

OSCAR C. FRANKE (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930, dissenting opinion by American Commissioner, undated. Pages 73-82.)

Commissioner Fernández MacGregor, for the Commission:

This claim is presented by the United States of America against the United Mexican States demanding from the latter, in behalf of Oscar C. Franke, an American citizen, the payment of \$5,000.00 United States currency, it being alleged that the claimant was arrested and detained

without justification by the Mexican authorities and subjected to cruel and inhuman treatment during the period of his detention.

The claimant and a companion of German origin, named Wolfgarten, on the morning of August 25, 1922, were in the town of Ciénega de los Caballos, State of Durango, Mexico, for the purpose of taking the passenger train to Empalme Purísima; they were arrested by a Mexican, Francisco Barbosa, *Jefe de Cuartel* of that place, searched and taken on foot, guarded by mounted men, over a mountain trail, to Empalme Purísima, a distance of 28 kilometres. They were not permitted to communicate with anyone or to stop for food and water and the journey was made in a heavy rain. Upon their arrival at Empalme Purísima, at about 3 o'clock in the afternoon, they were placed in a stock pen where they remained for nearly an hour when they were released without any explanation.

The claimant Government alleges through its Agency (a) that the arrest was unjustifiable and made without warrant of arrest from competent authority, (b) that Franke was subjected to unnecessarily harsh and inhuman treatment, and that as the acts of the Mexican *Jefe de Cuartel* resulted in an injustice to the American citizen in question, Mexico is directly responsible.

The Mexican Agency submitted a report from the same *Jefe de Cuartel*, who made the arrest, a minor official of little education, in which he stated not very clearly, that the German companion of Franke was employed by a lumber company which had a suit pending against another lumber concern, and that by virtue of this suit the Judge of the Civil Court of the City of Durango had issued an embargo against the lumber in the San Vincente Camp; that the Company's representative and the claimant had endeavored on a number of occasions to ship the embargoed lumber by railroad; that he, the *Jefe de Cuartel*, had warned them against such action; but that they disregarded his warning and that on August 24, 1922, he had discovered them while attempting to make another shipment for which reason he had arrested them.

Although the evidence filed by Mexico is scanty, it seems, nevertheless, to be worthy of credence on account of its frankness, it appearing from the report rendered by the *Jefe de Cuartel*, that there was reasonable ground for Franke's arrest, since he in company with Wolfgarten was violating an order of a Mexican Judge who had prohibited the removal of the lumber without his order. Whether it is considered, as maintained by the Mexican Agency, that the disposition or appropriation of embargoed property is equivalent to robbery under the Mexican penal law, or whether it is considered merely as a question of open and repeated disobedience of a judicial order, the act of Franke was punishable, and since the authority of the place, who was the *Jefe de Cuartel*, surprised Franke and his companion in the act of committing that punishable offense, a written order to arrest them was not necessary, inasmuch as the Mexican Constitution itself which requires this order as a general rule, makes the exception that it is not necessary in a case of *flagrante delicto*.

The allegation of cruel and inhuman treatment consists in denying to Franke all possibility of communicating with his friends, in compelling him to walk 28 kilometers in five hours in the rain, in denying to him during this time food and drink, and in confining him for an hour in a stock pen. It seems that the persons detained were able to communicate with their friends, since this is shown by the telegrams of complaint received by the Mexican Authorities and by the replies thereto received by the prisoners. Assuming the other circumstances of the arrest to be true, and without

considering the exaggeration with which claimants commonly relate their sufferings in these cases, it does not appear, nevertheless, that an award can be based upon a walk of 28 kilometers, nor upon a deprivation of food and drink for five hours (having in mind that the arrest was effected at about 10 o'clock in the morning and when the prisoners had certainly partaken of the first meal of the day) nor upon a detention of an hour in an inappropriate place, since none of these circumstances, nor all of them, although harsh in themselves, constitute treatment which may be considered below the standards of civilized nations.

The claim of Oscar C. Franke must therefore be disallowed.

Decision

The claim of the United States of America on behalf of Oscar C. Frank is disallowed.

Commissioner Nielsen dissenting.

This claim is made for a comparatively small amount, but cases of that nature of course may involve important principles of law, both substantive law and adjective law. And if it be proper to apply in what may be called a small case principles to which application is given in the opinion of my associates, it might be considered to be proper to give them application in like manner in other cases involving extensive property rights or serious questions of personal rights.

