreman in charge, that Manuel Cubillas, who was under contract with the then Governor of the State of Sonora, was about to remove claimant's pipe line which had been commandeered by the State Government, and that Cubillas had come to make arrangements for its removal. The Chief of Police of Horcasitas had been informed to the same effect and had been instructed to furnish an armed guard of soldiers or police to prevent any interference with the work. Despite protests, the work of tearing up the pipe line and dismantling of the heavy pumping machinery began about February 18, under the protection of a group of fifty soldiers acting under orders from the Government. The pumping plant, machinery, and water system were completely dismantled and removed.

The value of this pipe line is estimated at \$176,283.00. The remainder of the principal sum claimed is made up of items said to represent values of property lost as a result of lootings and illegal seizures.

In behalf of Mexico contentions were originally advanced to the effect that the Melczer Mining Company had no standing as a claimant. With respect to this point it was argued, first, that it had not been proven that the company was still in existence, even though it was shown that it had been chartered in the State of West Virginia on December 29, 1899; secondly, that it had not been shown that the company continued to have a right to do business in Mexico, even though that privilege might at some time have been granted; and thirdly, that the evidence in the case should have revealed a statement showing that the United States had been given authority to file the claim in behalf of the company. These contentions appear to have been largely abandoned in oral argument in the light of additional evidence filed by the United States subsequent to the filing of the Mexican Answer and the Mexican brief.

It was further contended in behalf of Mexico that the evidence submitted by the United States was insufficient to establish charges of lack of protection and of implication of Mexican authorities in the looting of the company's properties. Insufficiency of evidence was also asserted with respect to proof of the value of property alleged to have been lost through lootings and of the property said to have been confiscated.

The evidence produced by both Agencies is of a very unsatisfactory character. The record is such that it is impossible for the Commission to form any definite conclusions with respect to important issues of fact raised by the allegations in the Memorial and in the Answer. Numerous affidavits produced by the United States are wanting in specific information both as regards complaints against Mexican authorities and as regards losses said to have been sustained by the claimant. The Mexican Government produced nothing but copies of three brief communications written by Mexican officials in 1919, disclosing that the mine of the claimant company had been abandoned, and copies of two notes addressed by the American Chargé d'Affaires at Mexico City to the Mexican Foreign Office requesting protection for the company's property.

The existence of the Melczer Mining Company as a corporation under the laws of the State of West Virginia must be regarded as free from doubt. A copy of the certificate of incorporation accompanies the Memorial. There is evidence of the payment of the State corporation tax. The record contains a certificate from the Secretary of State of the State of West Virginia under date of July 22, 1927, that the company is "in good standing with the State

of West Virginia." It seems to be clear that over a long period of time little or no practical operations have been carried on by the company in Mexico. This fact, however, clearly did not result in the cancellation of the company's charter. The failure to do business did not operate as a dissolution of the corporation. See *Law v. Rich et al.*, decided by the Supreme Court of Appeals of West Virginia, 47 W. Va. 634. A claim can of course be presented in behalf of a corporation which is not doing business. Such a claim may be a valuable asset.

There is nothing in the record to show that the claimant company has been deprived of the right to carry on operations in Mexico. There is evidence of the payment of Mexican taxes. There is a copy of a communication addressed by the Mexican Foreign Office to the American Embassy at Mexico City in which it is stated that the company exists at a place near Rayón and possesses a mine which has been abandoned for a considerable period of time. There is a copy of a communication addressed to the company under date of March 1, 1928, in which information required by Mexican mining law is requested.

With respect to the argument that the record should contain some evidence that the claimant has invoked the assistance of the United States, it may be said that the Commission has repeatedly rendered awards in cases containing no evidence of this character. There can be no doubt that in international law and practice and under the terms of the Convention of September 8, 1923, either Government has a right to press claims before the Commission on proper proof of nationality. It may be assumed that it would be very unusual for a government to press a claim in the absence of any desire on the part of the claimant. There is a recorded precedent in which the claimant undertook to withdraw a case presented by Great Britain to an international tribunal, which held, however, that the claimant had no power to do so so long as the government espoused the claim. The tribunal in its opinion said that Great Britain derived its "authority to present" a claim not from the claimant or its representatives "but from the principles of international law" and presented the claim "not as the agent" of the claimant "subject to having its authority revoked, but as a sovereign, legally authorized and morally bound to assert and maintain the interests of those subject to its authority", and that how and when it should move to assert those interests was, so far as other States and the tribunal were concerned, "a matter exclusively for the determination of that sovereign." *Cayuga Indians case, American and British Claims Arbitration under the Special Agreement of August 18, 1910, American Agent's Report*, pp. 272-273.

The evidence produced by the United States in support of allegations with respect to looting, lack of protection, complaints against police authorities and military authorities, and the altercations which it appears Dr. Nicholas had with Mexican officials is too vague to be the basis of any pecuniary award. Looting probably did, as stated by counsel for Mexico, occur, but no definite conclusions can be reached with regard to the absence of protection. The difficulties which Dr. Nicholas is said to have had regarding a power of attorney and the particular use which it was desired to make of that power are not explained. No copy of the power is produced.

Even though justification for these several complaints of depredations and lack of protection had been conclusively established, the Commission would still be confronted by a lack of proper evidence to substantiate allegations with respect to the value of property said to have been stolen or

otherwise unlawfully seized. Numerous affidavits accompany the Memorial. Some of them contain conflicting as well as unexplained figures. In some of them there are general references to books, but there is no production of books or specific references to books. There is no specific reference to ledgers or to accounts. There are no certified statements from any books. There are assertions that some books could not be removed from Mexico because of prohibitions of Mexican law, and that books were destroyed during the progress of the looting. But there is no specific information as to what books were destroyed or which books are unavailable or what particular books were relied upon in formulating the statements purported to be based upon things revealed by books which are available. Some photographs are filed with the Memorial for the purpose of showing improvements erected on the premises of the company. These photographs would have been more useful had they been accompanied by authentications showing when and by whom they were taken. Doubtless very considerable sums of money were spent with a view to conducting extensive operations. The photographs contribute a little something towards showing that fact. But they are of slight value in forming a concise estimate of the amount of money put into the improvements.

The items of the claim with respect to alleged lootings and unlawful seizure of property must therefore be rejected because of the absence of convincing evidence both as to the occurrences on which these items of claims are predicated and as to the value of the property said to have been appropriated.

There is the same if not more uncertainty with respect to the value of the pipe line which it is alleged was seized by the authorities of the State of Sonora. However, the Commission in considering whether the item of the claim predicated on the seizure of this specific property should be dismissed for want of evidence is confronted by a situation somewhat different from that existing with respect to other properties for which indemnity is claimed. It is unnecessary to cite legal authority in support of the statement that an alien is entitled to compensation for confiscated property. As was stated in the opinion in the *Costello* case, Docket No. 3182,¹ the mere fact that evidence produced by the respondent Government is meagre, can not in itself justify an award in the absence of concrete and convincing evidence produced by the claimant Government. But it is not denied that this property was taken, and indeed it may be considered that the seizure is admitted. In these circumstances it may be taken for granted that Mexico could have furnished evidence with respect to the amount and value of the property taken. And it may therefore be assumed that such evidence as could have been produced on this point would not have refuted the charge in relation thereto which is made in the Memorial. However, even though this assumption be justified, the Commission would not be warranted in awarding the amount claimed for the pipe line. The evidence produced by the United States is altogether too uncertain. Varying estimates such as \$146,200.79, \$176,000.00 and \$200,000.00 are given with respect to the value of this property. There is considerable force in the argument advanced by counsel for Mexico in refuting the estimate submitted by the United States, but unquestionably he carries his argument too far when he asserts that the value of the property of the company is that of a scrap of old iron in Sonora. The claimant is entitled to indemnity for the injury

¹ See page 496.

which it has sustained. The measure of damages is the value of the property seized. The difficulties confronting the Commission in estimating that value have already been pointed out. The claimant Government has produced extremely unsatisfactory evidence, and the respondent Government, whose authorities are in possession of the property, have submitted no evidence. Counsel for the United States admitted in oral argument that account should be taken of depreciation. Such depreciation during a period of about eighteen years undoubtedly would be very considerable. The Commission considers that it is justified in awarding an indemnity of \$15,000.00 with interest at the rate of six per centum per annum from February 18, 1917, to the date on which the last award is rendered by the Commission.

Decision

The United Mexican States shall pay to the United States of America on behalf of the Melczer Mining Company the sum of \$15,000.00 (fifteen thousand dollars) with interest at the rate of six per centum per annum from February 18, 1917, to the date on which the last award is rendered by the Commission.

JAMES H. McMAHAN (U.S.A.) *v.* UNITED MEXICAN STATES
(*April 30, 1929, dissenting opinion by American Commissioner, undated. Pages 235-248.*)

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—UNNECESSARY USE OF ARMS.—RIGHT OF NAVIGATION OF RIO GRANDE RIVER.—EXERCISE OF POLICE POWER AT INTERNATIONAL BOUNDARY.—LOSS AND CONFISCATION OF PROPERTY. Claimant and companions were floating down the Rio Grande River in boats on a trapping expedition in 1895, when they were ordered to halt by an officer in command of a force of six or eight Mexican soldiers. With little or no time to comply with the order, the Mexicans fired several shots upon the Americans. Some of the Americans abandoned their boats and swam toward the American shore. They were rescued from the water by claimant and all rowed ashore in the remaining boats, which were then abandoned, and the group proceeded overland with great hardship to a town two days distant. Report was made of the occurrence and the Mexican Government was advised thereof through diplomatic channels. The free navigation of the Rio Grande was assured by treaty to the vessels and citizens of both the United States and Mexico. Evidence was furnished that the Mexican soldiers had express orders to investigate the American group. Two boats and their contents were seized by the Mexican authorities and never returned. *Held*, (i) claim based on acts of force of Mexican soldiers disallowed, since, under the somewhat conflicting evidence, it may have been justified as an exercise of the police power, and (ii) claim for confiscation of property *allowed*.

Cross-reference: Annual Digest, 1929-1930, p. 85.

Commissioner Fernández MacGregor, for the Commission:

The United States of America, on behalf of James H. McMahan, an American national, claim of the United Mexican States the amount of \$5,000.00 in United States currency, on the grounds that he was unlawfully

assaulted by Mexican soldiers, under the circumstances hereinafter set forth. About the middle of December 1895, the claimant, accompanied by his son Ben B. McMahan and two other young men, Walter Strickland and A. J. Blevins, organized a trapping expedition and started from Del Rio, Texas. They had drifted about 250 miles down stream, approaching an island situated 30 or 40 miles below the town of Carrizo, (now Zapata). The main channel of the river passes between the said island and the Mexican bank, one of the ends of the island being at a distance of 50 yards from the Mexican shore. Before reaching the island they noticed that some Mexicans were watching and following them. The Americans camped on the American bank opposite the island, but fearing an attack by the Mexicans moved their camp to the island. On the following day, January 12, 1896, they boarded their boats in order to follow the main channel down stream, when suddenly a Mexican officer in uniform, accompanied by six or eight soldiers appeared on the Mexican bank. The officer ordered the travelers to halt and without giving them time to comply with the order, the Mexicans fired several shots upon the Americans. Some of the shots hit the water; others struck the boats. Three of the travelers becoming frightened, leaped into the water and swam toward the island. The claimant did not abandon his boat and was able to recover one of those belonging to his companions, but the other two boats however, were carried by the current, later being captured by the Mexican soldiers who carried them away with all of the objects and implements therein deposited. The Mexican soldiers continued shouting, and threatened to kill or capture the Americans later, stating that they had enough men with which to do it. McMahan rescued his companions, rowed them across to the American side in the two boats that were left, and which he subsequently abandoned after entering with his companions into territory of the United States. After journeying for two days over an almost uninhabited region, and having suffered greatly from cold weather and lack of food, they arrived at the town of Carrizo, (now Zapata), where they were given assistance. Then they continued their journey to Laredo, Texas, having reached the said town six days after the occurrences, (January 18, 1896). The four Americans crossed the Rio Grande to Nuevo Laredo, Mexico, and in that place, signed a statement before the American Consul in which they narrated the facts and complained of an unlawful assault as well as of a dispossession of their property. The Mexican authorities who took cognizance of these incidents shortly after this complaint, did not take any steps to punish the soldiers guilty of the outrage inflicted upon the four Americans.

The American Agency alleges that pursuant to the boundary treaties concluded between Mexico and the United States, the navigation on the Rio Bravo del Norte, or Rio Grande, is free to the citizens of both countries, and that, therefore, James H. McMahan and his companions were exercising a right, when the Mexican soldiers, for no reason whatsoever, ordered them to halt and proceeded to attack them. That as a result thereof, the Mexican Government is responsible for the outrage and for the physical and mental suffering that the act of the soldiers caused the claimant, as well as for the value of the effects confiscated without cause.

Mexico denied this claim, contending at the outset that the Mexican authorities never had knowledge of the facts hereinbefore referred to, and in order to prove this, introduced some evidence. However, this defense was later abandoned due to the fact that the American Agency presented a copy of the diplomatic correspondence exchanged at that time between

the two Governments, in connection with the facts herein stated. The Mexican Agency also alleged that the soldiers complied with their duty in ordering to halt, and, trying to intimidate, thus to enforce obedience to their command, the four Americans whose presence had been called to their attention as suspicious.

In view of the evidence filed by the American Agency, and since the Mexican Agency in order to uphold its contentions, did not introduce evidence other than the aforesaid, the Commission finds that the facts in general occurred as narrated by McMahan and his companions, with the following exceptions: (a) It appears that the soldiers had received orders from their superiors to exercise vigilance over the four Americans in question who had been pointed out, previous to their arrival near Zapata County, Texas, as suspicious; (b) It unquestionably appears that from the start the Americans could have realized that the Mexicans who were ordering them to halt, were soldiers of the Mexican Army; (c) It appears more probable that the said soldiers confined themselves at first to command the Americans to halt since the statement made by McMahan and his companions immediately after the occurrences, in this connection, literally reads: "They ordered us to halt, commanding us to land, *and almost immediately*, his men (the officer's) fired four shots at us." This statement is changed in the claimant's affidavit made in the year 1927 to the effect that "an officer with six or seven men appeared on the Mexican bank and ordered us to put in toward that side, *and immediately* after giving the order and without giving us a chance to comply with it, the men fired several shots at us". The report made to the Department of Foreign Affairs (Mexican) contemporaneous with the affair and introduced by the American Agency, states that Peña, a sergeant, "dismounted from his horse and from the shore ordered them to halt asking those conducting the boat to state what they carried and what was their purpose; and that the answer he received was a shot fired by one of the rowing men. Then the sergeant fired a shot in the air and at that moment three of the rowing men leaped into the water". Nor does it seem clear that the intention of the soldiers in firing the shots was to harm the claimant and his companions, in view of the fact that, as already stated, it is doubtful whether the shot or shots were fired in the air or upon the men, and particularly in view of the fact that, as soon as the companions of McMahan jumped into the river in order to swim toward the island, the soldiers did not fire again, confining themselves to making new threats against the fugitives, according to the latter's statement. It seems reasonable to believe that if the intention of the soldiers had been to inflict any harm upon the Americans, they would have had an excellent opportunity of doing so, while the fugitives were swimming, taking into account the slowness of swimming, and particularly the fact that the river branch, according to the statement made by the claimant and his companions was at the most fifty yards wide at the place of the occurrence. On the contrary, it seems reasonable to admit that it is improbable that McMahan and his companions fired at the Mexican soldiers, inasmuch as this act of provocation, would have placed them in a condition of danger which they had no need risking.

The main contention alleged by the American Agency, as it has been pointed out already, is that the Mexican soldiers had no right to fire upon McMahan and his companions, not even to order them to halt, inasmuch as they were navigating upon an international river, which under particular treaties, is the subject of free navigation to the citizens of both countries.

In the past this Commission has already taken cognizance of cases in which some individual has suffered damage as a result of shots fired, either by Mexican or by American citizens across the same Río Grande, while the victim was still navigating on it. (*Swinney* case, Docket No. 130¹; *Teodoro García* case, Docket No. 292².) In these cases, the question of defining whether or not such acts constituted a violation of the right of free navigation on the river by the citizens of both countries, was never squarely raised as an issue for decision. Therefore, without considering such question, in deciding those cases, the Commission applied a wider principle, namely, that it is unlawful to use against individuals, by way of coercion, measures out of proportion to the seriousness of the matter in which the use of force is required, such principle being but an obvious consequence of the respect that is due to human life. Applying this test, the Commission found that the reckless use of firearms upon persons who disobeyed an order of the police, in cases of slight importance, or in those wherein persons are suspected of small offenses, or in those of innocent persons, rendered a Government whose officials used firearms liable for the damage caused. But in the instant case the question is directly raised as to whether or not the act of the Mexican soldiers should be condemned, insofar as it was an unwarranted attack upon the right of free navigation on the Río Grande or Bravo del Norte.

The situation of this river in the year that this claim arose was as follows: The Treaty of Peace, Friendship, Limits and Settlement, concluded between the two nations on February the 2nd, 1848, after defining what part of the Río Grande should be the boundary limit between the two countries, provides in its Article VII, that "the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation". The Treaty of Boundary concluded also between the two nations on December 30, 1853, which again includes a part of the course of the Río Grande as boundary between both countries, in its Article IV provides that "The several provisions, stipulations, and restrictions contained in the 7th article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte, below the initial of the said boundary provided in the first article of this treaty". The Treaty signed November 12, 1884, relating to the boundary line between the two countries, in that part following the channel of the Río Grande and of the Río Gila, in its Article I provides:

"The dividing line shall forever be that described in the aforesaid Treaty and follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one."

Article II of this same Treaty provides:

"Any other change, wrought by the force of the current, whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the

¹ See pages 98 and 138.

² See page 119.

survey made under the aforesaid Treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852, but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits."

In view of these provisions, there is no doubt but that McMahan and his companions were exercising a perfectly recognized right in navigating on a part of the Río Grande which serves as boundary between the two nations.

But, on the other hand, it is also necessary to take into account that the same Treaty of 1848 to which reference has been made above, in its Article VII further provides that:

"The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits."

The Treaty of 1853, as has been noted, leaves in force all of Article VII. in so far as it relates to all of that portion of the Río Grande which under this Treaty was established as boundary, and, consequently, leaves in force the reservation hereinbefore alluded to.

It appears that the reservation expressly made of the territorial rights of either Republic, within the limits which were established, covers the right of exercising the police power, inasmuch as it is one of the rights which the sovereign exercises over its territory. It is pertinent to recall at this point that the boundary or dividing line between both nations in reference to the Río Grande, is the middle of this river, following the deepest channel, which signifies that up to this point, the two nations may exercise their full territorial rights. But if this alone were not sufficient, by studying the subject of navigation on international rivers, whether they be boundary lines between two or more territories, and empty into the sea, it is found that the tendency is to establish the principle of free navigation, provided it be always limited by the right of the riparian States to exercise police rights in that portion of the course which corresponds to them. (See Oppenheim, *International Law*, Vol. 1, pp. 314-322, 3rd. Ed. 1920; Fauchille, *Droit International Public*, Vol. 1, 2nd Part. pp. 453 *et seq.* 8th Ed. 1925; Moore, *International Law Digest*, Vol. 1, pp. 616. *et seq.*; J. de Louter, *Le Droit International Positif*, Vol. 1, p. 445; Oxford Ed. 1920.) The Congress of Vienna of 1815 fixed the free navigation of certain rivers, *subject to police regulations*. Since this date, the restriction appears in nearly all treaties, and has at times been accepted by the United States: Treaty of Washington of May 8, 1871, Article XXVI; Treaty of June 15, 1845, Article 11. It should also be observed that the Institute of International Law in its session at Heidelberg on September 9, 1887, adopted regulations for the navigation of international rivers, applicable to rivers separating two States as well as those traversing several States, in which the right of the riparians to exercise police power over the stream is recognized.

What extension this right of exercise of the police power may have, as confronted with the principle of free navigation, is a matter as yet not defined by theory or precedent. It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty.

