NAOMI RUSSELL, IN HER OWN RIGHT AND AS ADMINISTRATRIX AND GUARDIAN (U.S.A.) *v.* UNITED MEXICAN STATES.

(Decision No. 5, April 24, 1931, separate opinions by each Commissioner; dissenting opinion by American Commissioner, undated. Pages 44-205.)

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Nielsen, Commissioner:

Claim in the amount of $100,000 gold currency of the United States, with interest, is made in this case by the United States of America against the United Mexican States on behalf of Naomi Russell, individually, and as administratrix of the Estate of Hubert L. Russell, deceased, and as guardian of her two minor children, Huberta Russell and Catherine Russell. The claim grows out of the killing of Hubert L. Russell, an American citizen, in Mexico in the year 1912. The substance of the allegations in the Memorial is as follows:

On or about the 29th day of September, 1912, Hubert L. Russell, an American citizen, was employed as Manager of the San Juan de Michis Ranch, located in the State of Durango, Mexico, and owned by the McCaughan Investment Company. By the terms of his employment he received as Manager a total remuneration amounting to between three thousand dollars ($3,000) and four thousand dollars ($4,000), United States currency a year. At that time he was thirty-two years of age, in the prime of life and in good health, and was supporting his wife, Naomi Russell, the above-named claimant, and their two minor children in perfect comfort.

On or about the 29th day of September, 1912, armed Mexican forces, who were under the general command of one General Orozco and were known as Orozquistas, and were under the immediate command of military leaders, subordinates of General Orozco, namely Colonel Jorge Huerca and Lieutenant Colonel Luis Caro, robbed Hubert L. Russell of the sum of three hundred pesos ($300) Mexican currency and shot and killed him. These armed forces consisted of armed revolutionary forces opposed to the forces under the command of Francisco Madero, as the result of the triumph of whose cause a Mexican Government *de facto* was established.

Shortly prior to the killing of Russell by these forces, the facts that they were on the march; that their destination was the San Juan de Michis Ranch; and that the life and property of an American citizen were threatened with imminent peril by the approach of the forces were officially communicated to the competent Mexican authorities, and request was made of them that they take immediate steps to afford protection to Russell and others on the ranch and in the vicinity thereof. The authorities failed to take the necessary steps for the protection of these persons and this property, and the failure to take such measures resulted in the robbery and death of Russell.

At the time of the death of Russell, the claimant and her two minor children were entirely dependent on the support provided by him. He was then providing the claimant and her two minor children with an annual sum of not less than two thousand dollars ($2,000), United States currency. As the result of the murder of her husband, the claimant and her two minor children were left with practically no means of support.

The damages and losses sustained resulted from the act of revolutionary forces opposed to forces as the result of the triumph of which a *de facto* government was established in Mexico, and that act was perpetuated by such forces during the revolutions and disturbed conditions which existed in Mexico covering the period from November 20, 1910, to May 31, 1920, inclusive.

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Prolonged oral arguments in addition to briefs have been submitted to the Commission in this case by counsel for each Government. With the exception of a single important point in relation to the interpretation of certain provisions of the Convention of September 10, 1923, there appears to be little or nothing in the substantial contentions advanced which has not repeatedly in some form been presented to and considered by other international tribunals, including the Commission created by the Convention of September 8, 1923, between the United States and Mexico. However, in view of the elaborate scope of argument in the instant case, it may be useful to undertake some discussion touching on all the pertinent questions that have been raised. Broadly speaking, they are concerned with (1) the standing of the persons in whose behalf the claim is preferred; (2) the responsibility of Mexico under the Treaty provisions which the claimant Government invokes with respect to allegations relative to acts or omissions of which complaint is made; (3) considerations pertaining to the evidence generally; and (4) the amount of the pecuniary award claimed.

Proof of nationality of the claimants, and other questions relating to their capacity.

The objections made by Mexico with respect to the standing of the persons in behalf of whom the claim is presented are concerned, on the one hand, with the proof of their nationality and, on the other hand, with their capacity, apart from questions of nationality.

In connection with the contention of Mexico that nationality has not been proven, particular stress is laid on the use of affidavits as proof of the nationality of Hubert L. Russell and of the claimants. It is pointed out that the record contains no proof from a register and no birth certificate. A statement is made in the Mexican Brief that affidavits "do not have any evidentiary weight". It is said that certain statements or affidavits were not even rendered in the manner prescribed by the laws in force in the Republic of Mexico, but were taken before American consuls, and that therefore such depositions cannot be taken into consideration. American consuls, it is said in the Mexican Reply to the American Counterbrief, may take affidavits for use in the United States but not for use in Mexico or in other countries. Reference is made to Mexican laws with regard to production of evidence before Mexican courts. It is said that Mexican laws do not empower consuls to take depositions. *Ex parte* testimony and the interest of witnesses in the case were also discussed in the Mexican Brief and in oral argument in behalf of Mexico.

In the *Solis* Case before the Commission under the Convention of September 8, 1923, between Mexico and the United States, similar contentions were advanced with respect to the use of affidavits as proof, and this subject was discussed in a unanimous opinion of the Commission, somewhat fully, as follows:

"In the Answer of the Mexican Government it is alleged that 'The American nationality of the claimant does not appear duly proven.' Some point is made of a discrepancy in the record with respect to the given name of the claimant, and with respect to an explanatory affidavit accompanying the Memorial, it is stated that it 'is wanting in any probatory force, inasmuch as it is *ex parte*.' These contentions were forcefully and in much detail elaborated by counsel for Mexico in oral argument and in the Mexican brief.

"Affidavits have been used by both parties in the pending arbitration. Use has been made of them extensively in arbitrations in different parts of the

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world for a century. And in Article III of the Convention of September 8, 1923, Mexico and the United States stipulate that they may be used before this Commission. It is unnecessary to observe, therefore, that the Commission can not regard them as being without any probatory force.

"The divergence of views between counsel for the respective parties in the arbitration probably results to some extent from differences in local customs and practices in the two countries. However, this Commission is an international tribunal, and it is its duty to receive, and to appraise in its best judgment, evidence presented to it in accordance with arbitral agreement and international practice.

"The records before the Commission contain correspondence between the two Governments, communications of various kinds contemporaneous with the occurrences pertaining to claims, and documents evidencing transactions en tering into these claims. It is of course necessary in cases tried either before international courts or domestic courts to obtain evidence with regard to occurrences out of which claims arise. Testimony of witnesses may be offered, subject to cross-examination, but obviously in international arbitrations this procedure is seldom practicable. No oral testimony has heretofore been offered to the Commission. Sworn statements and unsworn statements have been laid before the Commission. Unquestionably it is true, as has been argued before the Commission, that affidavits used before domestic courts have contained false statements, but it does not follow that, because false testimony may be revealed in a given case that there is a presumption that all testimony is false, and that a form of evidence sanctioned by the arbitral agreement and by international practice can not be used profitably. When sworn statements instead of unsworn statements are employed in an international arbitration it is undoubtedly because the use of an affidavit in an arbitration is to some extent an approach to testimony given before domestic tribunals with the prescribed sanctions of judicial procedure. When sworn testimony is submitted by either party the other party is of course privileged to undertake to impeach it, and, further, to analyze its value, as the Commission must do.

"Due no doubt in a measure to local custom and practice but slight use of affidavits have been made by the Mexican Government in the pending arbitration. As has been pointed out to the Commission, and as it is doubtless well known, affidavits are used extensively in the United States by administrative and by judicial official. Citizenship is a domestic matter in no way governed by international law, although multiplications of nationality frequently result in international difficulties. It has sometimes been said that, since obviously nationality of a claimant must be determined in the light of the law of the claimant government, proof adequate to establish citizenship under that law must be considered sufficient for an international tribunal. Even if this view be not accepted without qualification, it is certain that an international tribunal should not ignore local law and practices with regard to proof of nationality. The liberal practice in the United States in the matter of proving nationality in the absence of written, official records is shown by numerous judical decisions. See for example, *Boyd* v. *Thayer*, 143 U. S. 135. It requires only a moderate measure of familiarity with international arbitral decisions, many of which are conflicting, to know that no concrete rule of international law has been formulated on this subject of proof of nationality." *Opinions of Commissioners*, Washington, 1929, pp. 48-50.