In the instant case I find myself in disagreement with the views of my associates first as to the propriety of the methods used to enforce a certain embargo which is supposed to have existed, and secondly as to the treatment of questions of evidence raised in the case. I am inclined to consider this latter point to be the more important one. In addition to reference to a litigation involving personal property we are concerned in the instant case with a considerable number of questions of a kind that, generally speaking, may perhaps be said to be of a difficult, technical nature, such as some kind of a court order placing an embargo on personal property; orders of a court with respect to the enforcement of the embargo and with respect to the violation of the embargo; acts violative of the court order; and finally, the methods employed to give effect to such orders.

It is difficult for me to conceive of the existence of things of this kind and at the same time of the complete non-existence of any written records respecting them. If such things had existed, I am constrained to conclude that they could not have been shown by written records, and moreover, that they would have been shown. In the Mexican Answer it is stated that the Mexican Agency "despite its efforts, has not been able to obtain a complete information regarding the facts on which this claim is pretended to be based". And in the Mexican brief reference is again made to "efforts of the Mexican Government to furnish the Commission with the greatest possible number of sources upon which to base its opinion" which it is said "have been of no avail". The evidence furnished to prove all these matters on which the defense is grounded with respect to a pending litigation, a violation of an embargo and the punishment of such violation consists of a copy of a brief communication written by the magistrate against whose action complaint is made by the claimant and the claimant Government.

It is stated in the opinion of my associates that this communication or report of the *Jefe de Cuartel*, in the light of which the claim is rejected,

appears to be worthy of credence on account of its frankness. But in view of the conduct of the man and in view of the fact that the Mexican Agency, after exhausting all sources of information has been unable to produce any record of litigation, court orders, and steps to enforce court orders which I have mentioned, it seems to me that a more reasonable inference would be that the letter of the *Jefe de Cuartel* is somewhat ingenious rather than frank.

The allegations of the Memorial on which the claim is based are in substance as follows:

At about 10 o'clock in the morning of August 24 or 25, 1922, the claimant, in company with one José or Joseph Wolfgarten, a German subject, arrived at the town known as Ciénega de los Caballos in the State of Durango, Mexico, with the intention of taking the regular passenger train to the town of Empalme Purísima. Durango, some 28 kilometers distant. Shortly before the train arrived the claimant and Wolfgarten were arrested by Francisco Barbosa, Chief Quartermaster and *Jefe de Cuartel* No. 37, and two federal soldiers, who accompanied this official and were acting under his orders.

No warrant of arrest was shown the claimant, nor was any reason given why the claimant and his companion were detained. In custody of the *Jefe de Cuartel* and the two soldiers, all of whom were mounted, the claimant was ordered to proceed on foot to Empalme Purísima. The claimant offered to pay his railroad fare in order that he might make this long and tiresome trip by the train which was then about to depart for that point, but this privilege was denied to him. The privilege of communicating with friends or the American Consul was likewise refused claimant. The reason assigned for the silence which was imposed on the prisoners was the declaration by the *Jefe de Cuartel*, in effect: "I am the law, and will not permit more".

The claimant and his companion likewise were not permitted to speak to one another and were marched between the two armed soldiers for a period of five hours for a distance of 28 kilometers in a drenching rain through wild country where at times there was no road. During the journey they were not permitted to pause for rest at any time, nor were they given food or even a drink of water.

At 3 o'clock in the afternoon they arrived at Empalme Purísima where they were thrown into a stock pen along with a number of goats and cows, at the rear of the home of the *Jefe de Cuartel*. In this foul place they were held prisoners for a further period of an hour, still without food or water and under the surveillance of armed soldiers. At about 4 o'clock in the afternoon the claimant and his companion were released from custody without having been charged with any wrong-doing or violation of law and without being examined in regard to any charge of wrong-doing. In their weakened and exhausted condition they were then obliged to walk two miles to reach the nearest railroad station.

At the time claimant and his companion were taken into custody at Ciénega de los Caballos, one of their friends who had seen the affair called the matter to the attention of certain authorities, and as a result thereof a telegram was despatched by one Juan Torres S., General of Brigade, Chief of Military Operations, to Francisco Barbosa, who had arrested the claimant and his companion. The telegram directed Barbosa to release the prisoners.

