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

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

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.