The rights of American citizenship are not matters controlled by Mexican law, either as regards the definition of such rights in the light of constitutional or statutory provisions of law, or as regards methods of proof. With respect to these subjects we must of course look to American law. Even if the Mexican Government had undertaken to enact laws to control the action of representatives of another government or of an international tribunal with respect to proof of American citizenship of a claimant before

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the tribunal, obviously such a law could have no controlling effects. In harmony with the view expressed in the *Solis* case, *supra*, with respect to proof of nationality, it is interesting to observe the quotation from Fiori (*Derecho Internacional Privado*, Vol. 2, sec. 574) contained in the Mexican Brief in the instant case, with respect to proof of citizenship. It is said by the author that such proof "should be rendered conformably to the law of the country where the interested party alleges. he acquired citizenship".

All evidence produced before this Commission, either by Mexico or by the United States, has been *ex parte*. Neither Government has had representatives present for purposes of cross-examination when evidence has been prepared for the trial of cases before the Commission. Under the law of the United States American consuls are authorized to take affidavits. No Mexican law has been cited by which it has been attempted to prevent the use in Mexico of affidavits made before American consular officers. Nor has any Mexican law been cited by which it has been sought to prevent the use of such affidavits in a third country. Mexico would have no right under international law to put any such prohibition on the use of such affidavits.

With respect to considerations relating to the testimony of a person spoken of as one having an interest in the case, a claimant or some one else, it is interesting to take note of the observations of the British Commissioner, Sir John Percival, in connection with the disposition of a number of cases grouped under the caption, *Mexico City Bombardment Claims*, Decision Number 12, under the Convention concluded November 19, 1926, between Mexico and Great Britain. The distinguished British jurist discussed the contentions of the Mexican Agent to the effect that the declarations of a claimant should not be taken as proof of facts, and that no one could be a witness in his own cause. The Commissioner pointed out that such was not the law in Great Britain, the United States and other countries. He declared that such testimony should be weighed with respect to considerations pertaining to truth, fraud and exaggeration, as other testimony should be evaluated. And he observed that if the Commissioners, proceeding as reasonable men, were convinced that a fact had been proven it should be accepted, without reference to the method or the particular kind of proof permitted by the Convention. He referred approvingly to a unanimous opinion in this sense rendered in the *Parker* case by the so-called General Claims Commission, between the United States and Mexico, *Opinions of Commissioners, Washington, 1927*, pp. 37, 39-40, and to the *Dillon* case, *ibid*, 1929, p. 61, in which an affidavit of a claimant with respect to his imprisonment and ill-treatment was accepted by the Commission as proof of the allegations made by the United States in the claimant's behalf. The Commissioner cited with approval an extract from an opinion written in that case, as follows (p. 65):

"An arbitral tribunal can not, in my opinion, refuse to consider sworn statements of a claimant, even when contentions are supported solely by his own testimony. It must give such testimony its proper value for or against such contentions. Unimpeached testimony of a person who may be the best informed person regarding transactions and occurrences under consideration can not properly be disregarded because such a person is interested in a case. No principle of domestic or international law would sanction such an arbitrary disregard of evidence.

"It seems to me that whatever may be said with regard to the desirability or necessity of having testimony to corroborate the testimony of a claimant,

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a statement need not be regarded in the legal sense as unsupported even though it is unaccompanied by other statements."

Not infrequently domestic tribunals have stressed the fact that interested witnesses, parties to litigation, have failed to testify, and have pointed out the importance of the evidence they might have furnished, and have drawn inferences from their failure to testify. See *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, and cases there cited.

Certain further observations are very pertinent with respect to the extreme contention that affidavits "do not have any evidentiary weight". It is certainly a rule in construing treaties, as well as all laws, to give a sensible meaning to all their provisions if that be practicable. Treaty stipulations will not be regarded as a nullity unless the language clearly makes them so. It will not be presumed that the framers of a treaty have done a vain thing. See Moore, *International Law Digest*, Vol. V, p. 249, and the numerous citations there given. If it is a sound contention that affidavits "do not have any evidentiary weight", then the very distinguished gentlemen who originally framed the Convention of September 10, 1923, the very distinguished plenipotentiaries who signed in behalf of the two Governments, the President of each country who ratified it, and the legislative body in each country that gave it approval, all combined to require an absolutely useless thing, when they respectively joined in the formulation of the stipulations requiring the Commission to make use of affidavits. If such affidavits "do not have any evidentiary weight", they could only be of some personal, entirely extra-official, use to the Commissioners. Every interpretation that leads to an absurdity should be rejected. *Geofrey* v. *Riggs*, 133 U. S. 258, 270; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; Vattel, *Law of Nations*, Chitty's edition, p. 251; Grotius, *De Jure Belli Et Pacis*, Whewell's edition, Vol. II, p. 161; Pradier-Fodéré, *Traité de Droit International Public*, Vol. II, Sec. 1180, p. 885.

In the *Dyches* case in the arbitration between the United States and Mexico under the Convention of September 8, 1923, Mr. Commissioner Fernández MacGregor, speaking in behalf of all the Commissioners, with respect to proof of nationality of the claimant, said:

"... Since the perfectly definite facts of date and place of the claimant's birth are established in these affidavits by persons who are in the best position to know them through their ties of relationship, and as there is no circumstance contradicting the same, the Commission adheres to its previous opinions with respect to the probative weight of affidavits and to the matter of nationality." *Opinions of Commissioners, Washington, 1929*, pp. 193, 195-196.

The Commission under the Convention of September 8, 1923, between the United States and Mexico, has repeatedly accepted affidavits solely as proof of nationality. See as illustrative, *Parker* case, *Opinions of Commissioners, Washington, 1927*, p. 35; *Hatton* case, *ibid*, 1929, p. 6; *Corrie* case, *ibid*, p. 133; *Dyches* case, *supra*.

In the *Wilkinson and Montgomery* case under the Convention of July 4, 1868, between the United States and Mexico, Umpire Thornton went so far as to consider satisfactorily to be proved the citizenship of a claimant who, conformably to an order of the Commission, took oath in the Memorial that he was a native citizen of the United States. The Umpire considered that citizenship must be regarded as proved, unless the man's statement could be shown to be false. Moore, *International Arbitrations*, Vol. 3, p. 2532.

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Citations were made to this Commission to show that other Commissions have repeatedly accepted the same kind of proof in relation to this subject. Finally, it may be noted that this Commission, acting under the Convention of September 10, 1923, between Mexico and the United States, accepted such proof in the group of seventeen cases spoken of as the *Santa Isabel* cases, being the cases of *Pringle*, et al., Docket No. 449, decided April 26, 1926.

Nationality is the justification in international law for the intervenrion of one government to protect persons and property in another country. The jurisdictional article of the Convention of September 10, 1923, was framed in harmony with that principle, and this Commission, created by that Convention, has power to deal with the merits of claims only in cases where the claimants possess American nationality. It must of course in each case dipose of the preliminary jurisdictional question of nationality before deciding a case on the merits. And if American nationality of the claimant is not proven the Commission has no power to proceed to consider the merits of a case. Obviously, it need not be observed that the Commission could not in a given case disregard the Convention and say to itself that it would not pass on the question of citizenship because it was arbitrarily determined to decide the case on the merits in favor of the United States irrespective of proof of nationality. Equally obvious is it that the Commission could not say that it would likewise decide the case on the merits in favor of Mexico, although it had no power to do so because of lack of proof of nationality of the claimant.

Jurisdiction is the power of a tribunal to determine a case in accordance with the law creating the tribunal, or some other law prescribing 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*, under the Convention of September 8, 1923, between the United States and Mexico, *Opinions of Commissioners*, *Washington*, *1927*, p. 15. The law which creates this Commission and defines its jurisdiction is of course the Convention of September 10, 1923. The jurisdictional provisions of that Convention (apart from the preamble) are found in Article I, more specifically in Article III, and in Article VII.

It is properly observed in the Mexican Agent's Brief in the instant case that "if such an American citizenship were not fully proved the Commission would be entirely incompetent to study and pass on this claim, conformably with the preamble and Article I of the Convention of September 10, 1923". In connection with jurisdictional questions pertaining to citizenship, in cases before this Commission there can be nothing analogous to a waiver before a domestic court of a question of personal jurisdiction. See also on this point the *Stevenson* case in the British-Venezuelan Arbitration of 1903, *Venezuelan Arbitrations of 1903*, Ralston's *Report*, pp. 438, 451; *Hatton* case in the arbitration under the Convention of September 8, 1923, between the United States and Mexico, *Opinions of Commissioners*, *Washington*, *1929*, pp. 6, 8. *Costello* case, *ibid*, p. 252.