Therefore, it does not seem possible to deny that Mexico is entitled to exercise police powers, *some* police powers, at least, over the course of the Río Grande, and it does not appear excessive or contrary to the right of

free navigation, that jurisdictional action of the Mexican authorities, which in one specific occasion and for special causes bearing on its primary right of defense, was intended to ascertain what was being done and what objects were being carried by suspicious individuals who were travelling over deserted places in small crafts. In the instant case the soldiers had received express orders to investigate what McMahan and his companions were doing, and even though the grounds for the suspicions which the superior authorities had against these men are not exactly known, it appears they were afraid that smuggling would take place opposite the same island on which the Americans landed, a thing possible due to the proximity of the island to the Mexican shore. (Report of Pedro A. Magaña, in the evidence of the Mexican Agency.) An exceptional case was being dealt with, since although it appears that similar cases between the two nations had occurred before this instance, a note from the United States Consul to his Secretary of State, dated January 18, 1896, and referring to the same incident, reads:

“I am loathe, however, to believe that the miscreants were Mexican soldiers. Since the Mata incident, the Mexican military authorities along the border have shown a wholesome respect for boundary lines and due consideration of the rights of American citizens.”

It remains only to be considered the manner in which the Mexican soldiers exercised that limited right of inspection, in order to know if there was an excess of force or of coercion. According to the facts already stated in this case, the Commission cannot arrive at definite conclusions in this respect. It is not clear whether the soldiers made use of their firearms upon McMahan and his companions without giving them time to answer their intimations to come close to the shore; it is not clear, either, that the shots were fired upon the Americans, much less whether they fired with the intention of wounding them. It appears that there was either fault or mistake on both sides. If they were innocent passengers, the Americans undoubtedly had no ground to believe that Mexican soldiers whose identity was apparent, would wish to harm them. Had they answered the intimation of the soldiers, the incident would not have occurred. As for their part, the soldiers resorted to the dangerous means of intimidating McMahan and his companions with too much haste. At least, this is the opinion which the Diplomatic Representative of the United States in Mexico appeared then to have had of the case; his note of April 30, 1896, to the Secretary of State, the Hon. Richard Olney, reads:

“Incidents at the border of the two countries are not as frequent now as they were a few years ago, and owing to the circumstance of a mistake being made in this case by both parties, it does not seem to me to be a matter demanding rigid action by our Government.”

Under these circumstances, and even though the Commission condemns, as in other instances, the prompt and unwarranted use of arms, it does not find that there has been clear violation of any principle of international law, the only circumstance under which the responsibility of any of the two nations may be established.

But, on the other hand, it is proved that the Mexican soldiers seized two of the boats which McMahan and his companions had, with everything which was contained in them, and that the said boats were taken to a Mexican custom house, without an explanation ever having been forthcoming as to what became of this property. since, clearly it was not a case of

smuggling or of any other illicit act. The Commission is of the opinion that such an act constitutes a confiscation and that the Government of Mexico should answer for the same. The claimant gives in his affidavit a list of the articles which he lost with corresponding values, aggregating a total of \$1,000.00, United States currency. Among the items inserted there is one for the four boats, but it appears that it should be accepted only for two, since the other two boats were not seized by the Mexican soldiers, but abandoned by the claimant. There is another item of 30 beaver hides, but the list furnished by the customs house at Ciudad Mier refers only to five hides which appear in two items. This list furnished by the Mexican authorities to the diplomatic representatives of the United States at the time of the incidents, is very detailed and it appears to indicate that the value of the confiscated articles was somewhat exaggerated by the claimant. In view of the above, the Commission deems pertinent to award the lump sum of \$500.00 with interest.

Decision

The United Mexican States shall pay to the United States of America, on behalf of James H. McMahan, the amount of \$500.00 (five hundred dollars), United States currency, with interest at the rate of six per centum per annum from January 12, 1896, to the date on which the last award is rendered by the Commission.

Commissioner Nielsen, dissenting.

This case involves a comparatively small sum of money. I believe the amount claimed may properly be reduced, so that an award would be a rather inconsiderable sum. However the claim appears to involve important principles with regard to first, wrongful acts of soldiers and secondly, treaty rights securing freedom of navigation.

I am particularly impressed with the thought that the opinion of my associates is at variance with other opinions of the Commission dealing with what has been termed "reckless shooting"; indeed greatly at variance with one opinion (case of *Teodoro Garcia*, docket No. 292)¹ in which I did not concur and in which there is a discussion of a use of firearms which to my mind could be justified much better than can the action of the soldiers in the instant case.

In the *Swinney* case, docket No. 130, *Opinions of the Commissioners, Washington*, 1927, p. 131, the Commission dealt with the killing of a young man who, while engaged in a trapping expedition on the Rio Grande, was shot from the Mexican bank by two armed Mexicans. He died from the effects of the wounds inflicted on him. Swinney was discovered floating down the river in a boat which contained nothing but himself and his firearms. The armed Mexicans represented that they took him for a man who was on the river in contravention of law, which it was their duty to enforce. Evidence in the record did not disprove allegations made in behalf of Mexico that Swinney refused a summons to come closer to the Mexican bank to make explanations and instead of doing so rowed to the opposite bank. In an opinion written by Commissioner Van Vollenhoven and concurred in by Commissioner Fernández MacGregor it was said that the killing of Swinney was "an unlawful act of Mexican officials". In view of the innocent conduct of the men who figure in the instant case, the following

¹ See page 119.

extract from the opinion in the *Swinney* case seems to be pertinent with respect to the issues now raised:

"It is not clear from the record why Swinney looked like a smuggler or a revolutionary at that time and place, and how the Mexican officials could explain and account for their act of shooting under these circumstances, even when they considered him committing an unlawful act in crossing from one bank to another (a fact they did not see). Human life in these parts, on both sides, seems not to be appraised so highly as international standards prescribe."

By a unanimous decision an award of \$7,000.00 was made in this case.

The *Falcón* case, *ibid.*, p. 140, was concerned with the shooting of a Mexican citizen on the Rio Grande. Falcón and another Mexican named Félix Villarreal were seen in the river by American soldiers who it appears, believing that the men in the river were engaged in smuggling, approached them and directed them to halt. The Mexicans did not obey the order, whereupon a soldier fired a shot in the air. It appears that the soldiers were immediately fired upon from the Mexican side by mounted men, and that the soldiers returned the fire in self defense and also directed some shots at the men in the water. About fifty shots were exchanged while Falcón was approaching the Mexican shore. Falcón was hit and died from the effects of the wound. The Commission held that, even though it were assumed that Falcón was engaged in smuggling and that the American soldiers were fired upon from the Mexican side, the death of Falcón should be considered to be wrongful, since it seemed that the soldiers disregarded American military regulations forbidding the use of firearms against unarmed persons suspected of smuggling, and since it appeared that the soldiers fired on defenseless Mexicans in the river. In this case, it will be seen, not only was there firing from the Mexican side to the American side, but apparently also some reason for suspicion of unlawful conduct on the part of the unfortunate man who was killed. In this respect that case differs from the instant case. The Commission unanimously made an award in the sum of \$7,000.00 in favor of the widow of Falcón.

I think that it is particularly interesting to consider the case of *Teodoro García and M. A. Garza* in connection with the instant case. A little Mexican girl was shot in 1919 by an American army lieutenant while crossing the Rio Grande with a number of Mexicans on a raft which, in violation of the laws of the United States passed from the Mexican side to the American side and returned. The persons responsible for the crossing knew that they were acting in violation of law. The lieutenant was charged with enforcing legislation of various kinds relating to the entry into or departure from the United States of aliens in time of war; prohibition against the importation of arms and ammunition into Mexico; and matters relating to immigration and smuggling. The people propelling the raft refused to stop on being challenged by the lieutenant. The officer was tried by court-martial and sentenced to dismissal. The President of the United States as the court of last resort set aside the sentence apparently on the ground that the lieutenant had not committed manslaughter as defined by American law, and had not violated any army regulation. Two of the Commissioners undertook to define an "international standard of appraising human life", and said that this standard had been violated when the little girl was killed. They said in part:

"If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of firearms."

"In order to consider shooting on the border by armed officials of either Government (soldiers, river guards, custom guards) justified, a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighborhood; (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound, or kill. In no manner the Commission can endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exist prohibitive laws, that enforcement of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms."

An award of \$2,000.00 was made in favor of the parents of the girl.

I took the view in that case that the Commission was bound by the interpretation of American law given by the President, when he decided that the lieutenant had not violated that law; that clearly in the light of the record, the President's decision did not result in a denial of justice, and that therefore the question of responsibility on the part of the United States must be ascertained by determining whether American law sanctioned an act at variance with ordinary standards of civilization. It was not even attempted by comparing the law with the laws of other countries to show that the American law was of such a character, and I do not think it could have been shown. I expressed the view that to prescribe standards such as those formulated by the other Commissioners was in effect an attempt to frame an international code with respect to a very difficult subject of domestic penal legislation.

Lieutenant Gulley testified before the court-martial that he fired about twelve shots in the direction of the raft, and stated at the time he did so that he did not care to hit anyone but merely wanted to frighten the persons on it, so as to cause them to return to the American side in order that he might arrest them. He further testified that he could see no one on the raft when he fired and would not have fired in the direction of it, if he had known that women or children were on it. The court-martial found that the accused had no malice at the time of firing and no intention of killing anyone. A charge of wilfull killing was dismissed, and the accused was found guilty of manslaughter.

It will be seen that rules formulated by the two Commissioners are concerned with restrictions on the use of firearms in "preventing or repressing" some offense. In the instant case there was no occasion either to take steps to prevent or to repress wrong doing.

In the *Roper* case, *ibid.*, p. 205, claim was made in behalf of the mother of William Roper who was drowned in the Pánuco river at Tampico, as a result, as was alleged by the United States, of an assault on him and three American fellow seamen. There was some evidence indicating that Roper was wounded by a pistol shot. It was difficult to reach a definite conclusion with regard to the precise character of all the occurrences which took place. The Commission determined however that shots were fired by Mexican policemen, and that pistol fire was largely if not entirely responsible for the action of the men in leaping into the river where two of them met their death. Awards were unanimously made in this and in two other cases arising out of the same occurrences. *Brown* case, *ibid.*, p. 211; *Small* case, *ibid.*, p. 212.

These cases seem to be interesting in connection with the instant case, in that importance was attached to the element of fright resulting from an unnecessary use of firearms. Just what use of firearms was made by the Mexican soldiers in the instant case may be doubtful. There is testimony that bullets hit the boats. It is shown that the young men were badly frightened, as doubtless they had reason to be. Certainly the fact that all occupants of the boats, two of whom leaped into the water and swam to the shore, walked for days to get back to their starting place, is some evidence of actual danger. If they failed to obey a summons to come to the shore, it may be reasonably assumed I think that they apprehended something similar to what actually happened to them. The Mexican soldiers may not have shot with intent to kill, but I perceive no reason at all why they should have made use of firearms, particularly since obviously the persons in the boats were innocent of any offense or of any intent to commit an offense, and even if there had been some reason to suppose that these persons intended to engage in smuggling operations, which to my mind there was not, I perceive no justification for the use of firearms. I find it impossible to understand why the soldiers should have been instructed to keep a lookout for these boys and the man accompanying them as suspicious characters.

The *Stephens* case, *ibid.*, p. 397. involved the shooting of an American by the name of Edward C. Stephens by a Mexican soldier while passing in a motor car on a road near Villa Escobedo in the State of Chihuahua. In an opinion written in this case by Commissioner Van Vollenhoven and concurred in by Commissioner Fernández MacGregor, it was said:

"The excuse proffered by the killer that he merely intended to 'intimidate' Stephens would seem too trite to deserve the Commission's attention; see paragraph 3 of the opinion in the *Swimney* case (Docket No. 130), paragraph 3 of the opinion in the *Roper* case (Docket No. 183), paragraph 1 of the opinion in the *Falcón* case (Docket No. 278), and paragraph 6 of the opinion in the *Teodoro García* case (Docket No. 292)..."

An award of \$7,000.00 was unanimously made in this case.

Perhaps it may be said that navigation on the river in the locality where the occurrences in question took place is something almost negligible. Nevertheless the right of navigation was secured to these persons by treaty stipulations. Even though it be taken for granted that each Government has the right to exercise police authority on its side of the international boundary, the interference with the passage of boats without good cause is to my mind inconsistent with the right of free navigation. Evidence in this case leaves uncertain the precise location of the boats — whether they were on the Mexican or on the American side of the boundary line. However, that point seems to be immaterial. I think that the use of firearms and indeed any other means to arrest the progress of travelers against whom there can be no suspicion of wrongdoing, is inconsistent with the right of free navigation.

It is true that in former cases which I have cited loss of life resulted from use of firearms. Shooting that results in death or physical injury is a more serious offense than shooting which has no such fatal consequences. But shooting to be wrongful must not necessarily result in death. The unwarranted use of firearms is forbidden in order to prevent tragic occurrences.

I think that the claimant is entitled to the value of the property taken from him and interest and also some small compensation, considerably less than that claimed, for the loss of time and the very considerable hardships which he suffered in making his way back to the place from which

he started. He was deprived of his means of transportation, and even if such means had been available, it may be assumed that the occupants of the boats, in view of their experiences, would not have attempted to return by water. I of course am of the opinion that the claimant should have the sum awarded and, as I have indicated, something more.

BEN B. McMAHAN (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929, dissenting opinion by American Commissioner, undated. Pages 249-250.)

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—UNNECESSARY USE OF ARMS.—RIGHT OF NAVIGATION OF RIO GRANDE RIVER.—EXERCISE OF POLICE POWER AT INTERNATIONAL BOUNDARY.—LOSS AND CONFISCATION OF PROPERTY, Claim arising under same circumstances as those set forth in *James H. McMahan* claim *supra* allowed.

(Text of decision omitted.)

BARTHENIA STRICKLAND (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929, dissenting opinion by American Commissioner, undated. Pages 250-252.)

SURVIVAL OF CLAIM FOR LOSS OF PROPERTY.—PROPER PARTY CLAIMANT. Claimant's son suffered loss of personal property in circumstances set forth in *James H. McMahan* claim *supra*. Such son died in 1917. *Held*, claimant entitled to present claim.

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY.—UNNECESSARY USE OF ARMS.—RIGHT OF NAVIGATION OF RIO GRANDE RIVER.—EXERCISE OF POLICE POWER AT INTERNATIONAL BOUNDARY.—LOSS AND CONFISCATION OF PROPERTY. Claim arising under same circumstances as those set forth in *James H. McMahan* claim *supra* allowed.

(Text of decision omitted.)

LILY J. COSTELLO, MARIA EUGENIA COSTELLO and ANA MARIA COSTELLO (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929, concurring opinion by Presiding Commissioner, April 30, 1929, concurring opinion by Mexican Commissioner, April 30, 1929. Pages 252-265.)

NATIONALITY.—NATURALIZATION OF CHILD THROUGH NATURALIZATION OF PARENT. Child born abroad and resident abroad at time of naturalization in the United States of his father, which child subsequently removed to and resided in United States, *held* American citizen.

NATIONALITY OF CHILDREN BORN IN MEXICO OF AMERICAN PARENTS.—DUAL NATIONALITY. Children born in Mexico of American father, which children left Mexico before coming of age and were then living in the United States, *held* American citizens and not Mexican citizens.

PRESUMPTION OF LOSS OF AMERICAN NATIONALITY UNDER ACT OF MARCH 2, 1907. A naturalized American citizen resident in Mexico for over seven years, against whom the statutory presumption of loss of citizenship under Act of March 2, 1907, had run, *held*, (by majority vote), to be presumed to have ceased to be an American citizen.

DENIAL OF JUSTICE.—FAILURE TO PROTECT.—FAILURE TO APPREHEND OR PUNISH.—REQUIREMENT OF PROOF BY CLAIMANT GOVERNMENT.—BURDEN OF PROOF. Where such evidence as was furnished by claimant Government indicated some efforts were taken by Mexican authorities to apprehend murderers of alleged American subject, but evidence was otherwise slight, claim *disallowed*. Fact that evidence furnished by respondent Government is meagre does not relieve claimant Government of obligation to furnish concrete and convincing evidence.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 875; Annual Digest, 1929-1930, p. 188; British Yearbook, Vol. 11, 1930, p. 223.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$50,000.00 with interest is made in this case by the United States of America against the United Mexican States in behalf of Lily J. Costello, John Costello, William Costello, Theresa Costello Penico, Maria Eugenia Costello and Ana Maria Costello. The claim is grounded on an assertion of a denial of justice growing out of the failure of Mexican authorities to take adequate steps to apprehend and punish persons who killed Timothy J. Costello, an American citizen, in Mexico in the year 1922 and robbed his home.

During the course of oral argument the United States withdrew all claim in behalf of John Costello, William Costello and Theresa Costello Penico. The remaining claimants are therefore now Lily J. Costello, a sister of Timothy J. Costello, deceased, and Maria Eugenia Costello and Ana Maria Costello, two daughters of the deceased.

The substance of the allegations in the Memorial upon which the claim is grounded is as follows:

At the time this claim arose, and for some time prior thereto, Timothy J. Costello, an American citizen, was residing in the vicinity of Texcoco, State of Mexico, Republic of Mexico, where he was a joint owner of a ranch called La Blanca. He was engaged in the business of dairying and raising dairy cows. On several occasions previous to the time this claim arose depredations had been committed upon the ranch, and Costello had requested the appropriate authorities to furnish adequate police protection to the locality in which the ranch was located but no such protection was afforded. At about 6.30 o'clock in the afternoon of January 4, 1922, while Costello was seated in his home on the ranch, bandits entered the home without warning and brutally assaulted, shot and killed Costello. James Kelly, a partner of Costello, immediately fled from the house, and although pursued by a number of the outlaws, he escaped. The bandits remained in possession of the house for some time, appropriating to their own use valuable personal articles, money and firearms.

Immediately after the murder of Costello, local authorities at Texcoco were notified with a view to having the bandits apprehended and punished for the crime which they had committed. A small number of soldiers was sent to the scene of the crime where they remained throughout the night. No efforts were made by them to ascertain the whereabouts or the identity of the intruders, and on the following morning they returned to their quarters at Texcoco. The body of the deceased could not be cared for until the proper officials had taken due note of the tragedy. It was, therefore, allowed to remain where it fell from Wednesday until Friday afternoon, in a state of decomposition, when the administrative procedure for investigating such cases was finally completed and permission was given to inter the body. The local authorities were indifferent with respect to the apprehension of the intruders and were dilatory in acting. Although James Kelly was in the house with the deceased at the time the crime was committed, and notwithstanding the fact that the crime was committed on January 4, up to January 12, no one in authority had made inquiry of Kelly regarding the attack or the identity of the persons responsible for the crime. While some efforts on the part of the authorities were made to apprehend the persons responsible for the crime, it was not until after sufficient time had elapsed to enable them to escape. No persons have been apprehended or punished for the offense.

Questions were raised by Mexico with respect to the nationality of all persons appearing in the Memorial as claimants. In view of the fact that claim is now made in behalf of only three of these persons, questions of this character of course need to be considered with respect to those three only.

There is satisfactory evidence that Lily J. Costello was born in Philadelphia, Pennsylvania, in 1887. She is therefore a native citizen of the United States.

In reaching a determination with respect to the status of the children of Timothy J. Costello, it is necessary to begin with a consideration of the status of their grandfather, Michael Costello, the father of Timothy J. Costello. It is proved that Michael Costello, who was born in Ireland, was naturalized as an American citizen by a court in Philadelphia on September 19, 1888.

It is shown by sworn statements made by Timothy J. Costello before an American Consular Officer in Mexico and by an affidavit executed by his brother, William E. Costello, and his sister, Lily J. Costello, that Timothy J. Costello, a British subject by birth, arrived in the United States in 1896, and resided there about ten years. The evidence before the Commission justifies the conclusion that Timothy J. Costello acquired citizenship of the United States under the provisions of Section 2172 of the Revised Statutes of the United States which reads in part as follows:

“The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof.”

