

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

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

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*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,<sup>1</sup> 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

<sup>1</sup> 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,<sup>1</sup> 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

<sup>1</sup> 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.<sup>1</sup> 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

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<sup>1</sup> 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. 1166<sup>1</sup>, 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. 209<sup>2</sup>, 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. 218<sup>3</sup>, 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

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<sup>1</sup> See page 381.

<sup>2</sup> See page 364.

<sup>3</sup> 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. 354<sup>1</sup>, 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. 39<sup>2</sup>, 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.

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