In the so-called *Santa Isabel* cases, *supra*, it appears that Mexico objected to the jurisdiction of the Commission on account of lack of adequate proof of nationality in all but one case. The same arguments with respect to lack of probative value of affidavits were made in the majority of all these seventeen cases. Nevertheless, contentions of this kind were put aside by the Commission, which proceeded to consider the cases on the merits, and by a majority vote to dismiss all the cases on the merits. It may be noted that

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the dissenting third Commissioner evidently shared the views of the other two Commissioners with respect to the proof requisite to establish nationality in all cases. His dissent was entirely based on the issues which he took with the other two Commissioners with respect to the merits of the cases, and not with respect to any point of proof of nationality. Of course, it cannot be assumed that the Commission, without any determination of the question of its jurisdictional power to deal with these cases, proceeded to dismiss them on the merits. If the Commission did not have jurisdiction in these cases, as claims made in behalf of American citizens, then of course its action was void.

The Agent of Mexico cited the *Klemp* case before the Commission under the Convention of August 23, 1926, between Mexico and Germany. In an opinion rendered in that case, on April 11, 1927, it was held that a consular certificate with respect to the nationality of a claimant was not adequate proof of German citizenship. The Agent argued that much less could an affidavit be accepted as proof of American citizenship.

When a consular officer is required by the law of his country to examine into the question of citizenship before registering an applicant, and when his action is subject to review by authorities of his Government, it can probably be said that the determination of the question of nationality is made by the best expert authority with respect to the law on that subject. Authorities dealing with the matter may be said to act in a *quasi*-judicial capacity, even though of course judicial authorities may in any given case have the last word in such matters. When a consular certificate—one not made solely for the purpose of the presentation of the claim—is presented to a Commission, the Commission assuredly has before it a very authoritative pronouncement of a judicial character.

However, the comparison made seems to be irrelevant. An affidavit is not made to certify to the citizenship of a claimant. It obviously involves in no way any judicial or *quasi*-judicial pronouncement as to nationality. An affidavit is used for the purpose of furnishing facts upon which a Commission may base legal conclusions as to law.

The reason why affidavits are used by governments, such as those of the United States and Great Britain, which can probably be said to have engaged more extensively in international arbitrations than have any others, is, of course, to give weight to statements laid before international tribunals. It is to put back of testimony furnished such moral sanction as exists in Christian countries and such legal sanction as may be found in punishment for false swearing. The purpose is to approach as nearly as possible, in these less formal proceedings before international tribunals, to the standards exacted by domestic tribunals, rather than to make use of unsworn statements, letters written to be used for the proceedings, and other things, without such sanction.

The American nationality of Russell and of his widow and two children is amply proved by sworn statements. These statements emanate from persons who were competent to furnish testimony as to general knowledge concerning the status of Russell and his survivors; and also specific information that they all were born American citizens. In the case of each of them there is some testimony in addition to the sworn statements. With respect to the nationality of one of the daughters, there is convincing evidence in the form of a sworn certificate of the physician present at her birth.

Although it appears that Catherine Russell, the other daughter, was born in Mexico in 1909, her status with respect to the right of the United

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States to present a claim in her behalf involves no question of dual nationality. According to Article 30 of the Mexican Constitution of 1917, it appears that persons born in Mexico of foreign parents, in order to be regarded as Mexicans, must declare within one year after they become of age that they elect Mexican citizenship, and must further prove that they have resided within the country during the six years immediately prior to such declaration. It is clear from the record that Catherine Russell, who was born an American citizen pursuant to Section 1993 of the Revised Statutes of the United States, did not elect Mexican nationality in the manner prescribed by the Mexican Constitution. If the view should be taken that this Constitutional provision with respect to election did not supplant the Mexican law of May 28, 1886, relative to citizenship, and that Catherine Russell's status, from the standpoint of Mexican law, should be governed by the law of 1886, it appears with certainty that at the time of the presentation of this claim, namely, December 19, 1924, she did not possess Mexican nationality. And there is no evidence in the record showing that she at any time has had a dual nationality. Article 2 of the law of 1886 includes among its classifications of aliens the following:

"The children of an alien father, or of an alien mother and unknown father, born in the national territory, until they reach the age at which, according to the law of the nationality of the father or of the mother, as the case may be, they become of age. At the expiration of the year following that age they shall be regarded as Mexicans, unless they declare before the civil authorities of the place where they reside that they follow the citizenship of their parents."

This provision evidently carried out the intent of Article 30 of the Mexican Constitution of 1857.

There is nothing in the record bearing on the point whether Catherine Russell has recently become a Mexican as well as an American, and, in dealing with her status with respect to the instant case, there would be no use nor propriety in speculating on that point.

The Commission under the Convention of September 8, 1923, between Mexico and the United States, passed upon a similar point in the *Costello* case, *Opinions of Commissioners, Washington, 1929*, p. 252. The Commission was there concerned with the question of the citizenship of another young woman born in Mexico in 1909. For the purpose of deciding of necessity the preliminary question of jurisdiction, the Commission passed upon her status and the status of two other American citizens, and thereupon proceeded to dismiss the case on the merits.

When not a particle of evidence has been introduced by the respondent Government to refute the convincing proof of citizenship made by the Government of the United States conformably to American law and procedure and in the form in which nationality has been proven by that Government and other governments since the date of the Treaty concluded November 19, 1794, between the United States and Great Britain, with its then unique provision for arbitration, the claim will not be dismissed because proof of American citizenship has not been prepared in Mexico conformaoly to Mexican laws and procedure, according to which, it was argued, such proof should be formulated.

It is said in the Mexican Brief that "Naomi Russell is not recognized as having legal capacity to present the claim in her own right and as guardian of the aforesaid minors, because the right to claim proper indemnization corresponds only to the Estate of Hubert L. Russell". It is asserted that the civil status of the two minors as daughters of the deceased has not been

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proven. It is argued that the Government of Mexico would be exposed to the risk of the presentation of new claims by other persons calling themselves Russell's next-of-kin. In the Mexican Answer it is stated that no objection is raised to the legal capacity of Naomi Russell as administratrix of the estate of Hubert L. Russell.

Rule IV, 2, (i) is invoked. Is reads as follows:

"Claims put forward on behalf of a claimant who is dead, either for injury to person or loss of or damage to property, shall be presented by the personal or legal representative of the estate of the deceased; and the memorial shall set out with respect to both the claimant and such representative the facts which, under these rules, would be required of the former were he alive and presenting his claim before the Commission; and the claim shall be accompanied by documentary evidence, properly certified, of the authority of such representative."

In reply to contentions to this effect, it is argued by the United States that the Rule has no application, since the claim is not brought in behalf of a person who is dead, but in behalf of persons who were injured as a result of the murder of Russell. It is contended that the Rule, although it in an appropriate case may be applied, is one of convenience and not of fundamental right. The right to prefer a claim in behalf of persons such as appear as claimants in the present case must be determined, it is argued, in accordance with the provisions of the Convention of September 10, 1923, and in accordance with international practice.

If the Rule be construed in accordance with the Mexican Government's contention, there would still be a properly designated claimant before the Commission, inasmuch as the claimant's capacity as administratrix is not contested. If it be conceded that the claim could properly be filed in behalf of the administratrix, her nationality would be immaterial—certainly if it be shown that there are American beneficiaries of the claim. See case of *Belle M. Hendry*, in the arbitration under the Convention of September 8, 1923, between the United States and Mexico. *Opinions of Commissioners, Washington, 1930*, pp. 97, 98. But it appears to be unnecessary to give consideration to any possible uncertainty as to the meaning of the Rule—such as is suggested by the varying interpretations of the two Governments—since there is no doubt that the persons in whose behalf the claim is preferred come within the scope of Article III of the Convention of September 10, 1923, as persons who have suffered "losses or damages". Obviously they did, through the death of Russell. There can be no question with respect to the right to prefer a claim in behalf of a wife and the children, when the claim is predicated on the loss of the husband and father.

Both Governments in dealing with this point discussed domestic law—the principles of the common law and the principles of the civil law relating to rights of action before domestic tribunals. Particular reference was made to Lord Campbell's Act and its alteration of the common law. In the instant case the interpretation of Lord Campbell's Act by way of analogous reasoning may be interesting, in that the act has been judicially construed so as to confer an entirely new right of action, not for the benefit of the estate of a deceased person but in favor of wife and children. *Seward* v. *Vera Cruz*, L. R. 10 App. Cas. 59.

The examination of domestic law in connection with the determination of problems of international law may sometimes be useful and at other times misleading or entirely out of place. The impropriety of giving appli-

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cation to domestic law in the solution of the point at issue is easily revealed by a simple illustration.