From an affidavit made by Lily J. Costello, and from baptismal certificates executed in Mexico, it may be concluded that Ana Maria Costello and Maria Eugenia Costello were born in Mexico in 1909 and 1912, respectively. They were, accordingly, born American citizens under the provisions of Section 1993 of the Revised Statutes of the United States which reads as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Although these children were born in Mexico, it appears that their status involves no question of dual nationality in view of the provisions of Article 30 of the Mexican Constitution of 1917 from which it appears that persons born in Mexico of foreign parents in order to be regarded as Mexicans must declare within one year after they become of age that they elect Mexican citizenship, and must further prove that they have resided within the country during the six years immediately prior to such declaration. See also the Mexican law of 1886 relative to citizenship. Costello's children left Mexico before becoming of age and have been living in the United States since 1924.

In view of the facts and the applicable law which have been stated above, it appears that this claim is now made in behalf of three American citizens. According to the record they are all at the present time residing in the United States.

For the purpose of clarifying questions of nationality raised in the case, the Commission requested the American Agency during the course of oral argument to furnish further evidence. In response to this request there were produced copies of records showing that Timothy J. Costello had been registered in the American Consulate General at Mexico City in 1911 as an American citizen; that he was again registered there in 1920, and his registration was approved; but that subsequently in the same year, an instruction was sent to the Consul General disapproving the registration. Without entering into any discussion of the conclusion upon which the Department of State based its action in cancelling the registration of Costello, it may be said that the Commission feels constrained to accept that action as conclusive with respect to Costello's status under the applicable law and regulations. The statutory provisions under which that action was taken are found in Section 2 of the Act of March 2, 1907, 34 Stat. 1228, and read as follows:

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe."

The Department of State decided that Costello had failed to overcome the presumption referred to in the above mentioned statute which was referred to by Attorney General Sargent in an opinion rendered February 8, 1928, as being "so loosely drawn that its operation and effect have been in doubt ever since its passage." As was pointed out in that opinion, questions have at times been raised whether the citizenship of a person who fails to rebut the presumption is terminated or whether merely the right of protection is withdrawn from such a person while resident abroad, although citizenship is retained.

It does not appear that the court of last resort has ever passed upon this point. The question of the effect of an un rebutted presumption was raised

in *Gay v. United States*, 264 U. S. 353, but in that case the court held that the presumption had not arisen against the particular person whose status was under consideration by the court because of protracted residence in the country of his nativity. The court therefore found it unnecessary to make a pronouncement with respect to the effect of the presumption.

In the light of what seems to be a reasonable interpretation of the language of the statute, it seems to be clear that the law should be construed simply to deprive persons of protection while residing abroad and not entirely to nullify their citizenship, and that this interpretation is well supported by the action of both judicial and administrative officials of the Government of the United States.

On December 1, 1910, Attorney General Wickersham rendered an opinion to the Secretary of Commerce and Labor, 28 Ops. Atty. Gen. 504, with respect to the case of a native of Syria who was naturalized in the United States and subsequent to his naturalization returned to his native country, where he married a Syrian woman and remained for more than two years and then returned to the United States bringing with him his wife. The Attorney General stated in his opinion that the man did not by his residence abroad cease to be an American citizen, and that his wife should also be deemed to be a citizen and not subject to exclusion under the immigration laws, although she was afflicted with trachoma, a contagious disease. Mr. Wickersham expressed the view that the Act of March 2, 1907, was limited to naturalized citizens while residing in foreign countries beyond the period stated in the Act, the object thereof being to relieve the Government from the obligation to protect such citizens after residence abroad of a sufficient time to raise the presumption that they do not intend to return to the United States, and that the Act did not apply to citizens who returned to the United States. This opinion of the Chief Law Officer of the Government appears to furnish the most reasonable interpretation of which this vague and uncertain language of the statute is susceptible.

It is, of course, well established that the Executive under the Constitution of the United States is charged with the protection of the lives and property of American citizens abroad. Under the Act of March 2, 1907, Congress has sanctioned action on the part of the Department of State, acting under the direction of the President, in prescribing certain rules under which naturalized citizens resident abroad for specified periods must bring themselves in order to receive the continued protection of the Government while so resident. In carrying out the statute and the rules prescribed pursuant thereto, the Department is performing executive functions in relation to the protection of citizens abroad, as it did prior to the enactment of the statute, in the exercise of a discretion not defined by these specific rules. The law provides for naturalization through judicial action and for the cancellation of naturalization through judicial proceedings. There appears to be no good reason to believe that any intent should be imputed to Congress to authorize the Department of State to cancel the citizenship of persons abroad by prescribing rules to which such persons must conform in order to prevent themselves from becoming denaturalized. The Act contains no such express authorization. It makes no mention of cancellation of citizenship. It does not seem to be reasonable to suppose that Congress intended to prescribe a forfeiture of citizenship through residence abroad in the absence of explicit language such as is used in the provisions of the law relating to expatriation by naturalization under the laws of a foreign country or by the taking of an oath of allegiance to a foreign Government.

When dealing with the specific subject of loss of citizenship Congress in clear terms prescribed the manner in which that takes place. The first paragraph of Section 2 of the Act of March 2, 1907, reads as follows:

“That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken on oath of allegiance to any foreign state.”

It seems pertinent to note the title of the Act of March 2, 1907, which is “An Act in Reference to the Expatriation of Citizens and their Protection Abroad.”

Presumably executive officials of the United States have been guided by Mr. Wickersham’s opinion since the date of its rendition. The Department of State which has been so very largely concerned with the construction of these provisions, has evidently acted in accordance with Mr. Wickersham’s opinion. See *Compilation of Certain Departmental Circulars Relating to Citizenship, Registration of American Citizens, Issuance of Passports, Etc., 1925*, pp. 34, 45, 120.

On March 31, 1916, an opinion was rendered by Judge Hough of the District Court of the United States for the Southern District of New York from which it may appear that the Act of March 2, 1907, was given a construction at variance with that put upon it by Attorney General Wickersham. *United States ex rel. Anderson v. Howe*, 231 Fed. 546. A person named Anderson came to the United States from Sweden in 1891, was naturalized in 1905, and in the year following returned to Sweden, where he remained continually until 1915, when he again returned to this country. On his arrival in New York the immigration authorities found him insane and nearly penniless. He having been held as an alien within the prohibited classes, and ordered deported by the Secretary of Labor, a writ of *habeas corpus* was taken out in his behalf. The Court discharged the writ and remanded the relator. Anderson had not presented to any diplomatic or consular officer of the United States evidence to overcome the statutory presumption. Judge Hough stated that, although he thought that the presumption was rebuttable, Anderson was subject to exclusion as an alien. Without going into a discussion of the facts in the Anderson case, it may be observed that they differed considerably from the facts in the case dealt with in the opinion rendered by Attorney General Wickersham. If Anderson was an alien it would seem that he could have become an American citizen only through naturalization conformably to the provisions of the naturalization law, and it is not clear why or how he should rebut any presumption that had arisen against him in order again to obtain American nationality.

The view that a person who has not rebutted the presumption becomes an alien does not appear to be supported by other opinions rendered by Federal or State courts.

It is interesting to note that Judge Learned Hand, in *Stein v. Fleischman Company*, 237 Fed. 679, referred to the Anderson case and stated that it was one in which the treaty with the relator’s country of origin, Sweden, was such that a renewal of residence in Sweden in itself repatriated the naturalized American citizen. As the case came before the court, said Judge Hand, the relator’s residence, Sweden, had to be accepted as a fact, and “language regarding the Act of 1907 was therefore obiter.”

In *Thorsch v. Miller*, 5 Fed. (2d) 118, Chief Justice Martin of the Court of Appeals of the District of Columbia stated that the court took judicial notice of the interpretation given the Act by the Department of State, that

the presumption "continues to exist only while the naturalized citizen continues to reside abroad, and that upon the return of the individual to the United States and upon his establishment there in good faith of a permanent residence the reason for the presumption disappears."

In *Nurge v. Miller*, 286 Fed. 982, a suit to recover property taken by the Alien Property Custodian of the United States from a man who went to Germany in 1909 and did not return until after the Armistice, Judge Campbell said:

"I have, however, examined all of the cases cited and believe that the presumption may be, and in the case at bar has been overcome by the return of the plaintiff and the proof of his intention during all of his absence to remain a citizen of the United States."

See also *United States v. Eliassen*, 11 Fed. (2d) 785; and *Banning v. Penrose*, 255 Fed. 159.

It is interesting to consider, in connection with the case before the Commission, the case of *Nelson v. Nielsen, et al.* decided by a State court, the court of last resort of Nebraska, on April 16, 1925, 113 Neb., 453. In May of 1908, Chris Nelson, a naturalized citizen of Danish origin, sailed for Denmark. On the 18th day of December of the same year he was married in that country to a subject thereof, and by her he had a daughter, Hertha Oman, born on the 28th day of May 1910. In 1913 he returned to Nebraska to attend to some legal business in connexion with his land, after which he went back to Denmark, where he died, November 21, 1915. Subsequently his estate was duly settled by proceedings before a probate court in the State of Nebraska, and his personal property was distributed to his widow and daughter, the court adjudging that these persons were his sole heirs, and were entitled to his real estate by descent.

Their title to the real estate was later contested by a brother of the deceased. The Supreme Court said that the statutory presumption which had arisen against the deceased on account of his protracted residence abroad was enacted to relieve the Government of the United States from the duty of protecting its citizens long abroad in certain cases, and that the presumption could be rebutted not only by the presentation of evidence to a diplomatic or consular officer but by other sufficient means and circumstances. In the light of the evidence before the court it was further said that there was no difficulty in deciding that Nelson was to his death a citizen of the United States. His daughter, whose nationality was determined by that of the father, was also a citizen, said the court. And it further stated that while it might be that the widow, as a naturalized citizen, should have registered before an American consul in Denmark in order to retain her citizenship, in the absence of proof that she had not done so, she would be considered a citizen, having become one by her marriage to Nelson.

In an Act approved March 4, 1923 (42 Stat. 1516) Congress made provision for the return in certain cases of property seized by the Alien Property Custodian during the war between the United States and Germany. By Section 21 of that Act it was provided that the claim for the return of property "of any naturalized American citizen" should not be denied on the ground of any presumption of expatriation which had arisen against him under the Act of March 2, 1907. The Act therefore refers to a person against whom a presumption had arisen as an "American citizen" and not as an alien.

Sufficient citations have been made to show that neither the executive

department of the Government nor the legislative department nor the judiciary, with the possible exception of a single judge, have construed the Act of March 2, 1907, to effect a cancellation of citizenship of persons against whom the presumption therein stated has run.

When it is considered that the status of a great number of parents and children, as well as property rights, the nature and extent of which can not be estimated, must have been affected by the interpretation given to the law by both administrative and judicial officials over a long period of time, it seems proper to assume that a reasonable construction such as that placed upon the Act by Attorney General Wickersham would not lightly be set aside by any court. See with respect to the principle of contemporaneous interpretation, *Stewart v. Laird*, 1 Cranch 299; *The Laura*, 114 U. S. 411.

If the view should be taken that residence abroad for specified periods, coupled with the failure to rebut the statutory presumption, results in loss of citizenship, it would be uncertain when citizenship is nullified—whether that takes place after the expiration of the statutory periods, or after a consular or a diplomatic representative has passed upon the evidence submitted by persons against whom the presumption has run, or after the Department of State has passed upon it, or after persons have been notified of rulings made in their respective cases. There appears to be nothing in the law of 1907 to justify the view that Congress intended to legislate in such uncertain terms with respect to such a serious question as the cancellation of American citizenship.

It also seems to be unreasonable to suppose that Congress enacted a measure which would seem clearly to be in derogation of the authority vested in it under the Constitution. By Article I, Section 8, of the Constitution Congress is empowered to establish a uniform rule of naturalization. It would seem to be obvious that just as naturalization takes place through the exercise of a legislative function, denaturalization can only be effected by the legislative department of the Government, and not by an executive department like the Department of State. In connection with both naturalization and denaturalization Congress has imposed certain functions on the judiciary.

Under authorization from Congress, the Department of State has prescribed certain rules with respect to the rebuttal of a presumption arising from protracted residence abroad. These rules require proof explanatory of such residence. They relate to residence abroad for business purposes, or for reasons of health, or because of unforeseen exigencies, or for other specified reasons.

Undoubtedly Congress would have the constitutional power to enact a law declaring that, whenever the Department of State shall ascertain that a naturalized citizen has lived abroad for any specified period, such citizen shall cease to be an American citizen. The denaturalization here would take place upon the simple ascertainment of a fact by the Department. In such a case the legislative department would not be delegating its power to make a law but merely the power to determine some fact or state of things upon which, according to the terms of the law, that Department's action should depend. Two outstanding points in *Field v. Clark*, 143 U. S. 649, one of the most interesting cases in which the subject of the delegation of legislative power has been discussed, seem to be that discretion must not be vested in the Executive authorizing him in effect to make law, and that such discretion as the Executive has must relate to the execution of the law.

Congress could probably itself prescribe rules similar to those framed by the Department and declare that, whenever a naturalized citizen failed, in the judgment of the Department, to rebut a presumption in accordance with such rules, he should cease to be an American citizen. While in such a case undoubtedly a considerable measure of discretion on the part of the Department of State would be involved in ascertaining whether a naturalized citizen brought himself within these rules, it would seem, in the light of decisions of the Supreme Court bearing on the subject of delegation of legislative power, that an Act might properly be framed within the limits of constitutional authority.

But it would seem to be clear that Congress could not properly say that a naturalized American citizen residing abroad should cease after certain specified periods to be an American citizen, unless he complied with certain rules prescribed by the Department of State to determine conditions under which he might remain a citizen or be denaturalized. Such a law would appear clearly to have the effect of delegating to the Department of State authority to prescribe rules with respect to the denaturalization of American citizens, and in effect to give judicial application to such rules. There seems to be nothing in the law of 1907 to justify the conclusion that Congress undertook to enact such a law.

According to a ruling of the Department of State, Timothy J. Costello evidently was not considered to be entitled to protection of his Government at the time he was killed in Mexico. But he was an American citizen at that time. He was not a Mexican. And he had not by any action of his Government been outlawed as a man without a country. There was nothing in any established rule of domestic policy that would have precluded his Government from extending protection to him at some future date after he had returned to his own country to reside.

But the precise case before the Commission is one in which complaint is made that proper steps were not taken to apprehend and punish the murderers of an American citizen. That the Department of State might have been unwilling to protect Costello had he sought its protection shortly before his death can in no way be determinative of the right of the United States at this time to invoke the rule of international law requiring effective measures with respect to apprehension and punishment of persons who injure an alien. That rule is invoked in this case with a view to obtaining compensation for three American claimants now resident in the United States.

One of the claimants, Costello's sister, is a native citizen. Costello's daughters were born American citizens. They are not naturalized citizens in the sense in which that term is generally used. The presumption referred to in Section 2 of the Act of 1907, applies to naturalized citizens only. It is possible that one of the daughters may have been born after the presumption arose against their father, but it is not at all certain that this is a fact. Even if it were and in some way that could affect her status as an American citizen, both daughters are now resident in the United States, and their citizenship seems to be unquestionable.

In passing upon the complaint of negligence with respect to the apprehension and punishment of the persons who participated in the killing of Costello and the robbery of his home, the Commission is confronted, as it has been repeatedly in other cases, with the difficulty of basing any conclusion on meager and vague evidence. Information in communications sent to the Department of State by American Consular and Diplomatic representatives

in Mexico City is of too general and meagre a character to furnish the basis of a pecuniary award. The most definite statements furnished are found in a brief letter of January 9, 1922, transmitted by the American Consular representative at Mexico City to the American Chargé d'Affaires in Mexico. It is stated in that letter that during the evening in which Costello was killed a small detail of soldiers went to his home, remaining there all night, but that they accomplished nothing and made no effort to find the robbers or to ascertain who they were or from whence they came. It is further stated that no one in authority made inquiry of Mr. Kelly regarding the circumstances; that as the body of Costello could not be cared for until the officials had taken due note of the tragedy, it was allowed to lie where it fell from Wednesday evening until Friday afternoon; and that no steps appeared to have been taken by the authorities other than the sending of the military detail. It is not explained in this letter what opportunities the Consul had to obtain information respecting the actions of the authorities. From copies of communications exchanged between Mexican officials which have been produced by the Mexican Agency it appears that some investigations were made; also that soldiers encountered the bandits and killed the leader because he resisted arrest.

As was pointed out in the opinion of the Commission in the *Archuleta* case, Docket No. 175,¹ the Commission must reach a conclusion on the strength of the evidence produced by both parties. Evidence furnished by the respondent Government must of course be considered both with respect to what it may show against contentions advanced in defense to the claim and with respect to what may be revealed in support of such contentions. But the mere fact that such evidence is meagre can not in itself justify an award in the absence of concrete and convincing evidence produced by the claimant Government. In the light of the unsatisfactory evidence before the Commission, the Commission is constrained to dismiss the claim.

Dr. Sindballe, Presiding Commissioner:

I concur in the conclusion reached by Commissioner Nielsen, but it does not seem to me that the authorities quoted by him warrant a deviation from the wording of Section 2 of the Act of March 2, 1907, according to which a naturalized citizen in certain cases shall be presumed to have ceased to be an American citizen, as long as he does not rebut the presumption by returning to the United States with the intent of establishing a permanent residence there or otherwise, and it does not appear that after the statutory presumption first arose against Timothy J. Costello, anything ever occurred which might have put him in a position to overcome the presumption.

Fernández MacGregor, Commissioner:

I concur in the opinion of the Presiding Commissioner. This Commission has jurisdiction over the instant case, since at least two of the claimants are American citizens, but in view of the fact that Timothy J. Costello died without overcoming the presumption of having lost his American citizenship, it could not be said that Mexico was in relation to the United States under an international obligation of punishing his murderers and thus, the alleged failure to prosecute does not constitute as to the United States an international delinquency.

¹ See page 376.

Decision

The claim made by the United States of America in behalf of Lily J. Costello, Maria Eugenia Costello and Ana Maria Costello is disallowed.

GEORGE W. COOK (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929, dissenting opinion by American Commissioner, undated. Pages. 266-281.)

RESPONSIBILITY FOR ACTS OF *De Facto* GOVERNMENT. Contract for sale of school benches entered into with respondent Government during Huerta regime held a contract of an impersonal character for which respondent Government would be responsible.

CONTRACT CLAIMS.—EFFECT OF DOMESTIC LAW UPON RIGHT TO CLAIM.—

CONTRACT WITH AGENT. Claimant sold respondent Government 5,000 school benches, the delivery of 4,500 of which it admits, for which no payment was ever made. The contract therefor was entered into between the Ministry of Public Instruction and Fine Arts and claimant's agent in his personal capacity. *Held*, since claimant could not under Mexican law sue the respondent Government under contract made in the name of his agent, claim *disallowed*:

Cross-references: Am. J. Int. Law, Vol. 24, 1930, p. 398; Annual Digest, 1929-1930, pp. 177, 255.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$ 13,750, United States currency, with interest, is made against the United Mexican States by the United States of America on behalf of George W. Cook, an American citizen, for non-payment of the purchase price of 5,000 school benches alleged to have been delivered to the Mexican Ministry of Public Instruction and Fine Arts during the period from December 1913 to February 1914 pursuant to a contract of August 9, 1913, said to have been entered into between the said Ministry and Mosler, Bowen & Cook, Sucr., of which business house the claimant was the sole owner.

The respondent Government denies that 5,000 school benches were delivered, but admits the delivery of 4,500 benches. It contends, however, that Mexico is not obligated to pay Cook for the benches, first, because the transaction in question took place with an illegitimate authority, the General Victoriano Huerta administration, and secondly, because the said contract of August 9, 1913, was entered into between the Ministry of Public Instruction and Fine Arts and Sr. José Solórzano, and not between the Ministry and the claimant. With regard to the first of these contentions the Commission refers to its decision in the case of *George W. Hopkins*, Docket No. 39,¹ and the case of the *Peerless Motor Car Company*, Docket No. 56.² With regard to the second contention the pertinent facts are stated in the Memorial to be as follows:

¹ See pages 41 and 218.

² See page 203.

