E. R. KELLEY (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930, concurring opinion by Mexican Commissioner, October, 8 1930. Pages 82-93.)

Commissioner Nielsen, for the Commission:

This claim made in favor of E. R. Kelley, an American citizen, in the sum of 11,384 pesos, with interest, is predicated on allegations with respect to a breach of contractual obligations. The case was argued in May, 1927, in conjunction with the cases of *J. E. Dennison*, Docket No. 2332, *Belle M. Hendry*, Docket No. 2734, and *Halifax C. Clark and Olive Clark, joint executors of the estate of Alfred Clark, deceased*, Docket No. 2155. The aggregate of the principal sums of these claims is 177,404.08 pesos. All of these cases were reopened to afford the Agencies an opportunity to produce certain further evidence. The substance of the allegations set forth in the Memorial of the United States is as follows:

On June 1, 1912, claimant entered into a contract with the National Railways of Mexico whereby he became an employee of the railroad company. The terms of the contract stipulated that he should perform for a period of four years the duties of Division Superintendent of the Interoceanic Railways of Mexico, a line of railway operated by the National Railways of Mexico, and that the compensation for his services should be the sum of 600 pesos a month during the term of the contract.

On the execution of the contract the claimant entered upon the discharge of his duties and faithfully performed them until on or about March 30, 1914, when he left Mexico and went to the United States for a period of leave of absence of sixty or ninety days which had been granted to him. On or about May 1, 1914, he was, without fault on his part, and in violation of the terms of the contract, summarily discharged at the direction and by order of General Victoriano Huerta, Provisional President of Mexico. At the time of the discharge of the claimant there remained under the contract a period of two years and two months during which his employment should continue. No compensation was paid to him subsequent to April 1, 1914. The total amount of compensation due claimant for the period of time under the terms of the contract after his discharge is the sum of 15,600 pesos, Mexican currency.

As soon as the claimant was discharged from the services of said company he endeavored to obtain other employment but he was unsuccessful until on or about January 1, 1915, when he entered into an agreement of employment at a monthly salary of $124.00, currency of the United States, with the Texas-Mexican Railway which operated a line of railway between Laredo and Corpus Christi, Texas. The total amount paid to him as salary under that employment up to the date of the expiration of the contract with the National Railways of Mexico was $2,108.00, currency of the United States, or 4,216 pesos, Mexican currency, which should be deducted from the above stated sum of 15,600 pesos due to claimant.

Among the defenses advanced in behalf of Mexico in this case is the argument that the Government of Mexico is not responsible for the acts of General Victoriano Huerta.

But the contention is also made in the Answer that, even if such responsibility existed "taking into consideration that in April, 1914, American troops were landed in Vera Cruz, Mexico, and that the claimant, E. R. Kelley, says in his affidavit (Annex 3 of the Memorial) that 'All American employees of the National Railways of Mexico' (including himself) were ordered discharged at that time, such an order, if any, would have been a necessary and reasonable measure of public policy dictated by a government in the exercise of rights of sovereignty for the protection and safeguard not only of national integrity, which of itself would completely justify the act, but for the personal safety of all those American citizens who being engaged in the business of public transportation in Mexico at a time when there was great public excitement over the landing of American troops in Vera Cruz, were certainly exposed to grave and imminent danger as long as they continued in their respective employments". The Commission feels constrained to take a view of the case in harmony with the principal point of these contentions.

Without undertaking to classify all the incidents of 1914 at Vera Cruz in precise terms of international law pertaining to war, or measures stopping short of war, or something else, or to apply to such incidents concrete rules of that law, we are of the opinion that a proper disposition of the instant case may be found in principles of law to which proper application may be given in determining the question of international responsibility.