While, according to the terms of the Convention of September 10, 1923 it is provided that compensation shall be made *ex gratia* and not in accordance with rules and principles of international law, it is at times undoubtedly permissible and proper, in dealing with certain provisions of that agreement, to construe them in the light of international law and practice. It would be absurd reasoning that would justify a conclusion that, in a proceeding before an international tribunal, a claim predicated on a disregard of international law could be maintained by virtue of local legislation against a country in which the principles of the civil law obtain, whereas the same kind of a claim, against a country where the unaltered principles of the common law obtain, should be rejected in view of the provisions of local law. In such a situation, international delinquencies, which are defined by the same law among all countries, international law, would be redressed or left unredressed according to the variations of domestic law.

Rights of action accruing to wives and children, as well as other relatives of deceased persons, have been recognized in numerous cases before international tribunals. Case of *Laura E. Plehn* (widow of a murdered German), in the arbitration under the Convention concluded March 16, 1925, between Germany and Mexico; case of *Beatrice Di Caro* (widow of a murdered Italian), before the Italian-Venezuelan Commission of 1903, *Venezuelan Arbitrations of 1903*, Ralston's *Report*, p. 769; case of *Jose M. Portuondo* (son of a murdered American), in the arbitration under the agreement of February 12, 1871, between the United States and Spain, Moore, *International Arbitrations*, Vol. 3, p. 3007; case of *Gilmer-Hopkins* (in which awards were made in favor of the widow and daughter of a deceased American), in the arbitration under the Agreement of August 10, 1922, between the United States and Germany, *Consolidated Edition of Decisions and Opinions, 1925-1926*, Washington, Government Printing Office, 1927, p. 353; case of *MacHardy* (widower of a deceased American), *ibid*, p. 359; case of *Helena D. Chase* (a widow), in the arbitration under the Convention concluded July 4, 1868, between the United States and Mexico, Moore, *International Arbitrations*, Vol. 3, p. 2159; case of *Standish* (a widow), in the same arbitration, *ibid*, p. 3004; case of Heirs of *Cyrus M. Donougho*, in the same arbitration, *ibid*, p. 3012; case of *Connelly* (four sisters and two brothers of a murdered American), in the arbitration under the Convention concluded September 8, 1923, between the United States and Mexico, *Opinions of Commissioners, Washington, 1927*, p. 159; case of *Garcia* (father and mother of a deceased Mexican), *ibid*, p. 163; case of *Snapp* (father of a deceased American), *ibid*, p. 407; case of *Galván* (mother of a deceased Mexican), *ibid*, p. 408. The collective judgment of these tribunals and a great number of others that could be cited can not be discarded as erroneous.

The argument made in behalf of Mexico that Mexico might be exposed to the presentation of new claims by other persons calling themselves next-of-kin of Hubert L. Russell is not clear. It can not be supposed that the United States, having been a party to a proper adjudication of a claim growing out of the death of Russell, would attempt at some future date to bring another claim on account of his death. In the event that it should undertake to do so, it would be precluded from such remarkable action by Article VIII of the Convention of September 10, 1923.

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The application of provisions of the Convention to acts and omissions complained of by the claimant Government.

An issue has been raised with respect to the character of the persons who shot Russell. It is contended in behalf of Mexico that they did not constitute a *revolutionary force* such as is described in subparagraph (2) or (3) or (4) of Article III of the Convention of September 10, 1923. The assumption is made that the men were nothing but bandits. And it is said that, upon the hypothesis that they belonged to the so-called Orozquistas, it is a fact that men who arose in arms under Pascual Orozco were nothing more than insurgents such as are mentioned in sub-paragraph (5) of Article III of the Convention. Orozco, it is said, had no plan. It is contended that the Orozco movement did not contribute to the establishment of any Government *de facto* or *de jure*, in the Mexican Republic. This movement, it is said in the Mexican Brief, "can in no manner be considered a revolution", but must be regarded as a "mere insurrection or insubordination". In oral argument the conclusion was finally submitted that the acts on which the claim is predicated are not within any of those jurisdictional provisions of the Convention.

Contentions of this nature were met by the Agent of the United States with citations of official declarations respecting the character and magnitude of the Orozco movement. He quoted from the so-called "Plan of Orozco", in which Orozco refers to the movement as a "revolution", against President Madero. *Memoria de la Secretaria de Gobernación*, Mexico, D. F., 1916, p. 219. It is asserted in this Plan that the movement was supported by public opinion and an organized, disciplined army of over ten thousand men in the Northern part part of Mexico, and thirty thousand or forty thousand in the remainder of the country; that it had one entire state unanimously attached to the revolution and a constitutional government in favor of the revolution; and that it was by appropriate authorities regularly administering civil and criminal jurisprudence, and discharging legislative functions.

Citation was made to a description of Orozco's movement by President Madero, characterizing it as "civil war", the suppression of which had prompted the mobilization of 60,000 men and the conduct of military operations during "eight months of war". This civil war was characterized by the President as a revolution greater in scope and in seriousness than any that had occurred in Mexico, including that of 1910. *Diario Oficial*, September 16, 1912, p. 130. Citation was also made to a communication addressed by the Mexican Minister of Foreign Affairs to the American Embassy at Mexico City, under date of November 22, 1912. *Foreign Relations of the United States, 1912*, p. 876. It was stated in that note that the then Mexican Government had hardly assumed direction of public matters when it "was attacked by revolutionary movements", one of which, initiated by General Reyes, failed in its incipiency; and that the "second initiated by Pascual Orozco, who revolted with the volunteer forces he had in charge, succeeded through his treason, in taking possession of the State of Chihuahua, and advancing rapidly toward the south with the intention of overthrowing the constituted Government". Further reference was made to a note addressed by the Minister of Foreign Affairs to the American Embassy, under date of November 23, 1912, with respect to a claim of an American citizen. The Minister of Foreign Affairs referred to principles of international law with respect to the question of the responsibility of the Government when

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it "finds itself temporarily unable to repress within its territory all the punishable acts resulting from insurrection or civil war". *Ibid*, p. 982. Several other citations from official documents were made by the Agent of the United States bearing on the scope and character of the Orozco movement.

An issué is clearly raised whether the acts resulting in the death of Russell come within the categories of claims specified in subparagraph (2) of Article III of the Convention of September 10, 1923. In view of contentions that have been advanced it is also necessary to consider whether these acts are within the classification embraced by sub-paragraph (5) of Article III.

It is of course unnecessary to observe that the ascertainment of the intent of the parties to a treaty is the object of interpretation. Pradier-Fodéré, *Traité de Droit International Public*, Vol. II, secs. 1177, 1183, pp. 883, 887. Vattel, Book II, Chap. 17, sec. 287. In conjunction with this elementary rule of interpretation it is pertinent in the instant case to take account of another well-recognized rule to the effect that provisions of a treaty in *pari materia* should be considered together in reaching conclusions with respect to the intent of the framers. Moore, *International Law Digest*, Vol. V, p. 249.

In the preamble of a treaty we find expressed the general purpose of the treaty-makers. In the Convention of September 10, 1923, that is described to be the adjustment of "claims arising from losses or damages suffered by American citizens *through revolutionary acts*" (italics inserted) within the period from November 20, 1910, to May 31, 1920. Article I of the Convention prescribes jurisdiction over "all claims" of American citizens for losses or damages suffered "during the revolutions and disturbed conditions which existed in Mexico" during the specified period. In Article III it is further said that the claims to be decided are those "which arose during the revolutions and disturbed conditions" and were due to any act committed by forces subsequently enumerated in that Article.

The issues that have been raised with respect to the meaning of jurisdictional provisions stated in general terms and the more detailed provisions of Article III make it clear that there is room and need for interpretation. In interpreting a treaty it is proper to consider the history relating to its negotiations, the stipulations of other treaties concluded by the parties with respect to subjects similar to those dealt with by the treaty under consideration, and the conduct of the parties with respect to such treaties. These principles of interpretation have repeatedly been applied by domestic and international tribunals and by nations in the course of diplomatic exchanges. Pradier-Fodéré, *Traité de Droit International Public*, Vol. II, sec. 1188, p. 895; Crandall, *Treaties, Their Making and Enforcement*, 2nd ed., pp. 384-386; *Nielsen* v. *Johnson*, 279 U. S. 47, 52.

The Convention concluded September 8, 1923, between Mexico and the United States confers jurisdiction on the General Claims Commission thereby created over all outstanding claims "except those arising from acts incident to recent revolutions". This exception is stated in Article I of the Convention and throws some light on the scope of the Convention of September 10, 1923. The same is true with respect to the exception stated in the preamble of the earlier Convention, which, in reciting the purpose to settle claims by the citizens of each country against the other since July 4, 1868, excludes "claims for losses or damages growing out of the revolutionary disturbances in Mexico".