In July, 1913, the Mexican Minister of Public Instruction and Fine Arts called a meeting of the representatives of various commercial houses in Mexico City, and informed those present that the Ministry desired bids for 30,000 school benches. At this meeting Mosler, Bowen & Cook, Sucr., was represented by José Solórzano, who was one of their salesmen. Some time after the meeting Mosler, Bowen & Cook, Sucr., was informed that the Ministry had decided to apportion the order for the 30,000 school benches among various houses, and that that firm would receive an order for 6,000 benches as its share of the business. A representative of the Ministry afterwards asked the firm to prepare a contract for the construction of the 6,000 benches and to present it to the Ministry for signature. Accordingly it prepared a contract, and the claimant and Solórzano took it to the Ministry for signature. They were informed that an official of the Ministry wished to confer with Solórzano privately. By this official Solórzano was told that the Minister desired that the contract be entered into between the Ministry and Solórzano personally and not between the Ministry and Mosler, Bowen & Cook, Sucr. Solórzano as well as the claimant agreed thereto, and the contract was executed accordingly. Solórzano immediately turned the document over to Mosler, Bowen & Cook, Sucr., in whose factory the benches were built, and to whose factory a representative of the Ministry came for the purpose of inspecting benches that had been completed. All correspondence with the Ministry regarding the matter took, for the sake of consistence, place in the name of Solórzano, and also the invoices were issued in his name.

The question before the Commission is whether or not the claimant himself could sue under the contract entered into between the Ministry and Solórzano. On principle, that must depend on the intention of the parties, or, if the intention of the parties be not clear, what must be presumed to have been the intention of the parties. From the works of various civil law authors it appears that in countries, and among these Mexico, where the civil law obtains, the sole fact of a contract having been entered into by an agent in his own name excludes the principal from right of action. Mexican law contains an exception to this rule in case the agent is a "factor", who, according to Art. 309 of the Mexican Code of Commerce, is a person who has the management of a manufacturing or commercial undertaking or establishment, or who is authorized to enter into contracts in regard to *all* matters in reference to such an establishment or undertaking, but this exception does not apply in a case like the present, Solórzano not being a "factor" of Mosler, Bowen & Cook, Sucr. In Anglo-Saxon law the sole fact of a contract having been entered into by an agent in his own name is not considered as establishing a conclusive presumption that the intention was to deal with the agent only, at any rate not if the principal is undisclosed, and, by the weight of authority, not even if, as in the present case, the principal is disclosed. But, of course, a conclusive presumption may be established where there are further facts that point in the direction of an intention to exclude the principal from a right of action. So in *Die Elbinger Actien-Gesellschaft v. Claye*, L. R. & Q. B. 313, the further fact that the principal was known to be a foreigner, was held to raise a presumption that the contract was with the agent only. Now, in the present case, the claimant was a foreigner, and, further, it was at the express demand of the Minister that the contract was entered into between the Ministry and Solórzano personally. It therefore seems at any rate doubtful, if, according to Anglo-Saxon law, a principal would have the right to sue in a case like

the present, and, as above stated, according to Mexican law, by which the contract in question is governed, it must be assumed that he would not.

It appears that on February 4, 1915, Solórzano transferred any right he might have had under the contract in question to the claimant. The Commission has, however, no jurisdiction to enforce the right obtained by the claimant in virtue of this transfer.

Decision

The claim of the United States of America on behalf of George W. Cook is disallowed.

Commissioner Nielsen, dissenting.

This is a claim to obtain compensation for a quantity of school benches delivered to and accepted by the Mexican Government. As stated in the opinion of my associates, it appears that Mosler, Bowen & Cook, Sucr., were informed that they would receive an order for 6,000 benches as that firm's share of a total number which it had been made known to commercial firms was desired by the Government. The firm was asked to prepare a contract for the construction of the number allotted to it. When Solórzano, a salesman for the firm, took such a contract to the Mexican Minister of Public Instruction and Fine Arts, the latter said that he desired that it should be entered into personally between the Minister and Solórzano, and it was so executed. It is stated in the majority opinion that the question before the Commission is whether or not the claimant himself could sue under the contract entered into between the Ministry and Solórzano. In my opinion the question is whether this Commission can, conformably to the terms of submission in the Convention of September 8, 1923, that is, "in accordance with the principles of international law, justice and equity", make an award to the effect that Cook shall be paid the contract price of the benches. The legal questions involved in that issue are different from the point whether a Government may be sued on a contract.

In this case, as it happens in many other international cases, the questions of domestic law are much more difficult than those involved in the application of the proper principles of international law. The situs of every element of the contract invoked is in Mexico. Therefore the contract is governed in all respects by the law of Mexico. Any rights Cook has under the contract are therefore determined by Mexican law. If he had no rights, it is of course unnecessary to proceed to the question whether in the light of any principle or rule of international law such rights were infringed.

In the ultimate determination of responsibility under international law I think an international tribunal in a case of this kind can properly give effect to principles of law with respect to confiscation. International law does not prescribe rules relative to the forms and the legal effect of contracts, but that law is, in my opinion, concerned with the action authorities of a government may take with respect to contractual rights. If a government agrees to pay money for commodities and fails to make payment, it seems to me that an international tribunal may properly say that the purchase price of the commodities has been confiscated, or that the commodities have been confiscated, or that property rights in a contract have been destroyed or confiscated.

I assume that it is generally recognized that confiscation of the property of an alien is violative of international law, just as it is generally forbidden

by domestic law throughout the world. See "*Basis of the Law Against Confiscating Foreign-Owned Property*" by Chandler P. Anderson, *American Journal of International Law*, 1927, Vol. 21, p. 525. The extent to which principles of international law have been applied to this subject is interesting. While generally speaking the law of nations is not concerned with the actions of a government with respect to its own nationals, we find in international law a prohibition against confiscation even with respect to the property of a nation's own nationals; a well recognized rule of international law requires that an absorbing state shall respect and safeguard rights of persons and of property in ceded or in conquered territory. See American Agent's Report in the American and British Claims Arbitration under the Special Agreement of August 18, 1910, pp. 107 *et seq.*; pp. 167 *et seq.*

If Cook had rights under this contract, then he was entitled under the terms of the contract to receive compensation for the benches which he manufactured and delivered and which Mexico accepted and received but did not make payment for to any one. The brief of the American Agency contains no citation of Mexican law throwing light on the peculiar contract signed by Solórzano with a Mexican official. The effect of this contract under that law is the only point of difficulty in this case. In the written and in the oral argument counsel appeared to rely principally on two international cases, the *Henry* case before the American-Venezuelan Commission of 1903, *Ralston's Report*, p. 14, and the *McPherson* case before this Commission, *Opinions of the Commissioners*, Washington, 1927, p. 325.

In the *Henry* case claim was made to obtain compensation for Heny because of damage inflicted by Venezuelan authorities on a plantation with respect to which Heny asserted some rights, although he evidently was not the owner of it. One of the Commissioners, Mr. Bainbridge, considered that Heny's right might be considered in the nature of an antichresis. With respect to the argument of counsel for Venezuela that a contract upon which Heny based his claim of rights was void, because under Venezuelan law record in a registry was indispensable to the validity of the instrument, Mr. Bainbridge said that the argument was untenable; that the contract was valid as between the parties whether recorded or not; and that, whatever might be the effect of the registration law with respect to the rights of innocent third parties, it could have no effect in excusing the acts of a trespasser or tortfeasor. The case having passed for a decision to the Umpire, Mr. Barge, he stated that the contract relied upon in behalf of Heny was not a mortgage or a sale of an estate, and also lacked the characteristics of an antichresis. He found, however, that Heny did have an interest in the estate and an award was made by the Umpire in Heny's behalf. The reasoning upon which the Umpire based his conclusion is indicated by the following passages from his opinion:

"Whereas, however—whatever may be the technical deficiencies of the instrument—whilst interpreting contracts upon a basis of absolute equity, what the parties clearly intended to do must primarily be considered;

"And whereas, it was clearly the intention of parties that no one but the claimant should have a right to expropriate anything belonging to this estate, nor to profit by the revenues, at all events so long as his interest in the estate should last, which interest the heirs wished to guarantee; and whereas this interest existed as well in the sum invested by him in the estate as in the debts he assumed and which he might pay out of the estate, the credits and debits of which were equally transferred to him by the owners; whereas, therefore, according to this contract at the moment the facts which obliged the Venezuelan

Government to restitution took place, the only person who directly suffered the 'detrimentum' that had to be repaired was the claimant E. Heny;

"Whereas, it being true that according to the principles of law generally adopted by all nations and also by the civil law of Venezuela; contracts of this kind only obtain their value against third parties by being made public in accordance with the local law—in this claim before the Commission, bound by the Protocol, to decide all claims upon a basis of absolute equity, without regard to objections of a technical nature or of the provisions of local legislation, this principle can not be an objection, and even when made this objection may be disregarded without impairing the great legal maxim, *locus regit actum*, as equity demands, that he should be indemnified who directly suffered the losses, and it not being the question here who owned the estate 'La Fundación', but who had the free disposition over and the benefit and loss of the values for which restitution must be made, and who, therefore, in equity, owns the claim for that restitution against the Venezuelan Government."

The *McPherson* case is more nearly in point with respect to the instant case. In the former, claim was made in behalf of J. A. McPherson to recover the aggregate amount of some postal money orders which were not paid upon presentation to Mexican postal authorities. In behalf of Mexico it was contended, among other things, that no claim could be maintained before the Commission in behalf of the claimant, since it was shown by the evidence that the money orders were not the property of the claimant, they having been issued in the name of John Davidson. This contention was met by the United States with the argument that Davidson was an agent and banker for McPherson, and that the former bought money orders with money belonging to the latter who could be regarded as an undisclosed principal. The Commission found that the evidence showed beyond a reasonable doubt that the money orders were bought by Davidson for McPherson with funds belonging to the latter, and it was not denied by Mexico that McPherson might have had an interest in the money orders. In the opinion of the Commission it was stated that an award in favor of the claimant could not result in the payment of money to any other than the one who lost as a result of the non-payment of the money orders. By this opinion which was unanimous an award was made in favor of the claimant.

Possibly money orders may more appropriately be regarded as the means employed in the exercise of a governmental authority for the public benefit rather than as contracts or commercial transactions. Nevertheless the relationship between the purchaser of a money order and the Government is certainly in a sense of a contractual nature. In the instant case we are dealing with the legal effect of a contract. Neither Cook nor Solórzano was paid. There is no doubt that the loss resulting from the failure of the Mexican Government to meet its contractual obligations falls on Cook, just as the failure to pay the money orders resulted in a loss to McPherson. However, in order to justify an award in favor of Cook, the possession by him of a legal interest must be shown.

It was recognized in the *Heny* case and in the *McPherson* case that the claimant had some interest, and that because of that interest and of the wrongful act of governmental authorities the claimant in each case suffered a loss. In the *Heny* case it appears that Umpire Barge attached considerable significance to the term "equity" appearing in the terms of submission in the arbitral agreement under which he functioned. The terms of submission in the Convention of September 8, 1923, requiring a determination of cases in accordance with the principles of international law, justice and equity,

are somewhat elaborate, especially when they are considered in connection with the jurisdictional provisions of the Convention which are concerned with claims described in part as claims "for losses or damages suffered by persons or by their properties", and for "acts of officials or others acting for either Government and resulting in injustice". I think that the Commission has generally proceeded on the theory that, in spite of the somewhat elaborate terminology of the Convention, it is simply required by the Convention that all cases shall be decided by a just application of law; that the Commission should not render awards based on some personal undefined theories of equity which may differ greatly in the minds of different people. Perhaps since clearly Cook only is the loser as a result of the failure of Mexico to pay for the benches, which the Mexican Government received and Cook manufactured and delivered, and since neither Agency has made clear in the proceedings before the Commission the legal effect under Mexican law of the contract invoked in this case, the Commission could properly, by taking an equitable view of the case, so to speak, render an award to compensate Cook for the loss suffered by him. However, I think it is possible, particularly in the light of the conduct of the parties revealing their construction of the contract, to conclude that Cook had legal rights which were ignored.

It is stated in the majority opinion that from "the works of various civil law authors it appears that in countries, and among these Mexico, where the civil law obtains, the sole fact of a contract having been entered into by an agent in his own name excludes the principal from right of action." No citation of any author or from any code is made to support this conclusion, except with regard to an exception in Mexican law, which, however, is said not to be pertinent to the instant case. The correctness of the above quoted conclusion with respect to an exception being assumed, it is conceivable that there may be another exception in Mexican law which is pertinent. Had it been possible to invoke some provision of Mexican law, which is the law with which we are concerned in construing the contract in question, a law clearly showing that Cook had no rights under the contract, then of course I could have no occasion to dissent from the conclusions reached by my associates, since, as I have pointed out, Mexican law is controlling with respect to the question of Cook's rights under the contract.

It is stated in the majority opinion that the question before the Commission is whether the claimant could sue under the contract entered into between the Ministry and Solórzano. In dealing with an international case it should be borne in mind that the right of a person to sue a government under domestic law is not conclusive with respect to rights that may be invoked in behalf of such a person under international law. For example, the Government of the United States and the Government of Great Britain, generally speaking, do not allow themselves to be sued in tort, nor do the tribunals of either of the two Governments pass upon political acts of the Government which created them. But redress guaranteed by international law for wrongful action can of course be obtained in behalf of aliens in other ways than by suits against the Government, as through diplomatic channels, or through the action of international tribunals. International reclamations for the most part grow out of what in terms of domestic law is described as tortious acts. So, likewise, in a case in which a government might not by its domestic law provide for suits in contract against itself, money due under a breach of contract could nevertheless be recovered in

a proceeding before an international tribunal. Prior to the year 1855, the Government of the United States did not allow itself to be sued in contract. Persons having private claims against the Government had recourse solely to applications to Congress. The right to bring an action in contract against the Government was granted by the Act approved February 24, 1855, 10 Stat. 612. *Court of Claims Reports*, Vol. 17, pp. 3 *et seq.* A petition of right lies before British courts with respect to matters of contract.

In the majority opinion there is some discussion of rights of action under Anglo-Saxon law. Since the contract invoked in the instant case is governed by Mexican law, the principles of the common law or statutory provisions obtaining in so-called Anglo-Saxon countries have no relevancy except possibly by way of analogy. Under Anglo-Saxon law it is of course well established that an undisclosed principal may sue on the contract.

The case of *Die Elbinger Actien-Gesellschaft v. Claye*, L. R. & Q. B. 313, cited in the majority opinion, can only be fully understood when account is taken of the fact that the decision therein is based on a long established English usage of trade. Cook's firm which carried on its manufacturing and commercial business in Mexico can seemingly not be regarded as a foreign merchant in Mexico in the sense in which a German corporation doing business in Germany is foreign to England.

The principle on which *Die Elbinger Actien-Gesellschaft v. Claye* was decided does not seem to have been fully accepted in the United States. In *Bray v. Kettell*, 1 Allen 80, Chief Justice Bigelow, in making reference to cases in which it had been stated that agents acting for merchants residing in a foreign country are held personally liable on all contracts made by them for their employers without any distinction whether they describe themselves in the contract as agents or not, said:

"We are inclined to think that a careful examination of the cases which are cited in support of this supposed rule will show that this statement is altogether too broad and comprehensive. Certain it is, that if it ever was received as a correct exposition of the law, it has been essentially modified by the more recently adjudged cases. It doubtless had its origin in a custom of usage of trade existing in England, by which the domestic factor or agent was deemed to be the contracting party to whom credit was exclusively given; and it was confined to cases where the claim against the agent was for goods sold, and was not extended to written instruments. But it is going quite too far to say that this usage or custom is so ingrafted into the common law as to become a fixed and established rule, creating a presumption in all cases that the agent is exclusively liable, to the entire exoneration of his employer."

As I have already observed, there is not in this important case any citation in the majority opinion of any provision of any Mexican Code or any other legal citation as a basis for the conclusion that under the law of Mexico the sole fact that a contract has been entered into by an agent in his own name excludes the principal from a right of action. In support of a contention to that effect counsel for Mexico cited Article 284 of the Mexican Code of Commerce of 1890, reading as follows:

"When the commission merchant contracts in his own name, he shall have cause of action and liability direct with the persons with whom he contracts, without being obliged to declare who his principal is, except in the case of insurances." (Translation.)

It is difficult to perceive that language of this provision excludes the idea of rights and obligations of a principal under a contract made in the name of the agent. Article 284 of the Mexican Code seems to confer a right of

action on an agent. It is also a general rule of the common law that where a contract entered into on account of the principal is in its terms made with the agent personally, the agent may sue upon it. At the same time a principal who is the real party in interest, though not named as such, has also a right of action upon the contract which usually is paramount to that of the agent, so that if the principal sues the agent may not. *The Law of Agency*, Mecham, Vol. 2, pp. 1592-93.

In considering the effect of Article 284 of the Mexican Code it is pertinent to determine whether Solórzano may properly be regarded in connection with the transaction under consideration as a commission merchant (*comisionista*). It seems to me very doubtful that he can be so considered. Reference is made in the majority opinion to provisions of the Commercial Code of Mexico with respect to *factores*. The Code contains the following Articles:

“ART. 314. When the factor contracts in his own name, but on account of a principal, the other contracting party can take action against either the factor or the principal.

“ART. 315. Whenever the contracts entered into by the factors affect any object included in the kind of business or trade in which they are engaged, such contracts shall be considered to have been made on account of the principal, although the factor may not have so stated on entering into same, or may have exceeded his authority or committed an abuse of confidence.

“ART. 316. The contracts of his factor shall likewise bind the principal, even when they may be foreign to the class of business with which the factor is entrusted always provided that he is working under the instructions of his principal, or that the latter has given his approval in express terms or by positive acts.” (Translation.)

It is said that Solórzano was not a factor. Counsel for the United States argued that it might be just as proper to consider him to be a factor as to designate him as a *comisionista*. In my opinion he was probably neither in connection with the transaction under consideration, and the above quoted provisions from the Mexican Code are interesting merely in showing the principle of representation in Mexican law.

Counsel for Mexico perhaps did not rely fully in his contentions on the language of Article 284 of the Mexican Code, apparently considering that it might be interpreted in the light of Article 246 of the Code of Commerce of Spain reading as follows:

“Where the *comisionista* contracts in his own name, he shall not have to specify who the principal is, and he shall be liable in a direct manner, as if the business were his own, to the persons with whom he contracts, such persons to have no actions against the principal, nor the latter against them; without prejudice to the respective actions of the principal and the *comisionista* as between themselves.” (Translation.)

This provision of the Spanish Code is quoted in Lozano's publication of the Mexican Code of Commerce for 1890, and also in the same author's publication of 1889, containing the Mexican Code of Commerce with citations by way of comparison of provisions of the codes of other countries. The latter contains certain comments by Lozano on Article 246 of the Spanish Code. Counsel for Mexico apparently argued that Article 284 of the Mexican Code could be construed to have the same scope as Article 246 of the Spanish Code. To my mind it would involve an extremely liberal construction to read into the meagre language of Article 284 of the Mexican Code the comprehensive provisions of Article 246 of the Spanish Code. As has been

heretofore observed, Article 284 of the Mexican Code states a rule that is elementary in the common law with respect to the right of an agent to sue.

Apparently the principle of agency was not found in the early Roman law of contract. Hunter's *Roman Law*, 4th ed., p. 609; Sohm's *Institutes of Roman Law*, Ledlie's translation, Oxford, 1907, p. 221. But the idea of representation has of course been largely incorporated into the modern law of countries governed by the principles of the civil law, and this seems clearly to be true with respect to the law of Mexico. See on this point *Código de Comercio de los Estados Unidos Mexicanos*, Séptima, Edición, por Jenaro García Núñez y Francisco Pascual García, 1921, Arts. 51-74, 273-331; *Código Civil vigente en el Distrito y Territorios Federales*, por Francisco Pascual García, 1911, Arts. 2342-2358.

The point with respect to the intent of a party to a contract to deal with another specified party is touched upon in the opinion of my associates, and apparently was considerably stressed in the argument of counsel for Mexico. The obvious fact that a man has a right to contract with whomsoever he pleases is not inconsistent with the common law principles that an undisclosed principal or a person in whose favor a contract is made may sue on it. A man can not make a contract in such a way as to take the benefit thereof unless he also takes the responsibility of it. Counsel for Mexico argued that possibly the Mexican Government intended to contract with a Mexican citizen rather than with an alien, with the idea of avoiding diplomatic intervention in behalf of Cook or the presentation of a claim such as is now before the Commission. In my opinion the Commission is precluded from approving of any such suggestion, since diplomatic intervention could only be apprehended in case it was intended not to pay for the goods manufactured, delivered and accepted.