On April 20, 1914, the President of the United States appeared before the two Houses of Congress and detailed what he described as "wrongs and annoyances" suffered by representatives of the United States in Mexico, and he asked the approval of Congress to "use the armed forces of the United States in such ways and to such extent as may be necessary to obtain from General Huerta and his adherents the fullest recognition of the rights and dignity of the United States." *House Document No. 910, 63d Congress, 2d Session.* To be sure, the President expressed a "deep and genuine friendship" on the part of the American people for the people of Mexico, and he stated that he earnestly hoped that war was not at the time in question. However there was fighting between Mexican and American forces, and the city of Vera Cruz was occupied. *Foreign Relations of the United States*, 1914, p. 477, *et seq.* In whatever light the landing of American troops at Vera Cruz and the clash of military forces that followed may be viewed, it seems to be clear that when these occurrences took place, and when the order for the discharge of the claimant was given, hostilities of some considerable duration may reasonably have been anticipated.

There are well defined rules of international law for the safeguarding of rights of non-combatants. But there are of course many ways in which non-combatants may, without being entitled to compensation, suffer losses incident to the proper conduct of hostile operations. And a Government has recourse to a great many measures of self-protection distinct from actual military operations such as the segregation or internment of enemy nationals, the elimination of such persons from any positions in which they might be a source of danger, and their exclusion from prescribed locations. With respect to practices in Europe during the World War, see Oppenheim, *International Law*, Vol. II, 3rd ed., p. 149, *et seq.*, and as to action taken in the United States, see *United States Statutes at Large*, Vol. 40, Part II, p. 1716, *et seq.*

With reference to matters more directly connected with actual military affairs there are interesting illustrations of property losses for which those who have suffered such losses have not been considered to be entitled to compensation.

Thus it was held in the arbitration between the United States and Great Britain under the Special Agreement of August 18, 1910, that under certain conditions submarine cables might be cut without compensation being made for loss incident to the destruction of the physical property. In that case the British Government did not dispute the propriety of cutting the cables, a military measure, but argued that compensation should be made for the cost of repairing the cables. *Cuba Submarine Telegraph Co., Ltd., and the Eastern Extension, Australasia and China Telegraph Company, Ltd.* cases, *Report* of the American Agent, p. 40. In the same arbitration it was held that in time of war property may be destroyed in the interest of the preservation of the health of military forces and that compensation need not be made for the property. Case of *William Hardman, ibid.*, p. 495. It was said by the tribunal in that case that the presence of troops at a certain town where the property was located was a necessity of war, and the destruction required for their safety was consequently a necessity of war. In this case it was similarly argued in behalf of Great Britain that, while property might properly be destroyed for the purpose of preserving the health and increasing the comfort of troops, the right to destroy should be exercised subject to the payment of compensation.

It may also be observed that extensive pecuniary losses have of course occurred in various ways when the outbreak of hostilities has brought about the interruption of contractual relations, although rights established prior to such hostilities may in some measure have been preserved.

We do not agree with the Mexican Government's contention that the existence of a contract between the claimant and the National Railways of Mexico has not been proven. From the evidence it appears that the claimant had contractual rights and that he was prevented from the continued enjoyment of such rights. But in the light of principles which have been briefly discussed, the discharge of the claimant, an American citizen, holding a responsible position when these occurrences at Vera Cruz took place, could not be regarded as an arbitrary invasion of contractual property rights for which compensation should be made by the Mexican Government.

It was argued in behalf of the United States that if any rule or principle of international law in relation to war came into operation as a result of the situation which brought about the discharge of the claimant it would merely have the effect of suspending the claimant's contract and not of wiping it out entirely, and that the utmost that could have been justified

would have been a very short suspension of a long term contract. Counsel quoted several statements from writers on international law to the effect that contracts between nationals of belligerent states are necessarily suspended during war, also that there is a rule of international law that war suspends but does not annul such contracts.

When two nations are at war it may be possible for their respective nationals to carry on contractual relations, but as a general rule it is certainly not very convenient to do so, even if it be permitted by the Governments. In the consideration of the legal effect of such contracts it is necessary accurately to analyse the conditions under which such agreements are made and the nature of the authority that may prohibit or regulate them. And these matters can easily be analysed and understood, whatever statements of various kinds may have emanated from authors.