The contentions of the United States with respect to the inclusion of the claim within the provisions of sub-paragraph (2) of Article III are

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grounded not only on the views expressed with respect to the grammatical meaning of those provisions but also on arguments respecting the broad purposes of the Convention as revealed by its provisions and by language in the earlier Convention relating to claims growing out of revolutionary disturbances and claims arising from acts incident to recent revolutions. It is contended that the interpretation given by Mexico to sub-paragraph (2) of Article III of the later Convention is at variance with the language thereof and contrary to the broad purpose of the Convention to settle claims incident to revolutionary activities, as revealed by other parts of both Conventions.

An issue is raised with respect to the proper relation of the pronoun "them", the last word in sub-paragraph (2), which reads as follows:

> "By revolutionary forces as a result of the triumph of whose cause governments *de facto* or *de jure* have been established, or by revolutionary forces opposed to them."

In the Spanish text "them" is translated as *aquellas*. In view of the inflection given to this pronoun so as to harmonize it with the feminine noun *fuerzas*, the Spanish text may appear to convey a meaning different from that of the English text, if in that text the pronoun "them" is considered to have as its antecedent the word "Governments" or to have two antecedents, namely, the words "forces" and "Governments", rather than to relate solely to "forces". In dealing with this question it appears to be useful and proper to take account not only of the grammatical construction of these specific provisions but also of other parts of the Convention throwing light on its general purpose, and, further, to resort for the purpose of interpretation to records of the history of the negotiations that resulted in the framing of the Convention.

The grammatical construction which the Agent of the United States appeared to advance as the most plausible one is that "them" refers to "forces" and "Government". Certainly this is a reasonable view, since it may be assumed that revolutionary forces in opposition to something or somebody would be opposed at once to the Governments *de facto* and *de jure* and to the forces of such Governments, and not opposed to the forces only. Another view, perhaps a little more in harmony with grammatical construction, and not at variance in substance with the above-mentioned view, is that the pronoun "them" should refer back to the last noun in place of which it can reasonably be supposed that the pronoun stands, that noun being "Governments". From the standpoint of grammar, the least plausible view is that it was intended that the pronoun "them" should refer back to the first noun appearing in the phrase, namely, "forces." If that were the intention of the framers of the phrase, it would seem that the grammatical construction is somewhat crude, and unnecessarily so. But there appears to be no need to indulge in that assumption, since the phrase makes good sense if the word "Governments" is considered to be the antecedent of the pronoun "them". And from the standpoint of the meaning of the phrase it appears to be of no consequence whether "them" refers to "Governments" solely or to both "forces" and "Governments". To reconcile any apparent conflict of meaning between the English and Spanish text it may be useful to take account of the origin of the Convention.

In 1923, President Obregón of Mexico and President Harding of the United States appointed commissioners, each of whom received credentials,

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empowering them to confer, in the language employed, regarding the "international situation in order to seek out a mutual understanding between the Governments of Mexico and the United States". The records of the proceedings of these commissioners have been published in well-known public documents, namely, *Proceedings of the United States-Mexican Commission Convened in Mexico City, May 14, 1923*, Washington, Government Printing Office, 1925; and *La Cuestion Internacional Mexicano-Americana Durante El Gobierno Del Gral. Don Alvaro Obregón*, Mexico, Imprenta de la Secretaría de Relaciones Exteriores, 1926.

It is shown that at the first meeting, May 14, 1923, one of the Mexican Commissioners presented to the Commissioners of the United States a memorandum entitled, *The International Question between Mexico and the United States*. And he stated that he delivered this memorandum "with the authority of the Secretary of Foreign Affairs of Mexico, the document being a translation into English of the document given to the Mexican Commissioners by the Secretary of Foreign Affairs of Mexico as part of their instructions". These Commissioners exchanged views regarding serious pending questions between the two Governments, such as agrarian matters, rights of ownership in real property, and proper compensation for lands expropriated. Each delegation of Commissioners spoke in behalf of its Government. Thus, we find that the Mexican Commissioners would declare that they presented "the viewpoint of the Mexican Government" on this or that subject; and would make declarations respecting certain subjects "in behalf of their Government". And throughout it is shown that in reaching understandings in the matters which they were commissioned to handle they spoke for their Government. The declarations of the American Commissioners were in the same sense. We find an American Commissioner stating that "the United States maintains" certain views with respect to international law relative to the taking of property. The same Commissioner, we find, made a reservation "in behalf of the Government of the United States" with respect to compensation for expropriated lands.

Finally, the Commissioners consummated their labors by drafting the so-called "Special Claims Convention" and the so-called "General Claims Convention". In the minutes of the formal meeting of August 15, 1923, we find the following declarations:

"The American Commissioners stated in behalf of their Government that the text in English of the special claims convention and the text in English of the general claims convention as hereinafter written as a part of these proceedings are approved by the President of the United States and in the event that diplomatic relations are resumed between the two Governments these conventions as hereinafter set forth will be signed forthwith by duly authorized plenipotentiaries of the President of the United States.

"The Mexican Commissioners stated in behalf of their Government that the text in English of the special claims convention and the text in English of the claims convention as hereinafter written as a part of these proceedings are approved by the Mexican Government and in the event that diplomatic relations are resumed between the two Governments these conventions as hereinafter set forth will be signed forthwith by duly authorized plenipotentiaries of the President of the United Mexican States.

. . . . . .

"The negotiations connected with the formulating and drafting of the general claims convention and the special claims convention were conducted in English. The texts of such conventions as hereinafter set forth in the records of these proceedings were prepared in English and are approved as the originals."

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Presumably, the Convention was signed both in Spanish and in English. It contains no stipulation that either language shall control in case of a divergence leading to difficulties in interpretation. If there really exists a difference in meaning of the character that often presents vexatious problems of interpretation, it would certainly seem useful and pertinent to take account of the fact that the Convention was first framed in English; that a draft in that language was approved by the framers and by their respective Governments; and that a Spanish translation was made from that draft. It is clearly shown that the framers drafted the English text and for their purposes considered that to be the original, and that from that English text a translation was made. It is also clear that the translator, in inflecting the pronoun *aquellas* so as to refer it far back to the word *fuerzas* did not make a translation that conforms to the most plausible and the entirely grammatical, meaning of the English text. There seems to be no reason to suppose that, in the framing of such a simple phrase as that contained in the latter part of sub-paragraph (2) of Article III, the framers would have failed in the very simple duty to make their text entirely clear had they not intended to have the pronoun refer to the next preceding noun in the main clause of the sentence, namely, "governments", which, according to a logical, grammatical construction, should be the antecedent of the pronoun "them".

But from the broad standpoint of the repeatedly expressed purpose of the framers of the Treaty with respect to the adjustment of claims growing out of the revolutionary disturbances, it is not necessary and probably not appropriate to attach too much importance to grammatical construction. Moreover, if the seemingly plausible view is taken that opposition to the revolutionary forces that have established a government must be considered to be in opposition to that government, then there is no conflict of meaning between the two texts.

It would not be a reasonable interpretation of the Convention to exclude from the scope of sub-paragraph (2) of Article III the formidable revolutionary movement of Orozco, described by President Madero, by the Foreign Minister of Mexico, and in documentary evidence, appearing in the record. Orozco's forces were certainly opposed to the *de facto* and the *de jure* Government of President Madero, and to the forces mustered by that Government to suppress the Orozco revolutionists.

With respect to the propriety, discussed in the Brief of Mexico, of classifying acts upon which the claim is predicated within the scope of sub-paragraph (5) of Article III, it was argued in behalf of the United States that it is pertinent to take account of the particular kind of acts referred to in that sub-paragraph, namely, those occasioned "By mutinies or mobs, or insurrectionary forces other than those referred to under subdivisions (2), (3) and (4) above, or by bandits, provided in any case it be established that the appropriate authorities omitted to take reasonable measures to suppress insurrectionists, mobs or bandits, or treated them with lenity or were in fault in other particulars". It was contended that obviously, while the term "appropriate authorities" might necessarily include Federal authorities, it should be taken in the ordinary sense to include local authorities; that is, in any event, those authorities that may be expected to cope with lesser or sporadic disturbances, and not with powerful forces such as were required to repress the Orozco movement. That movement, it was argued, could therefore not reasonably be considered to fall within the scope of sub-paragraph (5). It was observed that in the case of large revolts

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it is seldom possible to charge a parent government with negligence in dealing with the revolutionists in connexion with the protection of the property of aliens. These are reasonable views.