It seems to be pertinent to consider the point of intent in a substantial way in dealing with questions under consideration. A government buying large quantities of supplies, it must be assumed would desire to deal with responsible persons or business concerns. The Mexican Ministry seemingly would not expect a salesman to manufacture and deliver a large quantity of benches; they desired to deal with a responsible manufacturing concern; they knew that Cook's firm manufactured the benches; a Mexican representative inspected the benches on Cook's premises.

Counsel for the United States suggested that, having in mind all the facts and circumstances in relation to the somewhat peculiar transactions in question, the view could properly be taken that the writing signed by the Mexican official and Solórzano did not represent the entire contract for the manufacture and delivery of the benches. There appears to be considerable plausibility in this argument. Generally speaking, when bids for commodities are asked for and made and accepted, a contract is complete. Of course laws and regulations may prescribe subsequent formalities.

In the absence of explicit information with respect to the transactions involved in the instant claim, it seems to me that the Commission is justified in resorting to conclusions based upon the actions of the two parties to the contract whatever may be its precise nature. In the extensive record in the case there is nothing to show that the Mexican Government in the past ever suggested that Cook had no rights because he did not sign the instrument signed by the Mexican Minister and Solórzano. In the *Greenstreet* case (Docket No. 2767)¹ the Commission was called upon to construe an

¹ See page 462.

important contract signed by the General Director of the National Railways of Mexico and by an attorney of E. S. Burrowes, President of the Burrowes Rapid Transit Company. There was nothing in the language of the contract to indicate that it was made on behalf of that company. In behalf of Mexico it was contended that no contractual relations had ever existed between the National Railways of Mexico and the Burrowes Rapid Transit Company. The Commission, in reaching a conclusion with respect to this point took account of the action of the parties. In the opinion written by the Presiding Commissioner it was pertinently said:

“There is, however, ample evidence to show that the transportation business really was carried on by the Burrowes Rapid Transit Company, and that this fact was perfectly well known to representatives of the National Railways of Mexico. It must therefore be assumed that the contract entered into was intended to be a contract between the National Railways of Mexico and the Burrowes Rapid Transit Company.”

Clearly the Commission in reaching the conclusion that the Burrowes Rapid Transit Company had rights under a contract signed by a representative of the Railways and an attorney for the Burrowes Company grounded its action on the interpretation put upon the contract by the parties, particularly by the Mexican Government. I perceive no reason why a similar conclusion may not be reached in the instant case with equal or with greater propriety. Cook's firm offered to make a quantity of benches desired by the Mexican Government. The firm was asked to bring in a contract. A representative of the firm signed that contract. The Mexican Government inspected the benches on Cook's premises and accepted them on delivery.

But I think there are still more pertinent considerations of which account may be taken. It is shown by the record that from 1918 up to the latter part of the year 1926, repeated requests for payment were made in the name of the firm of Mosler, Bowen & Cook, Sucr., by a representative of the firm, and evidently not once did the Mexican Government deny liability to the firm on the ground that the contract was signed by some other party.

In reply to a communication of November 26, 1918, it was stated to the firm: “in order to settle this matter it is necessary for you to prove that the said furniture is in the possession of the present Government”. In reply to a letter of December 14, 1918, from the firm, it was said: “It is not possible to order the payment which you request, unless you can prove that the said furniture is in the possession of the present government.” In response to a request made under date of December 28, 1918, for permission to examine files pertaining to the transaction in question, with a view to locating the furniture, the firm was informed that permission could not be granted. In reply to a communication of April 25, 1921, with which the firm's representative sent to the Ministry information concerning invoices, the former was requested to call at the Department of Finance to make certain explanations. Under date of November 16, 1921, the firm was informed by the Ministry of Finance that the General Controller's Office had stated that only by an express order of the President of the Republic could this claim be accepted, since the transactions belonged to the period of Victoriano Huerta. In response to a communication of November 17, 1922, addressed to President Obregón, the President replied that “the nullity of all acts of the usurping government of Huerta was decreed by a law” which under no circumstances could be annulled by the Executive Office. Certain detailed information having been requested of the firm, it was sent to the Controller's Office, which it appears consulted the Consult-

ing Attorney of his Department for an opinion. Under date of October 16, 1925, the Controller's Office informed the firm that, as the credits contained therein belonged to the years 1913 and 1914, they were annulled in conformity with the provisions of the law.

It thus appears that after extended discussion between the firm and the appropriate Mexican officials, the latter grounded their refusal to pay Cook's firm for the benches not on any contention that no contract had been made with the firm, but on a declaration of nullity of the debt. The annulment of debts either in time of peace or in time of war is violative of international law, and such annulment as a ground of defense for the non-payment of debts has repeatedly been so treated by this Commission. In the instant case an interesting defense based on a construction of Mexican contract law is plausibly made by the Mexican Agency. However, it seems to me that the Commission, in dealing with the uncertainties confronting it, is justified in taking into account the attitude of the claimant and of the respondent Government up to the present time, showing explicitly the rights asserted by Cook and the grounds on which the Mexican Government based its denial of the rights asserted. I am therefore of the opinion that an award should be made in the present case for the contract price of the benches manufactured and delivered by Cook's firm and accepted by the Mexican Government, and for a proper allowance of interest.

On February 4, 1915, Solórzano, on departing from Mexico, made an assignment of all his rights under the contract to Cook. It is clear that this assignment was made solely for the purpose of assisting in any possible way to obtain compensation. Solórzano has furnished sworn testimony that it was thoroughly understood by all concerned that in signing this contract he acted simply as the agent, and that Cook's firm was the real party in interest. Others have furnished testimony to the same effect. In the American brief no reliance is placed on this assignment as an important element in the claim. Let it be assumed that an assignment was necessary in order that Cook might have rights under the contract. Then had this assignment been made prior to the time when the compensation for the benches became due, so that there would have been a breach of contractual rights of the firm, it may be that a claim could now be made in behalf of Cook, since in that situation the claim which accrued was that of an American citizen. However, it seems to be clear that the money was due prior to the time of the assignment. And in any event, according to the view which I have indicated, the Commission is justified in proceeding on the theory that Cook's rights vested under the contract prior to this assignment. The assignment might be considered to be of much importance if the view should be taken that it is important only with respect to the question of the right to sue in Mexican courts.

I regret the necessity of dealing with uncertainties such as are involved in this case. However, it is certain that from the practical standpoint a pecuniary award could only have the effect of granting compensation to a claimant for commodities which he furnished in good faith. And if compensation is not paid the claimant suffers a considerable loss, and the Mexican Government retains property for which it paid nothing. In justification for withholding payment Mexican authorities have asserted nothing from 1915 up to the time of the proceedings before the Commission, except that the debt had been cancelled by executive decree.

SAMUEL DAVIES (U.S.A.) *v.* UNITED MEXICAN STATES

(April 30, 1929. Pages 282-284.)

AMENDMENT OF CLAIM. Claim was originally filed by memorandum in name of Samuel Davies and John W. Vincent, a partnership. Since American nationality of Vincent could not be established, memorial was filed in name of Davies for only half the amount. *Held*, such amendment not a late filing of a new claim requiring dismissal of claim.

PARTNERSHIP CLAIM.—NECESSITY OF ALLOTMENT. Claim for losses suffered by a partnership was presented by one of the two partners, other partner consenting thereto. *Held*, no allotment necessary.

CONFISCATION. Wood cut by claimant was seized by fiscal agent of State of Sonora and no payment therefor ever made. Claim *allowed*.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$820.00, United States currency, with interest thereon, is made against the United Mexican States by the United States of America on behalf of Samuel Davies, an American citizen. The facts upon which the claim is based are alleged to be as follows:

A partnership, in which the claimant and one John William Vincent had each an undivided one-half interest, and the place of business of which was Douglas, Arizona, had entered into an oral contract with the Sonora Land and Timber Company, Fronteras, State of Sonora, Mexico, for the purpose of cutting wood on the lands of this company. The partnership was to pay to the company the sum of \$1.00, United States currency, per cord for all wood cut under the contract. The wood was imported into the United States and sold there by the partnership. During April, 1917, the partnership had cut and transported to a station now known as Vigia, on the railroad from Agua Prieta to Nacozari, 328 cords of wood. This wood was seized and confiscated by the State of Sonora through its fiscal agent, Jesús O. Cota, who previously had seized the ranch property of the Sonora Land and Timber Company. It is for the wood thus confiscated that compensation is now claimed.

A claim for the alleged full value of the confiscated wood was originally filed by Memorandum in the name of *Samuel Davies and John W. Vincent, a partnership*. However, as the American nationality of Vincent could not be established, the Memorial was filed in the name of Davies and only half the alleged value of the wood is claimed thereby. Counsel for the respondent Government contends that the claim filed by the Memorial is a new claim, and that this claim must be dismissed, as the Memorial was filed after the expiration of the period of time within which, according to the Convention of September 8, 1923, between the United States and Mexico, claims may be presented. The Commission is of the opinion that the claim as now presented must be considered to be in substance a claim reduced in amount to the proportional interest of the partner whose American nationality is proved, and that, therefore, the said contention of Counsel for the respondent Government is untenable.

During oral argument the question arose as to whether or not an allotment such as prescribed by Art. 1 of the Convention of September 8, 1923,

between the United States and Mexico, must be presented by the claimant to the Commission in a case like the present. The Commission deems it unnecessary to consider this question, as it appears that Vincent has agreed to the present claim being presented on behalf of Davies.

That Davies and Vincent were the owners of 328 cords of wood situated at the station of Vigia, and that the wood was taken from them, is admitted by the respondent Government, but, referring to a statement of the Municipal President at Fronteras to the effect that the wood was taken by unknown persons and not confiscated by the authorities, the respondent Government denies that the wood was taken by the fiscal agent of the State of Sonora. However, as the statement of the Municipal President contains no particulars with regard to the taking of the goods, and as there are submitted affidavits of Davies, of Vincent, and of four other persons setting forth detailed statements to the effect that the wood actually was seized by the fiscal agent of the State of Sonora, Jesús O. Cota, the Commission is of the opinion that the confiscation of the wood as alleged by the claimant is sufficiently proven.

It is stated by the Municipal President at Fronteras that the value of the wood at the Station of Vigia was \$2,664.00, Mexican currency. As the estimate of the claimant does not seem exaggerated, the Commission, however, is of the opinion that an award in the amount claimed should be rendered.

Decision

The United Mexican States shall pay to the United States of America on behalf of Samuel Davies \$820 (eight hundred twenty dollars), United States currency, with interest thereon at the rate of six per centum per annum from May 1, 1917, to the date when the last award is rendered by the Commission.

RICHARD A. NEWMAN (U.S.A.) *v.* UNITED MEXICAN STATES

(May 6, 1929. Pages 284-286.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Claimant was kidnapped and held for ransom by Mexican bandits, necessitating considerable medical treatment by reason of hardships and injury suffered during his abduction. Dilatory efforts to apprehend the bandits were taken by Mexican authorities. About four years later leader of bandits surrendered to the military authorities but neither he nor his followers were ever tried or punished for abduction of claimant. Claim *allowed*.

Cross-reference: Am. J. Int. Law, Vol. 24, 1930, p. 411.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$15,000.00, United States currency, is made against the United Mexican States by the United States of America on behalf of Richard A. Newman, an American citizen, alleged to have

been kidnapped by Mexican bandits, for failure on the part of the Mexican authorities to rescue Newman and to apprehend and punish the kidnappers.

The facts out of which the claim arises are alleged to be as follows:

During the early part of January 1923, the claimant went to Mexico and established a small farm on a rented plot of ground known as the Hacienda Guatimapé in the State of Durango, about sixty miles north of the City of Durango. On April 24, 1923, he went out on horseback to visit an old dam site located at the foot of a mountain range about three miles distant from his Hacienda, for the purpose of fishing in a river and of satisfying his interest in a certain engineering project. While in route he was accosted by four or five armed Mexicans, robbed of his horse, a pistol, a pocket knife, and some few pesos he had on his person, and taken into the mountains. The abductors proved to be under the leadership of General Juan Galindo, a well known rebel or bandit in the region. They told Newman that he would be released only on payment of \$30,000.00, Mexican currency, and they subjected him to various hardships. They kept him until October 29, 1923, when he was released on payment by a special representative of the American Government of \$300.00, United States currency. He was then in a miserable condition, infested with vermin and suffering with an infected leg, which had been injured during an attempt to escape, and which made treatment in a medical sanatorium necessary, causing him an expense of about \$1,000.00, Mexican currency.

The respondent Government alleges that Newman joined the bandits or remained with them from his own free will. It appears that certain rumors to that effect existed in the region, and such rumors are reflected in testimony given by military authorities of the State of Durango as well as by some other persons. It further appears that Newman was allowed to write a number of letters in English to representatives of the American Government. But these facts furnish no proof for the assumption that the case was one of self-abduction, and in the light of the content of Newman's letters, which are to the effect that he does not believe that Galindo will kill him, and that he does not want anybody to pay ransom for him, the assumption must be rejected.

As soon as the abduction of Newman was brought to the knowledge of the Mexican Government, orders to rescue Newman were issued to the military authorities of the State of Durango. But it must be assumed that these authorities were dilatory in the matter, possibly because they believed the case to be one of self-abduction, possibly because Galindo, although followed by a group of only a few men, had such relations with the population of the region as to make the authorities consider him not as a usual bandit but to some extent as a political factor. On May 30, 1927, Galindo surrendered to the military authorities, but neither he nor his followers were ever brought to trial or punished for the abduction of Newman. It appears that the surrender took place according to an arrangement previously arrived at, the terms of which are unknown.

The Commission is of the opinion that Mexico must be responsible for failure on the part of the Mexican authorities to take proper steps to rescue Newman and bring his abductors to trial, and that, therefore, an award in the sum of \$7,000.00, United States currency, should be rendered in the present case.

Decision.

The United Mexican States shall pay to the United States of America on behalf of Richard A. Newman the sum of \$7,000.00 (seven thousand dollars), United States currency, without interest.

JOHN I. HOWE (U.S.A.) *v.* UNITED MEXICAN STATES

(May 9, 1929. Pages 286-288.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. During course of insurrection claimant's cattle were driven off and claimant's store was robbed. Claimant later recognized leader of band which robbed his store and pointed him out to sergeant of government forces. Claimant also requested commander of government troops to arrest culprit. No action was taken. Claim *disallowed*, since it was not clear that information given by claimant was a sufficient basis for action.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$647.47, United States currency, is made against the United Mexican States by the United States of America on behalf of John I. Howe, an American citizen, for alleged failure on the part of Mexican authorities to take proper steps to apprehend and punish some bandits or rebels responsible for the theft of property belonging to the claimant.

The facts out of which the claim arises are alleged to be as follows:

In October, 1923, Howe left the United States for the State of Veracruz, Mexico, with an emigrant car containing cattle, farm implements, household furniture and supplies. In the town of Lagos, a station on the Veracruz to Isthmus Railway, the cattle were unloaded and placed in the pasture of one E. D. Stone. Howe himself settled in the town of Isla, another station on the said Railway, and opened a store there. In December, 1923, at a time when, incident to the Adolfo de la Huerta insurrection, Government protection to the town of Lagos was withdrawn, a group of armed men, some fifty in number, drove off the cattle which Howe had placed in Stone's pasture, and during January and February, 1924, at a time when, incident to the same insurrection, Government protection was withdrawn from the town of Isla, and rebels were in possession of that town, a band of armed men came to Howe's store and robbed it of property of an alleged value of the sum claimed. In March, 1924, Government forces again came into possession of the town of Isla. Howe then informed the commander of the Government troops of the robbery of his property, and requested that steps be taken to apprehend the culprits, but no action was taken. A short time after, when Howe was travelling on a railway train, he recognized among the passengers the leader of the band which had robbed his store, and pointed him out to a sergeant who was stationed at Isla, and who, together with another soldier, was also on the train. But the sergeant took no action. Upon the arrival of the train at the next station, the soldiers and the culprit left the train. Howe also got off the train and applied to the

commander of the Government troops at that station, requesting him to have the culprit arrested, but no action was taken.

Originally compensation for the value of the cattle as well as of the merchandise was claimed, but now only the alleged value of the merchandise taken from Howe's store is claimed. It is not contended that the Mexican authorities were in a position to prevent the robbery of the store, but the contention is made that Mexico must be responsible, because the military authorities took no action when Howe requested them so to do. The Commission, however, is of the opinion that, in the light of the evidence submitted it is not clear whether the information given by Howe was of such a nature as to afford a sufficient basis for an action of the military authorities, and that, therefore, in the absence of more satisfactory evidence, no award can be rendered in the present case.

Decision.

The claim of the United States of America on behalf on John I. Howe is disallowed.

ESTHER MOFFIT (U.S.A.) *v.* UNITED MEXICAN STATES

(*May 9, 1929. Pages 288-291.*)

NON-PAYMENT OF MONEY ORDERS. Claim for non-payment of money orders *allowed.*

COMPUTATION OF AWARD.—RATES OF EXCHANGE. Award calculated on basis of payment in United States currency at rate of exchange as of date of breach of obligation, i.e., date when money orders were presented for payment and payment refused. Fact that claimant may have paid for such money orders in silver *held immaterial.*

Cross-reference: Annual Digest, 1929-1930, p. 199.

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of Esther Moffit to recover the sum of \$146.97, gold currency of the United States, stated to be the equivalent of 293.94 Mexican pesos, the aggregate amount of two money orders which it is alleged were not paid on presentation to Mexican postal authorities. Interest from August 30, 1914, is also claimed on the sum of \$146.97.

The transactions on which the claim is based are described in the Memorial in substance as follows:

During the year 1914 the claimant conducted a store at Ensenada, Lower California, Mexico, and in the course of business sent the two money orders to Melcher & Company of Mazatlán, Sinaloa. The orders were returned to her by Melcher & Company with the information that they could not be cashed, as there was no money for that purpose at the post office in Mazatlán. The claimant thereupon endeavored to have the two money orders cashed at Ensenada, but her efforts were unavailing. The claimant on several occasions endeavored to cash the orders at post offices in Mexico

and offered to pay taxes with them, but at no time were the orders accepted in payment of taxes, nor could she obtain a refund of the money paid for them.

Perhaps it may be considered that the defenses to the claim made in the Answer were abandoned except with respect to the point of the rate of exchange at which the award should be computed. In any event, the Commission, in the light of the principles stated in connection with previous similar cases, considers that an award should be made for the value of the money orders, and that the only issue in the case which is not controlled by previous decisions relates to the question of exchange.

Accompanying the Memorial of the United States is a letter addressed by the claimant to the American Agent under date of May 9, 1927, from which it may probably be inferred that the claimant intends to convey the information that the money orders were paid for in silver. On the basis of that communication the United States contends that the award should be rendered in the amount of the value of the silver peso in 1914, which it is said was \$0.4985.

In behalf of Mexico it was contended that any award given should be in a sum smaller than that claimed, and a statement is produced giving rates of exchange on New York in the year 1914.

The subject of exchange was discussed in some detail in the case of *George W. Cook*, Docket No. 663. *Opinions of the Commissioners*, Washington, 1927, p. 318. Reference was made to decisions of domestic courts which have had occasion to deal with the translation into the currency of their own country of monetary judgments fixed in the terms of the currency of some other country, these courts being required to convert currency in view of the fact that they can render judgments only in the coin of the governments by which they are created. It was pointed out that some courts have held that, in the case of a breach of contractual obligations, the rate of exchange should be determined as of the date of the breach, others have held that the rate should be fixed as of the date of judgment; it has been held that the value of the coin should be fixed as of the time suit was brought; and in the absence of evidence as to the value of the coin it has been held that the par value should be taken.

In the *Cook* case, *supra*, there was not before the Commission the proper kind of evidence on which the Commission could determine the rate of exchange at the time when certain money orders were dishonored, and it was contended in that case by the respondent Government that an award should be rendered in terms of the Mexican so-called Law of Payments of April 13, 1918. That contention was not sustained by the Commission.