Belligerent nations at times enact laws forbidding or regulating intercourse of their nationals with the nationals of enemy countries. A nation may deem it proper to put into effect such legislation in one war in which it is engaged and to refrain from doing so during the course of some other war, and legislation may be enforced during a part of the period of hostilities. Laws of this nature enacted by Governments vary in form, scope and legal effect. In the light of an analysis of international practice, it seems to be clear that there never has been any general consent among the nations of the world binding themselves by rules or principles of international law to control the acts of their respective nationals in the making of contracts with enemy nationals. Dr. Oppenheim, with his usual clarity and exactness, deals with this subject as follows:

"Before the World War, following Bynkershoek, most British and American writers and cases, and also some French and German writers, asserted the existence of a rule of International Law that all intercourse, and especially trading, was *ipso facto* by the outbreak of war prohibited between the subjects of the belligerents, unless it was permitted under the custom of war (as, for instance, ransom bills), or was allowed under special licences, and that all contracts concluded between the subjects of the belligerents before the outbreak of war become extinct or suspended. On the other hand, most German, French, and Italian writers denied the existence of such a rule, but asserted the existence of another, according to which belligerents were empowered to prohibit by special orders all trade between their own and enemy subjects.

"These assertions were remnants of the time when the distinction between International and Municipal Law was not, or was not clearly, drawn. International Law, being a law for the conduct of States only and exclusively, has nothing to do directly with the conduct of private individuals, and both assertions are, therefore, nowadays untenable. Their place must be taken by the statement that, States being sovereign, and the outbreak of war bringing the peaceful relations between belligerents to an end, it is within the competence of every State to enact by its Municipal Law such rules as it pleases concerning intercourse, and especially trading, between its own and enemy subjects.

"And if we look at the Municipal Laws of the several countries, as they stood before the World War, we find that they have to be divided into two groups. To the one group belonged those States—such as Austria-Hungary, Germany, Holland, and Italy—whose Governments were empowered by their Municipal Laws to prohibit by special order all trading with enemy subjects at the outbreak of war. In these countries trade with enemy subjects was permitted to continue after the outbreak of war unless special prohibitive orders were issued. To the other group belonged those States—such as Great Britain, the United States of America, and France—whose Municipal Laws declared trade and intercourse with enemy subjects *ipso facto* by the outbreak of war prohibited, but empowered the Governments to allow by special license all or certain kinds

of such trade. In Great Britain and the United States of America, it had been, since the end of the eighteenth century, an absolutely settled rule of the Common Law that, certain cases excepted, all intercourse, and especially trading, with alien enemies became *ipso facto* by the outbreak of war illegal, unless allowed by special licence.

"When the World War came, the belligerents by statute or decree supplemented or varied their Municipal Law relating to trading with the enemy. Thus Great Britain, in September 1914, passed the Trading with the Enemy Act, 1914, forbidding (except under license) all transactions during the war which were prohibited by Common Law, statute, or proclamation, and among them were all that would improve the financial or commercial position of a person trading or residing in an enemy country: *e. g.* paying debts to him, dealing in securities in which he was interested, handling goods destined for him or coming from him, or contracting with him. By a decree of September 27, 1914, France, after a preamble reciting that war of itself prohibited all commerce with the enemy, expressly forbade all trade with enemy subjects or persons residing in an enemy country, all contracts (*tout acte ou contrat*) with such persons, and the discharge for their benefit of obligations, pecuniary or otherwise resulting from *tout acte ou contrat passé*. Germany, by an ordinance of September 30, 1914, prohibited all payments to persons resident in the British Empire, and the ban was extended later to persons resident in other enemy countries. But German law admits trading with the enemy which is not expressly forbidden, and legislation in Germany against such trading seems to have been less rigorous than in Great Britain or France. The United States, by the Trading with the Enemy Act of October 6, 1917, prohibited all trading or contracting with persons resident or doing business in an enemy country, all payments to such persons, and all business or commercial communication with them." *International Law*, vol. II, 3rd ed., pp. 152-156.