It is alleged that the arrest and detention of the claimant were entirely without justification and were, as shown, accomplished under such cruel,

inhuman and revolting circumstances as to cause the claimant to suffer great mental and physical pain and anguish, as well as gross indignity.

These allegations are supported by the affidavit of the claimant and of José Wolfgarten, a German national, who was arrested together with the claimant, also an affidavit of a Mexican citizen. Nothing has been brought forward that disproves the allegations with respect to the arrest and subsequent mistreatment of the claimant, and indeed these matters appear not only to be convincingly proved but also, I think, to be admitted.

In the opinion of my associates some effort apparently is made to minimize the grievances of which the two arrested men complained. It is said with respect to the allegations that the claimant and his companion were prevented from communicating with friends that they appear to have been able to have such communication, since that is shown by telegrams of complaint received by the Mexican authorities and by replies received by the prisoners. This point appears to be of no considerable importance. However, it may be observed that, in the affidavit of Wolfgarten it is stated that the men were not permitted at first to send telegrams, but that he secretly contrived to have an employee inform the authorities in Durango as to what was happening to him. Wolfgarten, after his release, also sent a telegram to a German Consular Officer at Ciénega Junction. In considering the propriety of the methods used to enforce a court order I regard as unimportant any speculation with respect to such a minor detail as the point whether the prisoners had partaken of breakfast prior to their journey.

In considering the value of the evidence upon which the defense in the case is grounded and in the light of which the conclusions of my associates are based, it may be noted that there is a reference in Wolfgarten's affidavit to some kind of litigation with which it is stated Franke had no concern. It is interesting to examine the evidence furnished by the *Jefe de Cuartel*—the letter sent by him to the Municipal President at Durango, in response to a request by the latter for information. It reads as follows :

“I beg to greet you respectfully and at the same time answer your telegram which I have just received, dated today the 25th instant, in which you ask for a report on the arrest of Mr. José Wolfgarten. Mr. President, said Mr. Wolfgarten and Mr. Franke were arrested because they are very abusive and at the same time disobey the orders of the Court and other authorities, as I have received orders from the Court and at the same time in accord with the Municipal President, and these gentlemen were set on shipping carloads of timber from the San Vicente Camp, which lumber is under attachment; the reason is that I could not stand them any longer, because I have many times warned them not to ship carloads of said attached lumber until I received new orders from the Court and the consent of the lumber mill's Superintendent, but as these gentlemen continued disobeying the orders I had to take action against them for not complying with the Court's orders, basing myself on orders which I have received from my superiors and the Municipal Presidency, for these gentlemen did not obey orders and the proof is that I have on several occasions prevented their shipping attached lumber from the San Vicente Camp, except upon presentation of an order from the First Civil Court and the consent of Mr. Guillermo Maldonado, Superintendent of the lumber company, which they never did but only stated that they had orders from Mr. Edward Hartman and from the *Asociación Exploradora de Bosques*; but, Mr. President, I told them from the very beginning that I was not obeying any orders from Mr. Edward Hartman, because they were not sufficient for me, and at the same time I can see that Mr. Hartman and his employees do not constitute any authorities, for which reason I disobeyed the orders of the 'Asociación' and of Mr. Edward Hartman; I also beg to advise you that when they began to ship the first carloads, I received

orders from the Court, in accord with the depositary of the property of Mr. Hartman under attachment and Mr. Fernando Doran and Mr. José Wolfgarten said that they were going to ship lumber on the cars no matter who was opposed to it, thereby trampling upon the orders of the authorities, but in spite of this I acted with prudence to see if, by polite gestures, I could make them obey the orders of the authorities, but it was in vain and they did not respect the orders which I received from my superiors; thus I was here only to be mocked by these gentlemen and it did not seem well to me; I therefore proceeded against them for being so abusive; in a few days we shall meet here to discuss the subject. Yours respectfully, The Chief of Precinct 37, at Empalme Purísima, Francisco Barbosa." (Translation)