Whatever may be said of the principles underlying the decisions of domestic courts in cases in which the rates of exchange have been fixed as of the date of judgment or as of the date when suit was brought, those principles do not appear to be susceptible of logical application in a case such as that pending before the Commission. But the principle of applying the rate of exchange as of the date of the breach of an obligation appears to be one which the Commission can properly apply. The Commission has followed the practice of rendering awards in currency of the United States, having in mind the uncertainties with respect to the rate of exchange and, further, the provisions of the first paragraph of Article IX of the Convention of September 8, 1923. It is therefore proper that the award should be rendered in accordance with the rates prevailing at the time the money orders should have been paid; that was when they were presented for pay-

ment. By the application of that principle the award will be the equivalent value in gold which the claimant would have received had the orders been paid on presentation. The precise dates of presentation are not shown, but, in the absence of specific evidence on this point, it may be properly assumed that requests for payment were made shortly following the issuance of the orders.

In fixing the rate of exchange as of the time when the money orders should have been paid, the Commission does not need to concern itself with questions as to the precise meaning or evidential value that may be given to a letter such as that addressed by the claimant to the American Agent on May 9, 1927.

One of the orders is dated June 30, 1914; the other August 13, 1914. Adopting the rate of \$0.3075 stated in Annex 2 to the Mexican Answer to be the rate on June 30, 1914, an award should be rendered in the sum of \$90.38, with interest thereon.

Decision

The United Mexican States shall pay to the United States of America in behalf of Esther Moffit the sum of \$90.38 (ninety dollars and thirty-eight cents), United States currency, with interest at the rate of six per centum per annum from August 30, 1914, to the date on which the last award is rendered by the Commission.

ELVIRA ALMAGUER (U.S.A.) *v.* UNITED MEXICAN STATES

(*May 13, 1929. Pages 291-299.*)

FAILURE TO PROTECT.—EXISTENCE OF LAWLESSNESS. Mere fact that a large number of crimes may have taken place in the region where claim arose is not *prima facie* proof that State has failed in its duty to protect.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—RELEASE OF SUSPECTED CRIMINALS. Claimant's husband was killed as the result of a payroll robbery. A number of suspects were arrested but were released before trial on ground that evidence against them had ceased to exist. It appeared that such conclusion was unfounded in fact as to a number of important suspects. No explanation of such release was proffered from the judicial records by respondent Government. Claim *allowed*.

MEASURE OF DAMAGES. Rule in *Janes* claim *supra* followed, to the effect that different degrees of denial of justice would be taken into consideration in allowing damages.

Cross-references: Am. J. Int. Law, Vol. 24, 1930, p. 624; Annual Digest, 1929-1930, p. 170.

Commissioner Fernández MacGregor, for the Commission:

A claim in the amount of \$50,000.00, United States currency, is made by the United States of America, on behalf of Elvira Almaguer, against the United Mexican States, alleging that the claimant's husband, Toribio

Almaguer, an American citizen, was murdered in Mexico by a group of bandits, Mexican authorities having failed to extend adequate protection or to take steps to apprehend, prosecute and punish the persons responsible therefor.

It is alleged that prior to September 15, 1922, oil companies operating in the neighborhood of Tampico had sustained several losses incident to robberies of money which the said oil companies transported from the banks to the oil fields for the payment of the workmen; that due to the inactivity of the police in the prevention of these crimes, the companies had to resort to various means of safety, such as the employing of armed guards, automobiles, launches and aeroplanes; that shortly before eight o'clock, on the morning of September 15, of the same year, Frank L. Clark, Cashier of the Agwi Company, proceeded to a bank in Tampico, Tamaulipas, from which he withdrew 42,000.00 pesos, the said sum being placed in two leather bags for its transportation to the aviation field. Clark was carrying the said money in an automobile in charge of Toribio Almaguer and Macario Cano, and also having as passenger another employee of the Company named Rodolfo Saldaña Ruiz. Upon arrival at a certain place between the City of Tampico and the aviation field, this automobile was held up by another car containing bandits who assaulted Clark and his companions, shooting them with their firearms, as a result of which Toribio Almaguer was killed, Clark wounded in one arm, Cano bruised, and Saldaña alone remaining uninjured. The bandits seized the bags containing the money, boarded the automobile in which they had arrived to prepare their ambush, and departed towards the City of Tampico, following the direction of a point known as Cascajal. It appears that this group of bandits was composed of seven men. A few moments after the escape of the bandits, Saldaña, the only member of the Agwi party who had been left uninjured, hailed a passing automobile and immediately drove to the office of the Company, reporting the assault to the General Manager, and thereupon, both men went to the Police Headquarters to report the robbery and assault, and also the direction in which the bandits had escaped. The competent authorities began an investigation, and the following day they successfully apprehended not less than fifteen persons, who were questioned and detained on suspicion. Investigations were further continued, successfully resulting in the apprehension of a man by the name of Pedro Rojas who confessed to having been one of the assailants, and who furnished the names of the other participants to the crimes mentioned. Shortly thereafter, the said Pedro Rojas attempted to escape from jail and was shot by the police in an attempt to recapture him. This man died in the hospital as a result of his wounds. After the death of Rojas, the *Ministerio Público*, requested the release of all the other suspects, alleging that the clues which once existed as proof of their guilt, had vanished; consequently they were released on bond by the Judge with the exception of one named Nicolás Ramírez against whom there were also very strong suspicions. It appears that this man escaped from a hospital to which he had been confined during his imprisonment, and that he was not reaprehended until more than two years later, after having perpetrated other crimes. It also appears that a Military Judge, in order to perform certain judicial investigations in a certain trial which he was then conducting requested the civil judge who conducted the proceedings, to place Nicolás Ramírez under his charge, and that the said Ramírez in an attempt to escape while being taken from one court to the other, was shot and killed by the soldiers entrusted with his custody. Thereafter, no further steps were

taken in the proceedings started against the assailants of Almaguer, Clark and his companions, and therefore, as a result, no one was punished for the grave crimes herein set forth. The American Agency contends that this shows a serious negligence in the administration of justice by Mexico and thus renders its Government responsible for a denial of justice.

It is necessary first, to examine the alleged lack of protection in the region surrounding Tampico.

The American Agency has submitted the affidavits of several persons recording a list of robberies and assaults committed from 1918 until 1922, concluding therefrom that there were 28 cases of this nature in 1918, 20 in 1919, 8 in 1920, 9 in 1921, and 22 in the year 1922. There are statements in the aforesaid affidavits to the effect that the oil fields adjacent to Tampico were infested with outlaws, constituting a constant menace to life and property, and that the authorities did not take adequate steps to suppress this state of affairs; that while the Mexican Republic was practically at peace since 1921, the fields in the neighborhood of Tampico, however, were infested with marauders and bandits and that, although such facts could not have been unknown to the authorities in that region, the Federal Government did not take any practical steps to suppress this banditry. The respondent Government states that it was endeavoring to pacify the country after a revolt prolonged over a period of ten years, and that, in this connection it displayed unusual activity and diligence; that however, it was necessary to combat certain revolutionary groups as well as other small groups of outlaws and bandits; that the authorities, whenever the oil companies requested special armed guards in order to safeguard their money remittances, always were ready and willing to furnish, and did in a number of occasions furnish, said armed guards, and that particularly in the instant case, Rodolfo Saldaña, an employee of the Agwi Company, was, according to his own statement, warned by the police to give ample and timely notice concerning the day and hour in which the said transportation was to be effected, in order that full and adequate protection could be rendered.

In view of the meagerness of the evidence submitted regarding this point, the Commission is unable to conclude that Mexico is responsible for the failure to have rendered proper protection to the Tampico region in general, or to the deceased man in particular. The mere fact that in a certain nation or specific region thereof a high coefficient of criminality may exist, is no proof, by itself, that the government of such nation has failed in its duty of maintaining an adequate police force for the prosecution and punishment of criminals. In cases of this nature, it is necessary to consider the possibility of imparting protection, the extent to which protection is required, and the neglect to afford protection, and evidence as regards these elements is altogether lacking in the case under consideration.

In connection with the alleged negligence of the Mexican authorities in apprehending, prosecuting and punishing Almaguer's assailant the following facts mainly drawn from the evidence submitted by the Mexican Agency, are pertinent: the assault took place at about eight o'clock in the morning of September 15, 1922; the Police Headquarters at Tampico were notified shortly after the occurrences, and began to make the necessary investigations, in turn notifying the Second Court of First Instance of Tampico at 9.30 A. M. of the same day. The personnel of the said Police Headquarters proceeded to the scene of the crime, in order to obtain a view of the *locus*, and started to apprehend and examine several

suspicious persons and these by September 17 were sixteen in number. On September 19 the Court received from Police Headquarters the duly drawn preliminary declarations, and the persons who had been arrested. The Court also began an investigation on September 15, immediately taking the deposition of Clark and ordering the autopsy of Almaguer's body to be performed. From this moment, the Court diligently continued to act, and duly obtained the testimony of the persons arrested by the police and of others as well who appeared as suspicious to the said Court. On October 2, the detention of one of the guilty principals had already been effected, one Pedro Rojas, who confessed his guilt. From his statement it appeared that besides himself, Filiberto Lechuga, Eulalio Prieto, Pedro Díaz, Nicolás Ramírez, Pedro Rodríguez and Manuel Mora, were responsible for the assault, and that Julio Jeffries, Maurilio Rodríguez, Gerónimo Gutiérrez and Pío Gutiérrez were the concealers or the accessories. Three of these men named, Pedro Rojas, Julio Jeffries and Maurilio Rodríguez had already been arrested and declared to be formally imprisoned, the Judge hence issued a warrant for the apprehension of the others. Of these individuals, Eulalio Prieto, Nicolás Rodríguez, Manuel Mora, Gerónimo Gutiérrez and Pío Gutiérrez, were eventually apprehended, while Filiberto Lechuga, Pedro Díaz and Pedro Gutiérrez, the three principals, as well as Gabriel Martínez whose responsibility was secondary, were never apprehended.

It appears that after the death of Pedro Rojas resulting from his attempted escape, the *Ministerio Público*, representing the interests of society in the prosecution of crime, requested the release of all those held, alleging that the clues which existed as proof of their guilt had disappeared. It is shown that these requests were made before the Judge, the accused and their respective counsels being present. The Prosecuting Attorney vehemently expressed himself at the time of making these requests, in fact stating in one instance: "even though the public, once it has learned the facts through the exaggerated gossip of the court room loiterers, may accuse me as a faithless official. I shall face such criticism with a clear conscience, possessing as I do the certainty that the accused is innocent". Pedro Rojas apparently, died on December 23, 1922, and between January 12, and March 26, 1923 Gerónimo Gutiérrez, Martín Rodríguez, Pío Gutiérrez, Manuel Martín Mora, Vicente Rodríguez, Julio Jeffries, Marcial Godoy, Maurilio Rodríguez and Eulalio Prieto, were released on bond, Nicolás Ramírez, whose fate has been described, alone remaining on trial.

The American Agency has laid great stress on the release of the individuals above-mentioned, alleging that under every consideration such release was improper, inasmuch as sufficient circumstances existed to consider them guilty and inasmuch as they could not fall under the provisions of Article 20, sub-paragraph I of the Mexican Political Constitution of 1917, which in connection with the guarantees of the accused states the following:

"I.—He shall be set at liberty on demand and upon giving a bond up to ten thousand pesos, according to his personal resources and the seriousness of the offense charged, provided, that the said offense may not be punishable with penalty of more than five years, imprisonment; and without any further requisite than the placing of the stipulated sum at the disposal of the authorities or the giving of a mortgage bond or personal security sufficient to guarantee it."

The American Agency alleges that in accordance with the provisions of the Penal Code of Tamaulipas, the men who were accused of these criminal acts either as principals or as accessories, merited a penalty much

greater than five years, inasmuch as the case was one of highway robbery accompanied by violence, resulting in murder, with all of the aggravating circumstances, and that therefore, the Judge who granted liberty under bond, disobeyed the fundamental law of Mexico on this point. On the other hand, counsel for Mexico referred to Article 360 of the said Penal Code, which literally reads as follows:

“At whatever stage of the trial in which the grounds serving for decreeing detention of the preventive imprisonment, vanish, the accused or detained person shall be released, after he has been given a hearing, should he exist or be present; reserving the possibility to issue a new warrant of arrest, if there should later appear sufficient grounds therefor in the course of the trial. In this case the release shall be granted under a bond of not less than 20 and not over 100 pesos, except in the case of indigents who shall be released on parole.”

It is not for this Commission to decide whether or not Article 20, Section I. of the Mexican Political Constitution of 1917 was or was not violated. Inasmuch as this article is concerned with a guarantee, it is conceivable that it fixes only the minimum guarantee which shall be granted the accused in connection with this release on bond. Therefore, a minimum guarantee alone being involved, it is doubtful whether or not a state statute of the Mexican Federal Union more extensively granting the accused a release on bond, that is to say, in those cases in which the penalty is greater than five years, is or is not unconstitutional. But aside from this it appears that this question need not be decided in the instant case inasmuch as in order to decide whether or not the Mexican Judge acted lawfully, it is sufficient to refer exclusively to the provisions of Article 360 mentioned above. Indeed, under this article, the accused may be released whenever the grounds for ordering the detention or the preventive imprisonment may have vanished, and therefore the pertinent thing is to ascertain whether or not, in the case of the persons accused of the assault which resulted in Almaguer's death, the grounds did or did not vanish. Maurilio Rodríguez was declared formally imprisoned inasmuch as from the statements of some of the witnesses it was established that he was possessed of information concerning the contemplated assault prior to its commission, and also that he had even entrusted his own brother with the delivery of certain suspicious messages; above all, because after the occurrences, although apparently knowing that “El Pericón” was one of the accused, he, even being a soldier, did not make the proper denunciation and thus constituted himself an accessory. According to the confession of Pedro Rojas, Maurilio Rodríguez was the person who invited him to be a participant in the assault, thus rendering him an intellectual perpetrator thereof. Maurilio Rodríguez in his confession admitted that he knew of the assault twenty days before it occurred, and that he had duly communicated this information to Comandante Benavides. The *Ministerio Público* in applying for the release of this person on bond, stated that the only reason that existed for the detention of Rodríguez was a number of contradictions occurring between his own declarations and his brother Vicente's, but that these however, were soon harmonized, and that therefore, except for the sole statement of the witness Gabriel Martínez, nothing had been left pending against this man. Inasmuch as the grounds existing against Maurilio Rodríguez have already been mentioned, the contention of the *Ministerio Público* appears wholly unwarranted by the facts, nor is there any evidence in the whole record submitted by the Mexican Agency to show that such grounds did in fact vanish. Therefore,

it is reasonably apparent that the release of Maurilio Rodríguez was unlawful.

The same may be said in regard to Eulalio Prieto, alias "El Tejano". There exists against this individual the confession of Rojas, pointing to him as the other principal in the assault. Rojas was living in the house of the mother-in-law and the wife of "El Pericón". It is true that "El Pericón" altered his first confession with respect to "El Tejano", by denying that his preliminary statement was true, but the Judge observed that this denial made in the presence of "El Tejano", was accompanied by visible signs of fear, and that obviously, he only tried to save the latter exactly as he had tried to do with the others who had been detained. A witness named Licona testified that "El Tejano" slept in the house in which the assault was planned on the night previous thereto, and that furthermore, "El Tejano" had been subsequently apprehended in that very same house. The *Ministerio Público*, in requesting "El Tejano's" release on bond, alleged that all these suspicious circumstances had been contradicted by the testimony of several other witnesses who declared that "El Tejano" had been ill for several days prior to the assault at another place which he had never left. There is no record of the testimony of these witnesses referred to by the *Ministerio Público* or of any confrontation of them with "El Tejano", or of any confrontation of the latter with the other defendants.

Manuel Martín Mora, another suspect, according to Rojas' confession, was formally imprisoned and upon confrontation with Rojas himself, the latter ratified his statement to the effect that the said Mora was in the automobile of the assailants. There is no record to show that these clues vanished, and the same conclusion may be reached as regards Julio Jeffries, Gerónimo Rodríguez, Pío Rodríguez and Gabriel Martínez who were released, as already stated, shortly after the death of Rojas in a certain hearing in which no record exists as to what other evidence could have destroyed the strong suspicions existing against the individuals mentioned. As already stated, the record submitted by Mexico discloses a number of deficiencies after the death of "El Pericón", occurring on December 23, 1922. The releases on bond, based upon the lack of evidence were granted beginning on January 12, but between these two dates, it seems that no proceedings were carried on to obtain further evidence. During this period there were a large number of persons detained against whom weighty suspicions existed, and there is no evidence to show that the Judge undertook to make among them the confrontations which under Mexican law are necessary for the investigation of the actual responsibility falling upon each of them.

Counsel for Mexico argued that the judicial record filed by his Government in this case is not complete being solely a digest of the outstanding steps of the trial. Such assertion is well founded, but the Commission should consider that since the allegation of the American Agency was to the effect that in certain important matters the proceedings revealed either negligence or a violation of Mexican law, the proper thing for the Mexican Government was to show by adequate evidence that such was not the case. As disclosed by the digest in question submitted as evidence, the judicial proceedings are in existence, and the Mexican Agency could have introduced evidence tending to show the disappearance of the suspicious grounds, existing in the said proceedings, against the suspected principals and accessories of the crimes. The Commission is constrained to conclude as to the questions of legality of the release of the prisoners on bond and the investiga-

tion of the delinquency itself that a culpable negligence has been shown to exist.

Under the conditions above stated, it may be said that there was no complete prosecution and punishment of Almaguer's assailants, but taking into account that the proceedings in their initial stage up until the date of Pedro Rojas' death do not disclose any deficiency; and that at least two of those appearing as principals responsible for the crimes were seriously prosecuted, as shown by the fact of their death as a result of an attempted escape, and also taking into account that the Commission has expressed in the case of *Laura M. B. Janes*, Docket No. 168,¹ its opinion to the effect that in cases of denial of justice it would take into account the different shades thereof, ["more serious ones and lighter ones (no prosecution at all; prosecution and release; prosecution and light punishment; prosecution, punishment, and pardon)"] it deems that the claimant may properly be awarded in this instance the sum of \$7,000.00, inasmuch as there was a certain serious prosecution of some persons, while as regards others there was a negligent prosecution and no punishment.

Decision.

The United Mexican States shall pay to the United States of America on behalf of Elvira Almaguer, the amount of \$7,000.00 (seven thousand dollars), United States currency, without interest.

FRANK L. CLARK (U.S.A.) *v.* UNITED MEXICAN STATES

(*May 13, 1929. Pages 300-301.*)

FAILURE TO PROTECT.—EXISTENCE OF LAWLESSNESS.—DENIAL OF JUSTICE.
FAILURE TO APPREHEND OR PUNISH.—RELEASE OF SUSPECTED CRIMINALS.
—MEASURE OF DAMAGES. Claim arising under same circumstances as those set forth in *Elvira Almaguer* claim *supra* allowed.

Cross-reference: Am. J. Int. Law, Vol. 24, 1930, p. 631.

(*Text of decision omitted.*)

GENIE LANTMAN ELTON (U.S.A.) *v.* UNITED MEXICAN STATES

(*May 13, 1929. Pages 301-308.*)

JURISDICTION. Jurisdiction is the power of a tribunal to determine a case in accordance with the law creating the tribunal.

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.—RESPONSIBILITY FOR ACTS OF MILITARY FORCES. Claimant's husband was tried by an extraordinary court-martial, was sentenced to death for crime of aiding

¹ See page 82.

and abetting a rebellion, and was executed by Carranza forces. At the time in question neither the Federal courts nor the Congress functioned. Claimant Government contended constitutional guarantees were ignored by military court. *Held*, claim not within the jurisdiction of tribunal.

Cross-references: Annual Digest, 1929-1930. pp. 380, 386.

Commissioner Nielsen, for the Commission:

This is a claim in the amount of \$100,000.00 made by the United States of America against the United Mexican States in behalf of Genie Lantman Elton, widow of Howard Lincoln Elton, who was shot in the State of Oaxaca, Mexico, in 1916, in accordance with the sentence of an extraordinary court-martial.

In behalf of Mexico it is asserted that the Commission has no jurisdiction in this case. Pleas to the jurisdiction of this Commission have often been invoked; they have seldom been sustained. The contentions now made with respect to this point probably raise questions more doubtful than any presented in any other case in which the jurisdiction of the Commission has been challenged. A claim involves the assertion of rights under international law or under stipulations of treaties and a denial of rights so asserted. Without entering at length into the very considerable amount of detail found in the Memorial, the Answer and the Briefs, it is possible to indicate the nature of this claim by a brief summary of the salient contentions advanced by each Government.