Finally, it may be noted with respect to this subject that legislation of the United States and of Great Britain such as is referred to by Dr. Oppenheim was not by its principal provisions concerned with contracts made between persons within the territorial jurisdiction of each country but with intercourse across the line, so to speak, or in other words, with contracts made by nationals with persons domiciled or resident in the enemy country. Therefore, it is clear that matters of this kind have no relevancy to the issue that is before this Commission. And furthermore it should be observed that, as regards the particular point of defense under consideration, the argument made in behalf of the Mexican Government with respect to the operation of principles of law in relation to war was not concerned with such matters. The discharge of the claimant and other Americans holding responsible positions with the railroad company was justified from the standpoint of national security, or as might be said, as a measure of defence.

When all intercourse between nationals of belligerent governments is forbidden, intercourse incident to contractual relations is of course suspended Compensation is asked in behalf of the claimant from the date when he was discharged—very shortly after the landing of American troops which gave rise to the emergency. In connection with the consideration of contentions made with respect to the suspension and annulment of contracts in time of hostilities, we are not concerned with questions relative to remedies that may or should exist with regard to the preservations of pecuniary rights that have fully accrued under a contract prior to the outbreak of hostilities. See on this point *Neumond* v. *Farmers Feed Co. of New York*, 244 N. Y. 202. It is not contended that a debt due prior to the emergency which arose in April 1914, has been annulled. The argument in the instant case with respect to suspension of a contract as distinct from an annulment must evidently be predicated on the theory that an emergency could not justify a suspen-

sion of contractual relations in a manner that would have the effect either of rendering impossible the renewal of such relations after the cessation of the emergency or the realization of pecuniary benefits under the contract during the period of suspension.

With respect to the argument made in behalf of the United States relative to the destruction of contractual property rights, it was contended on the part of Mexico that, even if it were assumed that such rights had been destroyed, there was no consequent violation of international law. Touching this point citation was made of the *dictum* in the often quoted case of *Brown* v. *United States*, 8 Cranch 110, that the right to confiscate property of enemy nationals found within the jurisdiction of a belligerent government at the beginning of war is not forbidden by international law, even though the humane policy of modern times had mitigated the exercise of the right.

During the last century there has been a world wide effort to mitigate the horrors of war. The principle has been acknowledged more and more that the unarmed citizen shall be spared in person, property and honor, as much as the exigencies of war will permit. There may still be two theories with respect to this question: one that confiscation is forbidden; the other, that while the violation of private enemy property may be an obsolete practice of barbarism, the strict legal right of confiscation still exists. But it is unnecessary for us extensively to deal with this interesting subject, because the conclusion reached by the Commission and its disposition of the issues in the instant case are not at variance with the enlightened view aptly expressed by Dr. Oppenheim that "there is now a customary rule of International Law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent." *International Law*, 3rd ed., vol. 2, p. 158.

A question with respect to the confiscation of property might have arisen had the railroad company been forbidden to pay to the claimant any salary due to him prior to the occurrences at Vera Cruz in 1914. Evidently nothing of that kind took place. To be sure it is argued that property rights were destroyed or confiscated through the discharge of the claimant, as a result of which he lost what he might have earned had he been permitted to fulfill the terms of his contract. But in the argument of this case it was finally admitted in behalf of the United States that some kind of an emergency did exist in 1914 when the American troops landed at Vera Cruz, and that the emergency justified a temporary retirement of the claimant from the important position with the railroad company. It was argued, however, that there was no justification for dispensing with his services except during the period of the emergency. That period was estimated variously to be for a few days, or until the withdrawal of General Huerta from Mexico, or until the departure of American troops from Vera Cruz. The troops landed in April, 1914, and withdrew in November of that year. It does not appear from the record whether there were any negotiations between the parties with respect to re-employment.