It is stipulated specifically by Article II of the Convention that responsibility in cases before the Commission shall not be determined in accordance with international law. Evidently this stipulation applies to the acts referred to in sub-paragraph (5) as well as in the other sub-paragraphs of Article III. Nevertheless the language of sub-paragraph (5) would appear to justify the construction that the Commission, in dealing with the category of claims embraced therein, must take account at least to a considerable extent of the general principles of evidence and of law that enter into the determination of such cases by a strict application of international law. It is a reasonable interpretation that the Orozco revolutionary movement should not properly be considered to fall within the categories of sub-paragraph (5).

One of the Contentions of Mexico, to the effect that the acts on which the instant claim is based are not within any of the categories specified in Article III of the Convention, apparently is based on the theory that the forces therein specified connote groups of men of some considerable numbers.

It has been observed that, in interpreting a treaty, it is permissible to consider the conduct of the parties with respect to the treaty.

In the *Blair* case, *Opinions of Commissioners under the Convention concluded September 8, 1923, between the United States and Mexico, 1929*, p. 107, the Commission was concerned with a claim growing out of the killing of an American citizen by a Mexican in the year 1911. It was argued in behalf of Mexico in that case that, since it appeared that the claim arose during the period from November 20, 1910, to May 31, 1920, and that it was due to an act of bandits, it fell within the jurisdiction of the so-called Special Claims Commission. This contention was made with respect to the acts of one person. The majority of the Commissioners sustained the objection to the jurisdiction, apparently however on a different point.

In the *La Grange* case, *ibid*, p. 309, claim was made by the United States for the value of some property confiscated by a former governor of the State of Chihuahua. It was contended in that case by Mexico that the Commission had no jurisdiction. The contention was sustained in a unanimous opinion, in which it was held that the claim, being based on the action of one of General Carranza's subordinates, committed in 1913, fell within Article III of the Special Claims Convention and, therefore, was not within the jurisdiction of the General Claims Commission. Here, again the act of a single man was the basis of the claim.

In the *Elton* case, *ibid*, p. 501, the United States contended that a denial of justice resulted from the improper action of an extraordinary court martial, the sentence of which resulted in the shooting of Howard Lincoln Elton, an American citizen in Mexico. Counsel for Mexico objected to the jurisdiction of the Commission, contending that the claim was founded on "acts executed by forces belonging to the Carranza Government". The objection was sustained in a unanimous opinion of the Commission.

In the *American Bottle Company* case, *ibid*, p. 162, claim was made by the United States for the value of a quantity of bottles delivered to a Mexican, who was in charge of a brewery which was owned by an American corporation and which had been seized by General Venustiano Carranza in 1914. The Commission unanimously overruled the Mexican Government's contention that the Commission was without jurisdiction.

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In the *Pomeroy* case, *ibid*, 1930, p. 1, Mexico objected to the jurisdiction with respect to a claim for services rendered in 1911 to a military hospital in Ciudad Juárez under the control of Don Francisco I. Madero. In this case the Mexican Government's contention was overruled.

In the *Gorham* case, *ibid*, p. 132, a claim made by the United States was predicated on allegations with respect to failure of Mexican authorities to apprehend and punish the slayers of an American citizen in 1919. Mexico contended that, since it appeared from the Memorial and certain accompanying annexes that the crime was committed by two or more persons in some instances designated as "bandits", the claim fell within Article III of the so-called Special Claims Convention. This contention was not sustained.

It will be seen from these few illustrations that in the past Mexico has not made a criterion of responsibility the number of persons directly engaged in acts as the result of which damages have been claimed.

In dealing with this difficult question of jurisdiction, it would seem to be improper to undertake to make relative numbers of wrong-doers the criterion of responsibility for acts resulting in loss or damage. In the instant case, if numbers should control, it would seem to follow that there could be no responsibility for the killing of Russell unless he was murdered at the hands of a considerable group of men. Certainly the weapon of one man was sufficient to accomplish the purpose. So, with respect to the destruction or theft of property, it would seem strange to apply as a test of liability in any given case the number of robbers or persons committing depredations. A few might operate for themselves; or they might kill and rob, as appears to have been the situation in the instant case, in behalf of a larger party and at the command of some one in charge of that party. Furthermore, it would seem that responsibility, referred to in sub-paragraph (5) of Article III, for failure to prevent or to punish wrongful acts should not be contingent on the number of malefactors engaged in such acts.

We have a Convention which by its jurisdictional provisions confers jurisdiction in cases in which respon.ibility might be fixed by international law, and furthermore fixes liability on the respondent Government in cases in which there may not be responsibility under that law. It would be a strange interpretation that the so-called "Special Commission" created by that Convention should have a jurisdiction narrower than that possessed by a commission created by a convention requiring the determination of liability only in cases in which the respondent Government is responsible under the law of nations.

Moreover, it is pertinent to take account of the fact that the two Conventions of 1923 represent in reality a single arrangement for the settlement of all outstanding claims of each government against the other, even though it is provided by the Convention of later date that certain claims of the United States shall be settled by a so-called "Special Commission". Under the jurisdictional provisions of the Convention of September 8, 1923, Mexico has the right to present before a Commission *all* its claims arising since July 4, 1868, in the nature of these involved in the instant case. International arbitrations from time to time are concerned with cases growing out of the acts of soldiers, insurgents and mobs. As recently as 1926 the United States and Great Britain completed an arbitration which dealt with such claims. That arbitration embraced claims growing out of war in which each country had engaged about a quarter of a century prior to that date. It further was concerned with claims growing out of insurrections within the dominions of each Government which occurred within the same period

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prior to the termination of the arbitration. (*American and British Claims Arbitration under the Special Agreement of August 18, 1910*, American Agent's *Report*, p. 6, *et seq.*) Cases coming before tribunals are passed upon in the light of evidence and applicable rules of international law, and are allowed or dismissed on their merits. Certainly under the Convention of September 8, 1923, Mexico has a right to present cases in the nature of the instant claim, and it would seem strange if the Convention of September 10, 1923, should have been framed to exclude even a consideration of this case.

The point seems to be one of which it is pertinent to take account in connection with the resort made to other Conventions for purposes of interpretation. Those Conventions, concluded by Mexico with other governments, provide only for the adjustment of claims of those governments against Mexico, and not for the adjustment of Mexican claims.

In the light of the preamble, the comprehensive jurisdictional language of Article I, and the elaborately stated catagories set out in Article III, it would seem to be proper to give the Convention a liberal and comprehensive interpretation, rather than a narrow one going so far by a process of exclusion as to deny jurisdiction in a case such as that before the Commission. A more liberal interpretation would seem to be in harmony with the spirit of a memorandum which was delivered in 1921 by the Mexican Foreign Office to the American Chargé d'Affaires in Mexico, and which explained a Mexican counter-proposal relative to the adjustment of claims, in part as follows:

> ".... by virtue of which there would be erected a Mixed Commission which should have jurisdiction over the claims which citizens of the United States might have to present to the Government of Mexico for injuries resulting from the revolution. This treaty would not incorporate the character of reciprocity but it would have for its purpose—and the Government of Mexico casting aside the usual conventions and scruples declares this frankly to be the case—the sole end of making reparation for the injuries caused in Mexico to American interests, and, all the more clearly to prove the good will of the Government of Mexico and its desire to satisfy all just demands, the claims should be settled in a simple spirit of equity—this criterion being the broadest and most favorable to the claimants. Upon this convention being signed, in accordance with the wise political program of the Government of Mexico, since it has invited to join in similar conventions all the governments whose nationals have suffered injuries since 1910, and would serve to do away with the difficulties which of late have arisen as an obstacle with respect to the good relations between the two countries, the Government of Mexico would be unqualifiedly recognized by that of the United States and, relations being thus established without any diminution of the dignity and sovereignty of Mexico its Government would find itself placed in the position to carry out the political program announced by the President in his message to the Congress of the Union, to wit: To take steps which the greatest cordiality in such relations might require." (*La Cuestión Internacional Mexicano-Americana Durante el Gobierno del Gral. Don Alvaro Obregón*, Mexico, Imprenta de la Secretaría de Relaciones Exteriores, 1926, p. 126.)

The Agent of Mexico in interpreting the Convention of September 10, 1923, and in dealing with other legal questions, resorted to interesting sources, among them being a note sent by the Mexican Minister for Foreign Affairs to the American Ambassador at Mexico City under date of April 17, 1912; an opinion of a member of this Commission which it was explained was prepared for the purpose of a conference with the other Commissioners in connection with the disposition of the so-called *Santa Isabel* cases, *supra*;

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and a public address delivered in the United States by one of the Commissioners who had attended the so-called Bucareli Conferences.

