

DOUGLAS G. COLLIE MACNEILL (GREAT BRITAIN) *v.* UNITED
MEXICAN STATES

*(Decision No. 27, majority decision, not concurred in by Mexican Commissioner,
April 10, 1931. Pages 21-25.)*

1. The Memorial sets out that Mr. D. G. C. MacNeill is the owner of a system of tramways in Colima (State of Colima), known as the Ferrocarril Urbano de Colima, which he acquired by purchase in September 1904. The claim is for compensation for the requisition from the Colima Tramways of animals, fodder and passenger and freight cars by the Constitutional Army during the years 1914 to 1916 inclusive. The amount claimed is 1,637.05 pesos Mexican gold.

2. The case is before the Commission on a motion of the Mexican Agent to dismiss based on two grounds:

(a) The Commission is not competent to take cognizance of any damage sustained by claimant, inasmuch as the Government of the State of Colima granted the original concession for the construction and operation of the tramway system, with the particular condition that if the concessionaires or any company they might organize should transfer their rights to any other company or private person, the said undertaking would preserve its character as a Mexican company and have no rights of alienage, even though kept up by foreign capital.

(b) Mr. MacNeill does not show proof that he is the owner of the Ferrocarril Urbano de Colima.

3. In the discussion between the two Agents it was contended on the Mexican side that the same reasons which urged the Commission to allow the motion to dismiss in the case of the *Mexican Union Railway* (Claim No. 36, Decision No. 21) were also decisive in this case. The Agent saw in the stipulation of the concession, on which he now relied, another instance of the so-called Calvo Clause, of the same meaning and force as article 11 of the concession granted by the Federal Government of Mexico to the Mexican Union Railway (Limited).

The British Agent pointed out that in this case the wording of the stipulation was so vague that it did not make clear its real meaning. Moreover, he argued that nothing showed that claimant, in taking over the concession, knew that he thereby deprived himself of his right to appeal to his Government.

As to the ownership of Mr. MacNeill, the Agent submitted a document described by him as a certified copy of the deed of sale of the Tramway to the claimant.

4. The Commission is faced with the question whether the arguments which led to the decision in the case of the *Mexican Union Railway* (Limited) must also induce them to allow the motion to dismiss filed in the case of Mr. MacNeill.

It is therefore necessary to examine and decide how far the two cases are similar.

In order to do this it is essential to compare the text of the stipulations in the two concessions.

Article 11 of the concession of the Mexican Union Railway (Limited) reads as follows:

“La empresa será siempre mexicana aun cuando todos o algunos de sus miembros fueren extranjeros y estará sujeta exclusivamente a la jurisdicción de los Tribunales de la República Mexicana en todos los negocios cuya causa y acción tengan lugar dentro de su territorio. Ella misma y todos los extranjeros y los sucesores de éstos que tomen parte en sus negocios, sea como accionistas, empleados o en cualquier otro carácter, serán considerados como mexicanos

en todo cuanto a ella se refiera. Nunca podrán alegar respecto de los títulos y negocios relacionados con la empresa, derechos de extranjería bajo cualquier pretexto que sea. Sólo tendrán los derechos y medios de hacerlos valer que las leyes de la República conceden a los mexicanos, y por consiguiente no podrán tener ingerencia alguna los Agentes Diplomáticos extranjeros.”¹

Article 7 of the concession of the Ferrocarril Urbano de Colima reads:

“Séptimo: los concesionarios o la compañía que organicen, podrán traspasar sus derechos a otra compañía o a persona particular, con aprobación del Ayuntamiento, bajo el preciso requisito de conservar la empresa su carácter de mexicana y sin derechos de extranjería, aunque estuviere sostenida por capital extranjero.”²

5. The Commission has always realized that its decision in the case of the Mexican Union Railway (Limited) was of a very serious, momentous and consequential character in so far as it deprived British subjects of their right to ask through their Government redress before this Commission for damage and loss, suffered in Mexico. But the words in which the concessionaire had divested himself of the right, were so clear, circumstantial and detailed, that no other decision was justified. In the text of article 11 everything seems to have been foreseen; all the actions from which the concessionaire undertook to abstain himself, are enumerated, circumscribed and detailed with a complete fullness.