Elton was a mining engineer residing at the city of Oaxaca in the State of Oaxaca. He was accused of furnishing secret information to General Reyes, the leader of a military movement against the government of General Carranza. It was also alleged that Elton was in correspondence with Guillermo Meixueiro, a so-called "rebel chief". The information before the Commission with respect to the nature of the proceedings against Elton is very incomplete. The record of the trial has not been produced by either Agency. Accompanying the Mexican Answer are copies of numerous communications exchanged by Mexican officials from which it appears that the record could not be found.

However, a copy of the sentence imposed on Elton accompanies the Memorial of the United States. In that sentence it is recited that Elton was convicted under the so-called "Juarez decree" of January 25, 1862. It would seem probable that this decree covers the offense with which Elton was charged, but the United States contends in its brief that this decree could not properly be invoked against Elton. It is asserted that the decree was promulgated by General Juarez with a view to dealing with the situation in Mexico growing out of the Maximilian invasion and could have no application to the case of an American citizen arising in 1916. It is further contended that the decree was in derogation of the Mexican Constitution of 1857. With respect to this point citation is made of Article 23 of that Constitution providing that capital punishment is abolished for political offenses, and also to Article 13 of the Constitution providing that military jurisdiction shall be recognized only for the trial of criminal cases having direct connection with military discipline.

It is pointed out that, although Article 29 of the Constitution might be considered to contemplate the suspension by the President of Mexico of constitutional guarantees, such action could be taken, conformably to that Article, only "with the advice of the council of ministers and with the

approval of the Congress, and, in the recess thereof, of the Permanent Committee"; that such suspension could be "only for a limited time"; and that there could be no suspension of guarantees "ensuring the life of man".

With respect to the action of General Carranza in issuing on May 14, 1913, a decree putting into effect the so-called Juarez decree of 1862, it is argued that this action evidences the non-existence of the Juarez decree, and that General Carranza had no right at this early stage of his revolutionary activities, in 1913, to make decrees for the whole of the Republic of Mexico, and what is more important, had no right to set aside the Constitution of 1857 by the promulgation of a decree nullifying guarantees of the Constitution with respect to human life. This point as to nullification of guarantees with respect to life was particularly stressed in oral argument, and it was pointed out that General Carranza had shown in several ways that he intended to uphold the Constitution of 1857 and to compel the observance of it. Citation was made to Article 128 of that Constitution providing that the Constitution should "not lose its force and vigor, even though its observance might be interrupted by rebellion".

While some argument was made in the brief of the United States with respect to possible irregularities and prejudice in connection with the trial of Elton, emphasis was laid in oral argument on the contention that neither President Juarez nor General Carranza had any right to suspend constitutional guarantees with respect to human life, and that therefore Elton was sentenced and executed in derogation of Mexican law. With respect to this point reference was made to an opinion rendered by the military counsel to the court, Colonel Aurelio M. Pena, in which it was recommended that the decision of the court be revoked. Reference was made in this opinion to Article 23 of the Constitution of 1857 abolishing the death penalty for political offenses, and also to Article 38 of the Mexican law with respect to foreigners, providing for the expulsion of foreigners participating in rebellion.

In behalf of Mexico it was contended that the crime with which Elton was charged was established beyond a doubt, and that there was no question with respect to the lawfulness of the arrest and trial of the accused. It was argued that, although Article 23 of the Constitution of 1857 did abolish capital punishment for political offenses, Elton's offense was not merely political, but a serious crime of a military nature for which the Constitution did not abolish the death penalty. It was contended that both the Juarez decree of 1862 and the Carranza decree of 1913 putting into effect the Juarez decree were legal and were unobjectionable from the standpoint of international rights. The opinion of the counsel to the court was merely legal advice, it was asserted, and in no way binding on the court.

Particular emphasis was placed on the disturbed conditions in Mexico in 1916, and it was argued that at the time Elton was tried Mexico was in an abnormal political situation—in the midst of civil war; that the country was not under a constitutional régime at the time, but under an extra-constitutional power, governed by a revolutionary, *de facto* government; that therefore the Constitution of 1857 and all its civil rights and guarantees were not in operation; and that Elton was lawfully tried under the Juarez decree of January 25, 1862, put into effect by a decree of General Carranza in 1913.

With respect to the question of jurisdiction which was raised for the first time in the Mexican brief, it was contended by counsel for the United States

in oral argument that, while by the so-called Special Convention of September 10, 1923, Mexico had undertaken to make compensation in satisfaction of certain claims *ex gratia*, the claims coming before the so-called General Claims Commission of September 8, 1923, must be determined in accordance with principles of international law; in other words, the General Claims Commission is a court of international law, while the Special Commission may consider claims outside of international law and decide them in accordance with its views of justice and equity. The instant claim, it was argued, is a claim predicated on a denial of justice growing out of an improper criminal trial. It is therefore a case, it was stated, which should properly be adjudicated by the General Claims Commission through the proper application of international law. Since Mexico has a right to have claims arising under international law adjudicated by the General Claims Commission, the United States must have that same right, it was said, or the General Claims Convention lacks mutuality.

The activities of military agencies were stressed in the argument made in behalf of Mexico with respect to the question of jurisdiction. The line of argument may be illustrated by the following extract from the Mexican Brief:

"From the allegations in the Memorial, in the Answer, in the Reply, in the Brief of the claimant Government and the proofs presented by both Governments the following fundamental facts appear:

"1.—That the crime for which Elton was tried and sentenced was that of spying against the Mexican *Federal forces*, and aiding or conniving directly with *revolutionary forces* which were in rebellion against the Federal Government.

"2.—That he was tried by a *Court Martial*, that is a military court, composed wholly of *military officers* of the *Federal Army*.

"3.—That the sentence imposed upon him was then reviewed and confirmed by the *Military Commander of the Federal Army* at Oaxaca.

"4.—That he was shot by a *military squad of federal soldiers*.

"5.—That all these facts occurred between the period of time from *August 1916, to December 1916*.

"The preamble of the General Claims Convention of September 8, 1923, expressly exempts from the jurisdiction of the General Claims Commission: 'the claims for losses or damages *growing out of the revolutionary disturbances in Mexico which form the basis of another and separate Convention*'.

"On the other hand, Article III of the Special Claims Convention of September 10, 1923, provides:

"The claims which the Commission shall examine and decide are those which arose during the revolutions and disturbed conditions which existed in Mexico covering the period from *November 20, 1910, to May 31, 1920*, inclusive, and were due to any act by the following forces:

"(1) *By forces of a Government de jure or de facto*'.

"It is *obvious, apparent and conclusive* therefore that the present claim does not belong to the jurisdiction of the General Claims Commission. The case accrued within the period of time between November 20, 1910 to May 31, 1920. It is founded by claimant government on acts executed by forces belonging to the Carranza Government, which was at that time a *de facto* government. Finally, it arose from acts done by Elton directly connected with the 'recent revolutions' to which Article I of the General Claims Convention refers."

The distinction which it was sought to make in the argument in behalf of the United States with respect to cases arising under international law and therefore cognizable by the General Claims Commission and other cases outside of international law which may be decided by the Special Claims Commission is not entirely clear. It would seem to be unnecessary

for the Commission to concern itself with political reasons or other reasons which may have prompted the two Governments to conclude the Special Claims Convention with the purpose of adjudicating certain claims on the basis of an *ex gratia* settlement and without the application of rules or principles of international law. But it seems to be clear that the jurisdiction of each Commission was not primarily defined on the basis of some grouping of claims from the standpoint of susceptibility of determination under international law. The claims generally described in the Special Claims Convention would be susceptible of determination by an international tribunal applying international law. Thus, it may be noted that the first category of claims mentioned in Article III of that Convention refers to claims due to acts of forces of a *de jure* government. It being assumed that this category covers claims growing out of the destruction or appropriation of property by soldiers, it is not perceived why such claims could not be submitted to an international tribunal applying international law. Claims of this kind which have frequently been passed upon by international tribunals involve the application of rules or principles of law with respect to wanton or unnecessary destruction of property, or the destruction of property incident to the proper conduct of military operations, or the taking of property with or without compensation. The second category of claims referred to in this Article relates to claims growing out of acts of revolutionary forces. Such claims, which also have often been submitted to international tribunals, raise legal issues with respect to the capacity and willingness of a government to give protection against depredations committed by forces of this character.

While it is somewhat difficult to follow the reasoning employed in the argument in behalf of the United States, it is at least equally difficult to follow the conclusions arrived at in the Mexican brief to the effect that it is obvious and conclusive that the instant claim is not within the jurisdiction of the General Claims Commission.

Jurisdiction is the power of a tribunal to determine a case in accordance with the law creating the tribunal or a law prescribing its jurisdiction *U. S. v. Arredondo*, 31 U. S. 689; *Rudloff Case, Venezuelan Arbitrations of 1903, Ralston's Report*, pp. 182, 193-194; *Case of the Illinois Central Railroad Company*, Docket No. 432,¹ before this Commission. By the Convention of September 8, 1923, which created this Commission and defined its jurisdiction, the two Governments agreed to settle all outstanding claims since July 4, 1868, that is, since the date of the last general arbitration treaty concluded between them, there being excepted, however, from this settlement claims "arising from acts incident to the recent revolutions". The claims excepted are described in very meagre and general language. When there is need of interpretation of a treaty it is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration. Pradier-Fodéré, *Traité de Droit International Public*, Vol. II, Sec. 1188, p. 895. By examining the Convention of September 10, 1923, it is found that excepted claims are there more specifically described. However, cases presented to the Commission have revealed much difficulty in arriving at definite, satisfactory conclusions with respect to the intent of the contracting parties. This fact is certainly amply illustrated by the presentation of conflicting views advanced by representatives of each Government in the presentation of cases. While it would seem to be clear that

¹ See page 21.

the distinction which it is undertaken to make in behalf of the United States in the instant case is not conclusive, it seems to be equally clear that it is not obvious as contended in behalf of Mexico that it was the intention of the contracting parties that Mexico should settle *ex gratia* a claim which appears to be in the nature of a case predicated upon allegations of a denial of justice by a Mexican judicial tribunal.

Counsel for Mexico in oral argument referred to the forces of General Carranza as the forces of a *de facto* government. From the standpoint of international law a government may be regarded as *de jure* by virtue of the fact that it is *de facto*. However, in the light of recorded historical facts it appears to be clear that in 1916 General Carranza, while he may have gained the mastery of practically all of Mexico, considered himself to be a *de facto* ruler and his government a *de facto* government. It is interesting to note that in a communication under date of October 19, 1915, Secretary of State Lansing informed a representative of General Carranza in Washington that the President of the United States extended "recognition to the de facto Government of Mexico, of which General Venustiano Carranza is the Chief Executive". *Foreign Relations of the United States*, 1915, p. 771. In a communication of August 31, 1917, President Wilson acknowledged receipt of a letter dated May 1st of that year in which General Carranza announced his assumption of the office of President of the United Mexican States. *Foreign Relations of the United States*, 1917, p. 943.

Whatever distinction it may have been desired to make by these different forms of recognition, so-called, it would appear that the Commission is justified in considering that the instant claim is predicated upon charges of wrongful action on the part of military authorities carrying on their activities in Mexico at a time when all the agencies of the Constitutionalist Government were not discharging their functions in a manner prescribed by the existing Constitution. Neither the Federal courts nor the Congress functioned. General Carranza still styled himself the "First Chief of the Constitutionalist Army in Charge of the Executive Power". See *Codificación de los Decretos del C. Venustiano Carranza, Primer Jefe del Ejército Constitucionalista Encargado del Poder Ejecutivo de la Unión*. Had the instant case been predicated on allegations with respect to wanton shooting of an American citizen by forces of General Carranza, it would seem to be clear that it would be excluded from the jurisdiction of this Commission. The Mexican Government contends that, since Elton was tried by a military court whose sentence was confirmed by a military commander, and since the accused was shot by soldiers, the situation is the same. The Commission, confronted by the uncertainty of the language found in the two Conventions which has never been clarified by any documents relating to the negotiation of the Conventions or other evidence which it is permissible to use in interpreting a treaty, is constrained to sustain that view.

Decision

The Commission is without jurisdiction in this case.

FRANK LAGRANGE (U.S.A.) *v.* UNITED MEXICAN STATES*(May 13, 1929. Pages 309-312.)*

CONFLICTING JURISDICTION OF SPECIAL CLAIMS COMMISSION.—CONFISCATION BY MILITARY FORCES. Claimant's goods stored in warehouse were lost as a result of the seizure of such warehouse by General under the direction of General Carranza at a time when latter was a revolutionary military leader. *Held*, tribunal has no jurisdiction, since claim is covered by Article III of the Special Claims Convention of September 10, 1923.

Commissioner Nielsen, for the Commission:

Claim in the amount of \$5,472.22, United States currency, is made in this case by the United States of America against the United Mexican States in behalf of Frank LaGrange, the sum claimed being the value, it is stated, of property of the claimant which it is asserted was confiscated by order of M. Chao, a former Governor of the State of Chihuahua.

It is alleged in the Memorial that in December, 1913, the claimant was engaged in business in Ciudad Juarez, State of Chihuahua, Mexico, and that on or about December 18 of that year he ordered the goods in question from Domingo Trueva of that city. It is further alleged that the goods were paid for and were placed in a warehouse for storage pending delivery to LaGrange; that the warehouse was confiscated under order of M. Chao, and that on January 14, 1914, the claimant was informed by Chao that the goods would not be delivered to the claimant, as they were stored in a confiscated house.

In behalf of Mexico it is alleged that as a result of an investigation conducted by the Attorney General of the State of Chihuahua, no proof was found of the transactions underlying the claim. Therefore the allegations of the Memorial are generally denied. It is contended that the Commission has no jurisdiction in the case.

In order to determine the question of jurisdiction it is of course important to determine the precise nature of the claim described in the Memorial. The information furnished to the Commission by each side is unsatisfactory.

The United States has produced a copy of a communication under date of January 14, 1914, addressed by M. Chao to Francisco LaGrange which reads as follows:

“Correspondencia Particular del Gobernador del Estado de Chihuahua,

CHIHUAHUA, *Enero 14 de 1914.*

SR. FRANCISCO LAGRANGE,

Presente.

MUY SEÑOR MÍO: Me permito manifestarle que por orden de este Cuartel General no seran entregadas las mercancías que ampara la factura adjunta No. 8064, por estar confiscada la casa de donde proceden.

Sin otro asunto, soy de Ud. afmo. atto. y S. S.

M. CHAO.

DIVISION DEL NORTE

Cuartel General.”

Whatever may be the precise information which it was intended to convey by this communication, it seems to be certain that there was an interference with the claimant's property in the nature of a confiscation. However, it is not altogether clear whether such interference took place as a consequence of what might be called military activities, or whether it resulted from some action taken by the Governor entirely distinct from any military duties which he may have had. An affidavit made by LaGrange which accompanies the Memorial throws little light on this subject. It is said in this affidavit that the goods in question were confiscated during the incumbency of the Carranza-Villa faction in Mexico at the time when that faction had control of the Government, and that they were confiscated by General M. Chao who was recognized as Governor under that faction.

Mexico has thrown no light on the transactions in question either by testimony of Chao, who it appears died in 1923 or 1924, or the testimony of any one else possessing information regarding the matter. The evidence presented by the Mexican Agency relates to certain proceedings instituted before the Civil Court of First Instance of the District of Bravos, State of Chihuahua, with respect to the claim presented in behalf of LaGrange. From the records of these proceedings it appears that no record of the confiscation of the goods in question was found in the files of the military garrison of Ciudad Juarez or in the files of the office of the Municipal President. It further appears that three persons in Ciudad Juarez were asked certain questions to ascertain whether LaGrange had a business in Ciudad Juarez and whether Domingo Trueba had a business in that city and whether the Government had confiscated a warehouse in which the claimant's goods were stored. The answers given by each of these persons showed that they had no knowledge of any of the matters with respect to which they were questioned.

The objection to the jurisdiction made by Mexico is based on two grounds: (1) that the nationality of the claimant has not been proved, and (2) that, as stated in the Answer, the claim "is one of those claims expressly exempted from its jurisdiction and which, according to Article III of the Special Claims Convention of September 10th, 1923, must be submitted to the exclusive consideration of the Special Claims Commission created under the last mentioned Convention".

The objection with respect to the proof of nationality of the claimant which should have been raised in the Answer was first made in oral argument by counsel for Mexico. It is unnecessary to pass upon it in view of the conclusions of the Commission with respect to the other jurisdictional issue which has been raised. From historical information laid before the Commission it appears to be clear that Chao was an adherent of General Carranza. Evidently as such adherent he had the rank of a General. Doubtless as a so-called Governor he performed certain duties of a civilian character, but it may be assumed that as a supporter of the Carranza movement he was subject to the direction of General Carranza, who, in the early part of 1914, was styled by himself as "First Chief of the Constitutionalist Army". See *Codificación de los Decretos del C. Venustiano Carranza. Primer Jefe del Ejército Constitucionalista Encargado del Poder Ejecutivo de la Unión*. Whatever phraseology may be used to describe the status of General Carranza at that time, it would seem that he must certainly be regarded as having been a revolutionary military leader. The Commission is of the opinion that this claim based on an interference with property in the nature of a confiscation by one of General Carranza's subordinates falls within Article III

of the so-called Special Claims Convention, and that the Commission is therefore constrained to hold that the claim is not within its jurisdiction.

Decision.

The Commission is without jurisdiction in this case.

JOSEPH D. KNOTTS (U.S.A.) *v.* UNITED MEXICAN STATES

(*May 13, 1929. Pages 312-314.*)

DENIAL OF JUSTICE.—ILLEGAL ARREST. Claimant was arrested and imprisoned for short period of time for non-payment of taxes. Measures in question were not authorized by Mexican law. Claim *allowed*.

CRUEL AND INHUMANE IMPRISONMENT. Evidence *held* not to justify charge that claimant suffered great hardships during imprisonment.

MEASURE OF DAMAGES.—PROXIMATE CAUSE. Evidence *held* not to show that claimant's heart disease was permanently aggravated by arrest and imprisonment.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

In this case claim in the sum of \$10,000.00, United States currency, is made against the United Mexican States by the United States of America on behalf of Joseph D. Knotts, an American citizen, for alleged illegal arrest and detention by Mexican authorities in the town of Guadalupe y Calvo, Chihuahua, Mexico, and for alleged harsh and humiliating treatment in connection with the arrest and during the detention.

Knotts was in possession of a tract of land situated in the Mina District of Chihuahua, which he, together with certain other persons had purchased in 1913 or 1914 and had paid for, without the necessary documents of title having been executed. Knotts had paid the taxes on the land from March, 1914, to April, 1919, amounting to some ten or fifteen pesos per month. On or about January 1, 1921, demand was made on Knotts by the Collector of Taxes at Guadalupe y Calvo for payment of the taxes then due. Knotts informed the Tax Collector that he could not pay until he had obtained the necessary money in Parral, that he could not go to Parral immediately, but that as soon as he could do so he would pay the amount due. He states that the Tax Collector agreed to a postponement of the payment.

In the morning of April 15, 1921, Knotts, while en route to Parral, made a stop at Guadalupe y Calvo and visited an American friend who lived there. Shortly after Knotts had entered the house of his friend, the officer in command of the rural forces at the town, accompanied by four or five armed soldiers, came and took Knotts to the military headquarters. Here Knotts was detained for three hours, and it is alleged that he was placed in damp and unsanitary quarters, and that he suffered severely from the intense cold. After three hours had elapsed he was conducted to the office of the Municipal President, by whom he was informed that he would not

be released until he had paid his taxes. He was, however, granted the freedom of a part of the city, and on the following day he obtained his freedom on giving bond for the payment of the amount of taxes due.

Knotts, who was some sixty years of age, was suffering from a heart disease, and it is alleged that this became aggravated as a result of the treatment he received at the hands of the Mexican authorities.