Judicial tribunals, domestic and international, as well as diplomats, have properly allowed themselves considerable latitude in resorting to material for interpretation where interpretation was required. The Mexican Agent, however, seems to go somewhat far afield. No authority was cited for the use of such material.

Perhaps on extremely rare occasions a speech made in a legislative chamber by a member might be used by a judicial tribunal for purposes of construing a law. But it would, to say the least, be going far afield to employ for that purpose a public address made by such member some time after the enactment of the law.

And it would seemingly be going still further to make use of an opinion written for purposes of some kind of a conference of judges engaged in the task of construing the law in a case on trial. Such an opinion is certainly not something in the nature of an irrevocable pronouncement. If it were, there could be no conference, since the word "conference" itself implies discussion and possible harmonizing of views. Hence, the records of any conference held would be more useful material for interpretation than an opinion written for the purpose of conference, although the use of records of such a conference might assuredly be regarded as unusual for purposes of interpretation.

The Mexican note of April 17, 1912, was cited as something having a bearing on the responsibility which Mexico was willing to assume with respect to damages caused to foreigners as a result of revolutionary disturbances. The Mexican Minister for Foreign Affairs referred to "one part of the country" as being "in a state of rebellion", and to "the regions which have removed themselves from obedience to the legitimate authorities". The Government of Mexico had of course a right at the time to express views with respect to international responsibility growing out of a state of revolution.

This subject has been discussed in different phases by counsel for both Governments in the instant case. Reference has been made to cases growing out of the American Civil War. The citation of cases of this nature which came before international tribunals does not appear to be conclusive in connection with incidents such as are involved in the instant case. In an insurrection of the magnitude of that of the American Civil War, it is hardly to be expected that the Federal Government could often, if ever, be properly charged with negligence in preventing destruction or seizure of property or personal injuries by insurgents. Moreover, during the course of that strife the parent Government and numerous other governments recognized the belligerency of the insurgents, who had some form of government, controlled an extensive area and possessed splendid armies. Such an eminent authority on international law as Mr. Hall has advanced the view that the recognition of belligerency in itself releases the parent government from responsibility for acts of insurgents. He says:

"... So soon as recognition takes place, the parent state ceases to be responsible to such states as have accorded recognition, and when it has itself granted recognition to all states, for the acts of the insurgents, and for losses or inconveniences suffered by a foreign power or its subjects in consequence of the inability of the state to perform its international obligations in such parts of its dominions as are not under its actual control". Hall, *International Law*, 7th ed., p. 30.

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As a general rule, a government is responsible for the consequences of wrongdoing which it could have prevented by reasonably effective measures. And there is no good reason why that general rule of responsibility should not be applied in an appropriate case to acts of insurgents, the test of liability being capacity and willingness on the part of the authorities to act.

But in any event it is not perceived that there is anything in the Mexican note of April 17, 1912, that can have any useful bearing on the interpretation of the Convention of September 10, 1923. If in 1912 a government had presented to Mexico a claim for losses resulting from the proper conduct of military operations by Mexican forces, it might have been expected that Mexico would deny liability under international law, as perhaps it was intended to do, at least by implication with respect to damages resulting from the Orozco movement. Such a position on the part of Mexico could not now be reasonably cited for the purpose of throwing light on the intent of the Mexican Government in signing the Convention of September 10, 1923, because in Article III liability is stipulated for all claims occasioned by the acts of a government *de jure* or *de facto*.

Irrespective of the nature of sources to which resort is made for purposes of interpretation, the objection to the particular construction given to sub-paragraph (2) of Article III of the Convention by Mexico is that it requires a too extensive judicial re-writing of the Convention, so to speak. This important point cannot properly be ignored. It is controlling with respect to the issues raised relative to the interpretation of this provision.

Reference is made in that sub-paragraph to two sets of revolutionary forces. The Commission is in effect asked to read into the brief stipulation under consideration the meaning that, although two kinds of revolutionary forces are mentioned, they are really the same kind of revolutionary forces; also, to read into the provision that, while two kinds of revolutionary forces there described had a common object (to overthrow the established government), they were forces "opposed" to each other, forces engaged in some form of physical hostility toward each other. Since such a relationship of forces would seemingly present a strange situation, and since we have nothing to guide us but the word "opposed", it would be necessary to read into the Convention some description or numerous descriptions of the kinds of opposition which might exist among two sets of revolutionary forces who were co-operating for the same purpose and yet were opposed.

Furthermore, it appears to be necessary to make further interpolations to sustain the Mexican Government's interpretation. The Commission is asked to read into this sub-paragraph an element of time to convey the meaning that the revolutionary forces mentioned in the last phrase, having a common purpose with the revolutionary forces mentioned in the first phrase, were nevertheless opposed to the latter and were opposed to them *before* they established governments *de facto* or *de jure*.

It is shown that the framers of the Convention, when they undertook to designate forces with reference to an element of time of the operations of such forces, did so in express terms. For instance, in sub-paragraph (3) there is a reference to forces arising from disjunction of forces mentioned in the next preceding paragraph "up to the time when the government *de jure* established itself as a result of a particular revolution". Some allowance being made for a none too specific use of the word "disjunction", sub-paragraph (3) would appear to furnish a better description of the classification of revolutionary forces referred to in the second clause of

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sub-paragraph (2), as construed by the Mexican Government, than sub-paragraph (2) itself does.

The Commission is asked in effect to undertake a judicial re-writing of sub-paragraph (2) by reading into it the elaborate and seemingly somewhat odd additions which have been mentioned. Such action, it is believed, would be contrary to well established principles of interpretation.

In construing provisions of a Treaty between Spain and the United States, Mr. Justice Storey, of the Supreme Court of the United States, in the case of *The Amiable Isabella*, 6 Wheaton (U. S.) 1, 71-72, said:

"In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part a usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.

. . . . . .

"In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise."

In the *British Counter* case in the Alaskan Boundary Arbitration under the Treaty of January 24, 1903, between the United States and Great Britain, it was said:

"It is respectfully submitted on behalf of Great Britain that the function of the Tribunal is to interpret the Articles of the Convention by ascertaining the intention and meaning thereof, and not to re-cast it."(Published in the American print, Vol. IV, p. 6).

In *Lake County* v. *Rollins*, 130 U. S. 662, 670, the Supreme Court of the United States, in dealing with the interpretation of provisions of the constitution of one of the states of the Union, said:

"We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error."

To construe the Convention in the manner contended for by the United States appears to give effect to the language of the provisions under consideration without interpolation, and without attaching the somewhat strange connotation which the Mexican Government's interpretation requires with respect to the word "opposed". From the standpoint of interpretation contended for by the United States, it seems to be of little consequence so far as substance is concerned whether the pronoun "them" at the end of sub-paragraph (2) relates to "governments" or to the forces of those governments, or to both.

Reference was made in argument to the preambles of the Conventions of September 8, 1923, and September 10, 1923, respectively. A preamble expresses the purpose of a treaty. In conventional arrangements, such as have entered into international relations for centuries, perhaps very frequently the language of preambles may not be very useful for purposes of construing numerous and varied specific provisions found in such treaties. Doubtless at times the preambles can serve no purpose whatever. It is interesting to note that Mr. Chief Justice Hughes of the Supreme Court of the United States, in a recent opinion dealing with the rights of aliens in the United States to dispose of their property, referred to the preamble of a so-called

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commercial treaty concluded April 3, 1783, between the United States and Sweden. Citation was made of the preamble to show that the Treaty was in harmony with the general purpose of treaties of amity and commerce, which was said to be "to avoid injurious discrimination in either country against the citizens of the other". This general purpose, the court considered, was not contravened by certain restrictions on alienation provided by the law of one of the states of the Union. *Todok* v. *Union State Bank*, 281 U. S. 449.

In dealing with a treaty which is of a somewhat unusual character, and which is not concerned with a multiplicity of distinct subjects, resort to the preamble may be even more useful for the purpose of ascertaining the intent of the framers with respect to a single, specific subject, such as the adjustments of claims.

The Commission under the Convention of September 8, 1923, between Mexico and the United States has deemed it proper to refer repeatedly to jurisdictional stipulations in the Convention of September 10, 1923.