The case becomes simplified when it is seen that it is common ground between the parties that an emergency arose in April, 1914, justifying the retirement of the claimant at that time. The question is then presented: What should subsequently be done? In the light of even a meagre knowledge of the serious occurrences under consideration it is clear that Mexican authorities would not reasonably anticipate some slight emergency prompting them merely to notify the claimant of a suspension from, but early resumption of, employment. Of course there could be no logical or indeed reasonable

speculation at that time as to the future. Another possible expedient might have been that the claimant could have been retired from service, and that when it was considered that the emergency had ceased, the railroad official who took his place could have been discharged and the claimant restored. One can imagine still another solution—in effect that apparently insisted upon by the claimant government at the present time—that the claimant, being permanently discharged, should be paid for what he lost, because he was not permitted to fulfill his contract. Happy suggestions, practical or impractical, may be made in retrospect as to methods by which unfortunate occurrences might have been avoided. The Commission must deal with the facts before it and apply to conflicting interests proper principles of law in the absence of concrete rules. The question before the Commission is whether the claimant, having been discharged as the result of a reasonable anticipation of a very serious emergency, should be paid the value of the unexpired term of his contract. Certainly if this admitted emergency had lasted throughout the period of the contract, the right to retire the claimant from service during that period being conceded, it is difficult to perceive the logic of an argument that he should be paid for services not rendered—services performed by some one else who was paid. Yet compensation is claimed from the date of the discharge of the claimant.

As is shown by precedents that have been cited and others that might be mentioned, there is a wide range of defensive measures in time of hostilities. Undoubtedly the justification of such measures must be found in the nature of the emergency in each given case and of the methods employed to meet the situation.

As bearing on this question as to the character of an emergency in the light of international precedents, citation was made in behalf of the United States by counsel in an elaborate argument solely of an extract from a note written by Secretary of State Webster in 1842 with regard to the so-called interesting *Caroline* incident. But the emergency with which Great Britain and the United States were concerned in the controversy with respect to the destruction of the *Caroline* and the incidental wounding and killing of some Americans within American jurisdiction by a Canadian force is not one that appears to be apposite to the instant case. To be sure, the destruction of the *Caroline* might be regarded as a defensive measure. It involved hostile operations and an invasion of American sovereignty which, however, did not prompt the United States to go to war. The precise question which was discussed in connection with these incidents evidently pertained to the justification for a violation of sovereignty. Great Britain invoked the so-called right of self defense, and Secretary of State Webster, while apparently conceding some such right, stated in effect that its exercise should be confined to cases in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation". Moore, *International Law Digest*, Vol. II, p. 409, *et seq.*

Moreover, there has not been brought to our attention any case in which this right or so-called right has been exercised where compensation has been made for the damages inflicted as a result of the measures employed. This interesting historial episode appears to have little or no pertinency to the instant case even by way of analogy. And while the same is doubtless true of another related incident, it may be noted that the only case growing out of the *Caroline* incident which was presented to the Commission in the arbitration between the United States and Great Britain under the treaty

of 1853 was dismissed by the umpire. Case of *McLeod*, Moore, *International Arbitrations*, vol. 3, p. 2419.

Payment must be made for property appropriated for use by belligerent forces. Unnecessary destruction is forbidden. Compensation is due for the benefits resulting from ownership or user. In dealing with the precise question under consideration by such analogous reasoning as we consider it to be proper to employ, we must take account of things which in the light of international practice have been regarded as proper, strictly defensive measures employed in the interest of the public safety. Generally speaking, international law does not require that even nationals of neutral countries be compensated for losses resulting from such measures. In giving application to principles of law it is pertinent to bear in mind that it is rights of such persons with which international tribunals have generally been concerned in the disposition of claims arising in the course of hostile operations. Rights secured to nationals of enemy governments are generally dealt with in peace arrangements in a preliminary or final way. However the existence of such rights appears to be interestingly recognized in Article III of the Convention of The Hague of 1907 respecting the law and customs of war on land.

The loss sustained by the claimant is of course regrettable. The record reveals the high estimate put upon his services by the President of the railroad company. He was the victim of unfortunate occurrences, and in the light of the principles which have been discussed, the Commission is of the opinion that it cannot properly award him compensation.

Fernández MacGregor, Commissioner:

I agree that this case must be disallowed. The landing of American forces in Vera Cruz gave the right to any Government of Mexico to take defensive measures for its territory, sanctioned by international law, among which is certainly included the right to remove the North American citizens employed on the Mexican railways which were to be used for strategic purposes.

Decision

The claim of the United States of America on behalf of E. R. Kelley is disallowed.