

MEXICO/U.S.A. (GENERAL CLAIMS COMMISSION)

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

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

*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. 270<sup>1</sup> and 271.<sup>2</sup>

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.<sup>3</sup> 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

<sup>1</sup> See page 117.

<sup>2</sup> See page 110.

<sup>3</sup> 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.

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