A single glance at the text of article 7 of the concession now under consideration, will show that even assuming that the insertion of a so-called Calvo Clause was intended, this object could certainly not be achieved by the limited, vague and obscure wording of the paragraph, in which the stipulation was laid down.

That the undertaking was to preserve its character as a Mexican Company was certainly not an obstacle against an appeal to the British Government in case the capital were British. Consequently there remain only the words “and have no rights of alienage”.

So far as the Commissioners know, the distinct meaning of “*rights of alienage*” cannot be found in the municipal laws of Mexico or Great Britain nor in any acknowledged rule of international law, nor in judgments of international courts. It is an expression which as yet does not allow of a clear and a well defined interpretation.

The majority of the Commission is therefore not able to understand what were the precise rights waived by the concessionaire, and for this reason they

¹ *English translation.*—“The Company shall always be a Mexican Company, even though any or all its members should be aliens, and it shall be subject exclusively to the jurisdiction of the Courts of the Republic of Mexico in all matters whose cause and right of action shall arise within the territory of said Republic. The said Company and all aliens and the successors of such aliens having any interest in its business, whether as shareholders, employees or in any other capacity, shall be considered as Mexican in everything relating to said Company. They shall never be entitled to assert, in regard to any titles and business connected with the Company, any rights of alienage under any pretext whatsoever. They shall only have such rights and means of asserting them as the laws of the Republic grant to Mexicans, and Foreign Diplomatic Agents may, consequently, not intervene in any manner whatsoever.” (*Translation from the original report.*)

² *English translation.*—“The concessionaries, or the Company which they organize, may transfer their rights to another Company or to an individual with the approval of the Corporation, under the precise condition that the business will preserve its Mexican character and without rights of foreigners, even if it may be sustained by foreign capital.” (*Translation from the original report.*)

cannot accept a similarity between this clause and the clause inserted in the concession dealt with in decision No. 21.

The majority holds the view that a so-called Calvo Clause, to be respected in international jurisprudence, must be drafted in such a way as not to allow any doubt as to the intentions of both parties. The Commission cannot see that this has been done in article 7 of the concession.

6. The majority of the Commission has another objection against acknowledging the clause, on which the Mexican Agent relied.

The clause forms part of a contract between a concessionnaire and the Municipal Corporation of the town of Colima, a local authority. Although this contract has been approved by the Congress of the State of Colima, it is not a deed to which the United Mexican States have been party.

It is the opinion of the Commissioners that provisions affecting citizenship, the rights of foreigners, naturalization, etc., to be valid before an international tribunal, must emanate from treaties, the national legislation, decrees of the National Government, or deeds signed by or on behalf of such a Government. They cannot be regarded as valid, when they are stipulated by a local corporation, which is not entitled to dispose of such vital matters as the right of a concessionnaire to appeal to his Government.

7. The fact that in this case the clause was one of the conditions on which a municipal concession was granted, gives rise to another consideration.

The stipulation, on which the motion is based, is part of a contract to which the Mexican Government were no party.

The majority of the Commission considers this to be another very important discrepancy between this case and the claim of the Mexican Union Railway (Limited), which had contracted with the same Government against which the claim was directed.

Here the Government had nothing to do with the concession. For the Government the contract was *res inter alios acta*. From the Government is claimed compensation not for the non-observation of the contract, but for losses outside any contractual relation.

The majority of the Commissioners fail to see how the Government can derive rights from this contract to which they were not a party.

8. The Commission disallows the motion, invites the Mexican Agent to file his answer to the claim, and reserves its decision on claimant's ownership until the claim shall be examined on its merits. The Mexican Commissioner reserves his right to present a dissenting opinion.