It is alleged in the Mexican Answer that the arrest of Knotts took place pursuant to an order of *arraigo* issued by the Municipal President. According to Mexican law, however, failure to pay taxes does not warrant the imposition of arrest or *arraigo*, and the imposition of an *arraigo* does not give a right to arrest the person upon whom it is imposed, an *arraigo* being only a precautionary measure to the effect of forbidding a person to leave a certain jurisdiction. Further, an *arraigo* cannot be imposed without the interposition of the judiciary. The treatment accorded Knotts was therefore clearly in contravention of Mexican law.

The evidence submitted does not show that Knotts suffered great hardships during his detention. Neither can it be considered as sufficiently proven that Knotts' heart disease was permanently aggravated by what happened, although, according to the statement of a medical expert, this may have been the case. The Commission is of the opinion that an amount of \$300.00, United States currency, may properly be awarded in favor of Knotts as compensation for the illegal treatment accorded him.

Decision

The United Mexican States shall pay to the United States of America on behalf of Joseph D. Knotts the sum of \$300.00 (three hundred dollars), United States currency, without interest.

MARY EVANGELINE ARNOLD MUNROE (U.S.A.) *v.* UNITED MEXICAN STATES

(*May 17, 1929. Pages 314-317.*)

AMENDMENT OF CLAIM. Claim for death of an American subject was originally filed in name of father of decedent. Later tribunal granted motion to substitute claimant in his place and stead, designating as claimant the sister and surviving next-of-kin of decedent. *Held*, such substitution of parties was proper and claimant entitled to present claim. No issue of late filing involved.

NATIONALITY, PROOF OF. Evidence of American nationality of claimant and her relationship to decedent *held* sufficient.

WRONGFUL DEATH, COLLATERAL RELATIVES AS PARTIES CLAIMANT. Sister of murdered American subject *held* entitled to present claim.

RESPONSIBILITY FOR ACTS OF FORCES.—MOB VIOLENCE.—DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. Claim arising under same circumstances as those set forth in *Thomas H. Youmans* claim *supra* allowed.

Cross-reference: Annual Digest, 1929-1930, p. 178.

(Text of opinion omitted.)

MARY M. HALL (U.S.A.) *v.* UNITED MEXICAN STATES

(May 17, 1929, concurring opinion by American Commissioner, May 17, 1929.
Pages 318-324.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. A track motor-car operated by claimant's husband collided with rear of train and was thrown off the track. Some evidence indicated he was alive for a few moments after crash. Other evidence indicated a cause of or contributing factor to his death may have been stoning by a Mexican subject. It appeared that he had a weak heart. Investigation was made by authorities and some arrests were made. Two very young children were only witnesses of stoning. No one was ever tried or punished for the stoning. *Held*, denial of justice not established.

The Presiding Commissioner, Dr. Sindballe, for the Commission :

In this case claim in the sum of \$25,000.00, United States currency, is made against the United Mexican States by the United States of America on behalf of Mrs. Mary M. Hall, an American citizen, for failure on the part of the Mexican authorities to prosecute and punish one Remigio Ruelas, who is alleged to have stoned and killed the son of the claimant, Charles J. Hall.

The facts out of which the claim arises are the following:

On the morning of March 22, 1926, Charles J. Hall, who was employed in the engineering department of the Southern Pacific Railroad Company, was proceeding down the railroad from a station named Cutla toward the station of Ixtlán, State of Nayarit, Mexico, operating a track motor car and following up a train which had preceded him. The train arrived at the station of Ixtlán at eight o'clock in the morning, and stopped there. About half an hour later, Hall's car was seen coming down the railroad and approaching the caboose of the train, Hall lying motionless face down over the motor. In order to avoid a collision between the caboose of the train and Hall's car, signal was given for the train to go ahead, but before the brakes could be released and the train put in motion, Hall's car collided with the caboose and was thrown off the track. Hall was picked up by an American friend. An eye-witness later testified that he saw Hall gasp when he was picked up, but immediately after it appeared that Hall was dead.

The assumption arose among the onlookers that Hall had been stoned. Therefore, the train was immediately ordered to back up the track for the purpose of obtaining information with regard to Hall's death, and four soldiers were ordered to mount the caboose. At the town of Méxpan Hall's hat was turned over to the investigating party by one Florencio Carmona, who had picked it up. On a street corner of the same town two individuals, who later turned out to be Remigio Ruelas and Jesús Flores, were seen. One of the trainmen pointed at these individuals, who immediately started to run. The soldiers pursued them and fired two shots at them, but without hitting any of them, and without succeeding in capturing them. Later Ruelas was found hiding in a mill and was arrested.

Two boys were found who testified that Ruelas had thrown a stone at Hall when he passed Méxpan, and that Ruelas was accompanied by Flores at the time.

The Municipal President of Ixtlán went to the station of the town as soon as he learned of the incident. He informed the *Ministerio Público* of what had happened, stating that Ruelas was captured and mentioning the testimony of the two boys, one of whom was Jesús Machuca, it not being possible to ascertain the name of the other. Ruelas was brought before the judge of first instance. He denied having thrown a stone and endeavored to establish an alibi, involving himself in certain contradictory statements. Some witnesses testified as to the movements of Ruelas on the day in question and his character. The legal medical expert attached to the Court was ordered to make a description and autopsy of Hall's corpse. According to the opinion rendered by him Hall had a weak heart and his death was caused by heart failure. Besides two small excoriations on the left thumb Hall's body showed three wounds, one near the right temporal region, one on the left temporal region, and one on the upper part of the helix of the left ear. The three wounds were superficial, and not such as to endanger a normal man's life. Excepting the one first described, the wounds were produced after death. With regard to the first described wound, it could not be said whether it was produced during life or a short time after death. In case it was produced during life, it might have occasioned the heart failure.

Hall's body was also examined by the surgeon of the Southern Pacific Railroad Company, Dr. Fuller, who arrived at substantially the same conclusion as the medical expert of the court.

On March 26, 1926, at the recommendation of the *Ministerio Público*, Ruelas was released, as the Constitutional period within which to determine the release or the formal imprisonment of a prisoner was about to expire, and as it was found that there did not appear data sufficient to establish a *corpus delicti* of homicide or to indicate the probable guilt of the accused.

On March 27, Florencio Carmona, the man who picked up Hall's hat, and who had been arrested and turned over to the Court by the Chief of Military Operations of the State, was examined by the judge and confronted with several witnesses. On March 29, Carmona was released. No further action appears to have been taken by the Court. Flores was never captured, and the two boys who testified that they had seen Ruelas throw a stone were not brought before the Court.

The United States contends that the failure to take the testimony of the children and the finding that no *corpus delicti* of homicide had been established constitute a denial of justice for which Mexico must be responsible under international law.

The contention of the United States might be justified if it could be assumed that the court record reflects all the activity displayed by the Mexican authorities on the occasion of Hall's death. From a letter written by the Mexican Minister of Foreign Affairs to the American Ambassador at Mexico City it appears, however, that this is not the case. It appears that the authorities questioned both of the boys who had seen Ruelas throw a stone, and in view of the fact that the boys were very young—José Machuca, who made the most detailed statements, was 6 years of age—the taking of their testimony outside of the Court for the purpose of deciding whether or not a formal trial should be instituted can hardly be censured. It is mentioned in the said letter that José Machuca did not say "in any of his statements" that he had seen Ruelas hit Hall. It is further mentioned that the place from which the children claimed to have seen Ruelas throw a

stone was the top of an embankment, which was about three meters above the railroad track, that a wound produced by a rock thrown from this height would have certain characteristics, and that the medical expert verbally reported that the wound presented by Hall had different characteristics giving the appearance of having been produced by something sharp, and that individuals who saw Hall's motor collide with the caboose of the train had stated that Hall's head struck some metal. From these and certain other particulars regarding Hall's hat the conclusion is drawn that "even had Remigio Ruelas thrown a stone, it could not possibly have occasioned the death of Mr. Hall."

The Commission is not called upon to decide whether the conclusion thus arrived at by the Mexican authorities is right or wrong. At any rate, it is not so clearly wrong that a denial of justice can be predicated thereon. Neither can it be said that the failure to bring Ruelas to trial constituted a denial of justice. It would seem that, with the exception of Flores' testimony the authorities had such evidence of importance as might be expected to be available. The report of the medical expert tended to exculpate Ruelas. That the latter had fled and hid and afterwards tried to establish an alibi could hardly be conclusive against him, especially in view of the fact that he, who was only 18 years of age, was pursued and shot at by soldiers.

Nielsen, Commissioner :

While I am not disposed to dissent from the views of my associates to the extent of expressing the opinion that a pecuniary award should be rendered in this case, I do not agree with the conclusions expressed in the opinion written by the Presiding Commissioner.

It should be borne in mind that the claim is grounded on contentions that there was a failure of Mexican authorities to take proper steps to apprehend and punish the persons responsible for the death of the claimant's son. I think that there is strong evidence that some one was responsible for the death of Hall. In any event, although there was no trial of anyone against whom evidence directed suspicion, and therefore are no records such as a trial would develop, it seems to me that even the investigation conducted with respect to the tragedy strongly indicated that a crime had been committed. In the absence of a trial of anyone, it is useless in the light of the information now available to speculate as to what the precise character of the crime may have been—whether Hall was killed by a stone thrown at him or whether he was disabled, so that he lost control of the car which he was driving and consequently lost his life.

In a case of this kind I do not consider that a proper solution of issues can be reached by picking out this or that detail and formulating a conclusion as to whether some particular act resulted in a denial of justice as that term is understood in international law and practice. We must examine all the acts against which complaint is made and ascertain whether or not in the light of the record it may be concluded that there was a failure to meet the requirements of the rule of international law that prompt and effective measures shall be taken to apprehend and punish persons guilty of crimes against aliens.

Reference is made in the opinion of the Presiding Commissioner to a note addressed to the American Ambassador by the Mexican Foreign Office and to the conclusion therein stated that even if Ruelas had thrown a stone it could not possibly have occasioned the death of Hall. It is stated in the opinion that the Commission is not called upon to decide whether this

conclusion is right or wrong; that in any event it is not so clearly wrong that a denial of justice can be predicated thereon. In cases of this kind the Commission has applied the test whether there is convincing evidence of a pronounced degree of improper governmental administration. It may be true that we are not called upon to determine whether the conclusions set forth in the Mexican note are right or wrong; and also technically correct that no denial of justice can be predicated on those conclusions. But of course we are called upon to determine whether or not the action of the local Mexican authorities in this case was right or wrong. If we are of the opinion in the light of the evidence and the applicable law that it was obviously wrong, then we should render a pecuniary award, and if we reach a conclusion to the contrary, then the claim should be dismissed. However, it seems to me that an answer to the question whether a stone could have occasioned the death of Hall would be far from being conclusive with respect to the issues in the case. If a stone disabled Hall and was the primary cause of his death, then, I take it, a crime was committed by the person who threw the stone.

That an adequate investigation was not conducted seems to me to be revealed by the record of the investigation which did take place. That record was filed as Annex 1 with the Mexican Answer. That Ruelas sought to establish an alibi would of course not be "conclusive against him" as observed in the Presiding Commissioner's opinion. But the fact that he was only eighteen years of age would not in my opinion have any bearing on his guilt. That he clearly made conflicting statements, that he sought to escape capture, and that he hid are facts which to my mind create strong suspicion of guilt. According to the record the soldiers did not shoot until after he started to run when he saw them.

If Ruelas threw a stone at Hall, which it seems to me to be clear that he did, there evidently were three eye-witnesses to this act. From the record of investigation it appears that none of these three was called, and what seems to be more striking, it appears that not even an order of arrest was given for the apprehension of Flores who evidently accompanied Ruelas. The children, who it appears saw Ruelas throw a stone, may have been young, but it does not appear that the law prevented their giving testimony. And since besides them there evidently was but one eye-witness, their testimony was important. That they could give intelligible testimony can seemingly be inferred from the communication sent by the Municipal President to the *Ministerio Público*. Had the former not been convinced of this it would seem that he would not have communicated, as he did, to the *Ministerio Público* the positive information that Ruelas hit Hall "in the head with a rock, producing instant death". The information furnished by these children is borne out by the damaging conduct of Ruelas and by the disappearance of Flores whom the children evidently related they saw in company with Ruelas.

It is said in the opinion of the Presiding Commissioner that with the exception of Flores' testimony the authorities who made the investigation has such evidence as might be expected to be available. I do not think that we can reach any sound conclusion from the meagre record before us as to what evidence might have been produced at a trial conducted with energetic prosecution and defense. Moreover, it seems to me that even in the preliminary investigation clearly further facts might have been developed. And certainly the testimony of Flores, the young man who accompanied

Ruelas, would have been important both in the preliminary investigation and in any trial that might have been held.

Without undertaking to specify the precise nature of the charge that should have been made against Ruelas, I am of the opinion that it may be concluded from the record that he and probably Flores should have been tried on some charge.

Certain observations made in the unanimous opinion of the Commission in the *Roper* case, *Opinions of the Commissioners, Washington, 1927*, p. 205, pp. 209-210, seem to me to be very apposite to the instant case. After a reference in that opinion to a person said to have been an eye-witness to important occurrences it was said by the Commission:

“From testimony given by Mexicans it appears that the half-naked American who had so persistently sought to obtain the arrest of negroes who had assaulted him, suddenly disappeared at the time when his presence would have been most important for the consummation of his purpose of obtaining redress. It is strange that such an important witness should not have been located by Mexican authorities. There would seem to be good reason to suppose that he could easily have been found if he were a reality. He was strikingly identified by several persons who gave testimony before the Mexican Judge, and it was testified that he could speak some Spanish.

“The Commission believes that it has mentioned enough things shown by the record upon which to ground the conclusion that the occurrences in relation to the death of these American seamen were of such a character that the persons directly concerned with them should have been prosecuted and brought to trial to determine their innocence or guilt with respect to the death of the Americans. The conclusions of the Judge at Tampico with respect to the investigation conducted by him were treated in oral and in written arguments advanced in behalf of the Mexican Government as the judgment of a judicial tribunal. And the well-known declarations of international tribunals and of authorities on international law with regard to the respect that is due to a nation's judiciary were invoked to support the argument that the Commission could not, in the light of the record in the case, question the propriety of the Judge's finding. In considering that contention we believe that we should look to matters of substance rather than form. We do not consider the functions exercised by a Judge in making an investigation whether there should be a prosecution as judicial functions in the sense in which the term judicial is generally used in opinions of tribunals or in writings dealing with denial of justice growing out of judicial proceedings. It may readily be conceded that actions of the Judge should not be characterized by this Commission as improper in the absence of clear evidence of their impropriety. Obviously, however, the application of rules or principles asserted by this Commission in the past with respect to denials of justice will involve widely varying problems. To undertake to pick flaws in the solemn judgments of a nation's highest tribunal is something very different from passing upon the merits of an investigation conducted by an official—whether he be a judge or a police magistrate—having for its purpose the apprehension or possible prosecution of persons who may appear to be guilty of crime.”

Decision

The claim of the United States of America on behalf of Mrs. Mary M. Hall is disallowed.

MRS. CLARA WILLIS (U.S.A.) *v.* UNITED MEXICAN STATES
(May 17, 1929. Pages 325-327.)

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—BIAS OF INVESTIGATING OFFICIAL. American subject was killed during course of altercation with Mexican. Investigating official was brother of said Mexican. Investigating official was brother of said Mexican. Latter was arrested, tried, and acquitted, and proceedings were reviewed by an appellate court. Though preliminary investigation was improperly carried out, that fact and fact that it may have affected the final result of the judicial proceedings, *held* not a denial of justice.

The Presiding Commissioner, Dr. Sindballe, for the Commission :

On July 17, 1911, between ten and eleven o'clock, A. M., when Milton K. Willis and Jack Ricks, two employees of the California-Mexico Land and Cattle Company, had just returned from a trip to the camp where they were stationed, located near Mexicali, Lower California, Mexico, two persons, one Epifanio Gallegos and Regino Avilez rode up on horseback to the said camp. They were asked to dismount, which they did. They inquired about some horses. Willis questioned Gallegos about some vile language he was supposed to have used in speaking of the employees of the company, and after a wordy altercation between Willis and Gallegos some shots were exchanged between them, the result of which was that Willis was killed by Gallegos and that Gallegos was hit in the right hand and Avilez, who was unarmed, shot through the chest by Willis.

The Sub-Prefecture of Mexicali, which was informed of Willis' death on July 19, 1911, took the testimony of Ricks on July 23, and the testimony of Gallegos and Avilez on August 2. The record of the proceedings was submitted to the Court of First Instance of Mexicali on August 14. Pursuant to the order of the court Gallegos was arrested and prosecuted. On April 21, 1912, Gallegos was acquitted, it being assumed by the Court that he had acted in self-defense. In accordance with Mexican Law, the proceedings of the court were reviewed by the Superior Court, which, it appears, made no observations with regard to the decision.

The United States contends that the criminal proceedings undertaken by Mexican officials in the investigation of the death of Willis and the conduct of the trial of Gallegos resulted in a denial of justice according to established principles of international law.

Before the Sub-Prefecture Gallegos and Avilez both stated that Willis had fired two shots at Gallegos with a revolver, before Gallegos fired his shot, and that Willis fired a third shot at Gallegos at the same time when Gallegos fired at Willis. Ricks testified, according to the record of the Sub-Prefecture, that he went into a tent before the shooting began, that from inside the tent he heard two shots being fired almost simultaneously, that he then took a rifle, from under Willis' bed and that when he went out, he saw Willis, who was down on his knees, shoot Avilez through the chest and then fall forward. He added, according to the same record, that because of the confusion of the moment he could not tell how many shots were fired between Gallegos and Willis, who were the only ones who used their arms.

As to the procedure before the court very little is known, the court record having been destroyed by fire. In the decision of the court the following passage is found:

"Whereas; third, That in the presence of the court, Epifanio Gallegos, John B. Ricks and Regino Avilez, confirmed their declarations, deposing in fact as they had done before the secretary of the Sub-Prefecture, all of their statements being in accord, except with reference to the number of shots fired, as Ricks, in confrontation with the defendant, stated that he could not ascertain the exact number of them due to the excitement of the occasion."

On February 8, 1913, Ricks made a deposition before the American Consul at Mexicali. On this occasion he stated that when he went out of the tent with Willis' rifle, he found that the rifle was empty although it had been loaded in the morning, and that Gallegos, in leaving the camp on his horse, had pulled some cartridges out of his pocket, saying, "Here's your cartridges—the reason you could not shoot". He said that he had testified to the same effect before the court, but that this part of his testimony had not been taken down. He further stated that he had examined Willis' gun after the shooting and had found that only two shots had been fired by Willis, so that Willis could have fired only one shot at Gallegos.

According to the testimony of Gallegos and Avilez before the Sub-Prefecture the cartridges were taken from Willis' rifle during a struggle for possession of the rifle which took place when Ricks came out of the tent. That such a struggle took place, is testified to by Ricks also.

It is not possible for the Commission to arrive at a definite conclusion with regard to the question as to whether Gallegos or Willis shot first. In view of the short distance between the two persons, it seems improbable that the explanation of Gallegos and Avilez to the effect that Willis started the shooting by firing two shots at Gallegos without hitting him is correct, but it cannot be inferred with any degree of certainty from this, or from any of the evidence submitted, that Gallegos was the attacking party.

With regard to the procedure it appears that the Sub-Prefect was a brother of Gallegos, and in view hereof the preliminary investigation must be considered as having been improperly carried out. Whether or not this has been remedied during the court procedure, cannot be established with certainty. The court records are not available. It is explained by the Mexican Agency that the records were destroyed in connection with the burning of a building in which they were kept. It appears, however, from the above quoted passage of the court decision, that the testimony of the witnesses was taken by the judge, so that, in the light of the available evidence, the Commission would not be justified in assuming that the court proceedings were improper. It was argued by counsel for the United States that, in view particularly of the nature of the evidence taken before the Sub-Prefecture, further testimony should have been developed before the court. But it is impossible from the meagre record before the Commission to determine the precise nature of the proceedings which took place before the court. Even assuming that the court proceedings were properly carried out, the possibility exists that the improper preliminary investigation may have affected the final result of the proceedings, but, in the opinion of the Commission, the mere possibility hereof does not afford a sufficient basis for giving a pecuniary award.

Decision

The claim of the United States of America on behalf of Mrs. Clara Willis is disallowed.