As I have already observed, we have no information that throws any light on the scope and legal effect of the unrecorded judicial orders which are said to have been violated. There are many precedents illustrating the fact that lower courts have often been under a misconception as to what might constitute a violation of their own orders. In the instant case we have no record before us as to what any court may have said or done. Barbosa's word is accepted on that interesting point of a violation of a court order. Barbosa declares that the prisoners insisted on violating court orders. The nearest he comes to giving specific information on that point is by a statement that the men were determined to ship cargoes of timber from the San Vicente Camp. If, as I understand it is assumed in the opinion of my associates, it may be taken for granted that such action on the part of the men might be in the nature of robbery and that therefore the men may be considered to have been arrested in *flagrante delicto*, it seems to be proper to take note of the fact that when these men were arrested they were not at the San Vicente Camp. The evidence shows that on the day of the arrest they had come on a handcar from the camp to Ciénega de los Caballos where they were arrested when they were waiting to take a train. The Mexican citizen, R. Tovalín, testifies to having assisted the prisoners to make the journey on the handcar. The distance of this trip does not appear from the record. It is of course useless to speculate with respect to numerous, possible, unknown, interesting occurrences which are supposed to have entered into the case. However, it may be observed that it seems to be certain that the men were not caught in *flagrante delicto* in carrying lumber on the handcar to be taken on a passenger train.

In the *Pomeroy's El Paso Transfer Company*¹ case claim was made for the trifling amount of \$223.00 for services said to have been rendered by the claimant to Mexican authorities. The allegations with respect to performance of the services and the agreed compensation for them were supported by two detailed affidavits and copies of bills for the services, authenticated under oath by an employee of the claimant company. No doubt was cast upon that evidence by any evidence produced by the respondent government, and no satisfactory explanation was given as to the non-production of such evidence. Nevertheless my associates considered the unrefuted evidence produced by the claimant as insufficient to establish this small transaction. It was stated that the record really contained nothing but the testimony of a single witness. The treatment by my associates of matters of evidence in the instant case seems to me to fall far short of squaring with the conclusions reached in the *Pomeroy's El Paso Transfer Company* case. I think that it is interesting and pertinent to compare the rejection of the evidence of the claimant government in the latter to justify the dismissal

¹ See page 551.

of the claim, with the acceptance of the evidence (the Barbosa letter) of the respondent government in the instant case to warrant a dismissal here.

I have quoted in full the communication of the *Jefe de Cuartel*, Barbosa, on which the defense in the instant case rests and upon which the conclusions in the majority opinion are grounded with respect to all these things—litigation, a court order, violation of court orders, and this communication is described as one of frankness. It is accepted as controlling with respect to all of these things concerning which the Mexican Government, with all the resources at its command, informs us no record has been found. Barbosa is no doubt aptly referred to in the majority opinion as “a minor official of little education”. Evidently no importance is attached to the three affidavits which are not even mentioned. From them certainly nothing can be inferred in regard to arrests for crime in *flagrante delicto*. And at least two of them, unless they are utterly disregarded, contain a clear refutation of the idea that the claimant was properly arrested; that he had any connection with a pending litigation; and that he violated some court order.

I have indicated my view that the treatment of evidence is the question of main importance in this case. With respect to the occurrences on which the claim is grounded it is said in the opinion of my associates that “none of these circumstances, nor all of them, although harsh in themselves, constitute treatment which may be considered below the standards of civilized nations”. Conduct not at variance with what is sometimes roughly spoken of as ordinary standards of civilization or the standards of civilized nations must, I assume, be regarded to be proper conduct. Whatever may be said as to the actual sufferings endured by the claimant, I am in sympathy with the view expressed by counsel for the United States with respect to the injury and indignity suffered by a man as a consequence of an arrest and the humiliation resulting from treatment such as was accorded to the prisoners. They were marched for a very considerable distance in bad weather under guard of soldiers and finally deposited in a pen with goats and cows. It seems to me that Barbosa, prompted by a proper sense of property values and by natural humanitarian instincts, might have been reluctant to handle one of his cows in that manner—I refer now to the journey and not to deposit of the men in the pen. I am unable to take the view that this was an appropriate manner of enforcing an order of embargo. If it was proper under Mexican law then that could be shown, just as I assume that, had there been any order which was violated by the claimant, that could have been shown by official records.

I think it may be assumed that the release of the men from custody an hour after they had been deposited in the pen must have been directed by order of the Municipal President at Durango, who apparently earnestly interested himself in the occurrences under consideration. If the two prisoners were properly handled by Barbosa, subject to a court order for violation of an embargo then the Municipal President himself must have defied the court and have become an accomplice, in a sense, with the claimant and his companion. That I do not consider to be plausible.