Note has been taken of the fact that the provisions of the later Conventions are much more specific than the very general ones of the earlier Convention. Nevertheless, the question which in each case has confronted the Commission under the Convention of September 8, 1923, has of course been to determine whether cases came within the meagrely stated jurisdictional provisions of that Convention. And the Commission has deemed it to be necessary and proper to apply the criterion whether cases in which the jurisdictional issue was raised were excluded because they were, in the language of the preamble of the Convention, claims "growing out of the revolutionary disturbances in Mexico". And it has of course been necessary to determine in such cases whether they were claims, in the meagre language of Article I "arising from acts incident to the recent revolutions". At times it has been difficult to determine whether losses which it has been alleged were suffered were or were not losses "growing out of the revolutionary disturbances". Pertinent considerations have been whether certain acts were of such a nature that they could not have occurred unless there had been revolutionary disturbances, or whether they were such that only through strained reasoning or speculation could they be attributed to such disturbances. When they have been acts of insurrectionary soldiers, there of course has been no uncertainty. *Kaiser* case, *Opinions of Commissioners under the Convention concluded September 8, 1923, between the United States and Mexico*, 1929, p. 80; *American Bottle Company* case, *ibid*, p. 162; *Pomeroy* case, *ibid*, 1930. p. 1; *Sewell* case, *ibid*, p. 112; *Gorham* case, *ibid*, p. 132.

In dealing with the perplexing problem of responsibility, it would seem to be desirable and indeed necessary to avoid taking account too much of dictionary definitions of such terms as "revolutionary forces", "insurrectionary forces", and "bandits". It can scarcely be said that there are concise legal definitions of those terms, and they have repeatedly been used interchangeably. This is certainly true with respect to such terms as "revolutionists" and "insurrectionists". Indeed, in the Convention itself, following references to "revolutionary forces" in sub-paragraphs (2) and (3) and to "federal forces" in sub-paragraph (4), in Article III there is a reference in sub-paragraph (5) to "insurrectionary forces other than those referred to under subdivisions (2), (3) and (4) above". It thus appears that the framers of the Convention used interchangeably the terms "revolutionary forces", "federal forces" and "insurrectionary forces". Had they intended to make some distinction between "insurrectionary forces" and

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"revolutionary forces", it must be assumed that they would of course simply have said in sub-parapraph (5) "insurrectionary forces" and not added "*other than those referred to under subdivisions (2), (3) and (4) above*". (Italics inserted.) It may reasonably be assumed that they used the terms interchangeably becase they considered that no useful and practical distinction could be made.

The American colonies originated a successful secession movement in 1776. It did not have for its purpose the overthrow of the entire rule of the King of England, but merely its elimination in certain territories under his sovereignty. The movement is always spoken of as a "revolution". The war between the States of the United States of America had also the purpose of secession, and is generally called a "civil war" or a "rebellion". The so-called French Revolution had for its object the overthrow of French monarchical government, and the term "revolution" seems very apt with respect to that movement. The Mexican Minister for Foreign Affairs and the President of Mexico in 1912 referred to Orozco's movement as a "revolution". That movement had for its purpose the overthrow of the then existing Federal authority in Mexico.

With respect to this point it would be unfortunate to fail to take account again of the general purpose of the Convention.

To be sure, it is a sound principle that special provisions should control over general provisions. But when the special provisions contained in the Treaty make use of terms interchangeably in this manner, and when strictly legal definitions of terms are wanting, it again becomes proper to refer to the general, broad, comprehensive description of the purposes of the Convention, and of the acts on which claims may be predicated.

The basis of responsibility prescribed by the Convention

There has been much discussion in oral argument with respect to the principles on the basis of which questions of liability or non-liability must be determined. It may therefore be useful to sketch in general terms the scope of the provisions of the Convention of September 10, 1923, in the light of which all questions bearing on this point must be resolved.

It is of course necessary, in undertaking to deal with the question of liability or non-liability in any given case, to take account of the fact that it has been stipulated that responsibility in cases coming before this Commission is not to be determined in accordance with international law. This fact is made clear by Article II of the Convention of September 10, 1923, and it is further clarified by Article III. Furthermore, it is also worthy of note that the question of responsibility is specifically dealt with in a declaration on the part of the Government of Mexico found in Article II of the Convention. Responsibility is therefore fixed by a treaty, and is not to be determined in accordance with rules or principles of international law. The reasons for this situation are of a political character, and consequently are of no concern in connection with the judicial determination of cases conformably to the stipulations of the arbitral agreement.

Article II of the Convention requires that cases are to be decided "in accordance with the principles of justice and equity". It is significant that the terms of the submission make no mention of law. Possibly this fact in itself might not have been conclusive with respect to the basis of responsibility, if the question had not been clarified by subsequent provisions.

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The protocols in the Venezuelan Arbitrations of 1903 required that cases should be decided "upon a basis of absolute equity, without regard to objections of a technical nature or of the provisions of local legislation". There was no reference to law in those protocols. Nevertheless, at least two umpires considered that they were bound to apply the law of nations in making their decisions. They construed the somewhat unique terms of submission to eliminate any question with respect to *local legislation intended to obviate international responsibility*, but not to authorize the determination of cases by the exercise of an unrestricted discretion rather than by the application of law. See opinion of Plumley, Umpire, in the *Aroa Mines* case, *Venezuelan Arbitrations of 1903*, Ralston's *Report*, pp. 344, 379, 386; opinion of Ralston, Umpire, *ibid*, pp. 679, 692.

However, in the Convention of September 10, 1923, between Mexico and the United States, we have terms of submission couched in language much more specific and detailed than that found in the protocols in the Venezuelan Arbitrations, and we know precisely why those terms were used. Following the stipulations in the Convention requiring the decision of cases "in accordance with the principles of justice and equity", is the declaration of the Mexican Government of its desire that "responsibility *shall not* be fixed according to the generally accepted rules and principles of international law", (italics inserted) but that it will be sufficient "that it be established that the alleged loss or damage in any case was sustained and was due to any of the causes enumerated in Article III" of the Convention.

It is therefore obvious that in the determination of the question of responsibility in any given case two questions must be determined: (1) whether loss or damage was sustained, and (2) whether such loss or damage was due to any of the causes mentioned in Article III. Of course, if it is found in any case that such loss or damage was suffered as a result of any stated cause, it is incumbent on the Commission to fix the amount of damage.

As a general rule it is of course the duty of an international tribunal to decide international cases by a just application of law. On rare occasions, as is the case with respect to this Commission, international tribunals may be authorized to decide cases without being required to apply international law. The Permanent Court of International Justice is empowered to decide cases *ex aequo et bono* if the parties agree thereto. It appears that the court is thus authorized in effect to make compromise awards not based on law, if it is so desired by litigants. Stat., Art. 38, Par. 4.

On February 9, 1920, several powers signed a Treaty recognizing the sovereignty of Norway over the archipelago of Spitsbergen, which had for centuries been in the anomalous situation of being a *terra nullius*. An Annex to the Treaty contains stipulations with respect to rights in the islands prior to the signing of the Treaty. It was stipulated that conflicting claims to lands should be passed upon by a tribunal composed of a Commissioner, acting in conjunction with arbitrators designated by governments whose nationals had claims. It was provided that the Tribunal, in dealing with claims, should take into consideration "the general principles of justice and equity". This was a needful provision inasmuch as apparently there was no law to apply, either domestic or international. Persons could have no title under municipal law in a *terra nullius*, where no such law existed, and rights which they asserted were evidently not defined by the generally recognized principles of international law.

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The term "equity" is used in treaties of submission when it is intended that law is not to be applied. And there may be cases in which members of an international tribunal may be authorized to decide controversies in accordance with their personal views as to what may be a proper disposition of cases. Fortunately, the meaning of "equity" in the Convention of September 10, 1923, is specifically defined in that Convention. The arbitral agreement obviously uses the term "equity" because it is stipulated that the question of responsibility shall not be determined in accordance with law. The Convention contains specific stipulations which show beyond any doubt that the Commission is not authorized to decide any case in accordance with notions of the members as to what may be fair or equitable—whatever those handsome terms may mean. The Commission must decide cases in accordance with rules prescribed by the Convention, these rules being law for the parties to that agreement and for the Commission. There can therefore be no place for any theory that the members should play the rôle of jugglers in dealing with facts and law. The Convention, instead of prescribing the application of international law, requires that in determining responsibility in each case two questions must be ascertained in the light of evidence, namely, whether loss or damage was sustained, and whether such loss or damage was due to any of certain causes specified in the Convention. The determination of these two points is therefore what is meant by the determination of responsibility in accordance with equity. The Commission must therefore not decide cases in accordance with the individual notions of members as to what equity may be in any given case. It must not undertake to apply equity as a branch of domestic law, as for example the system of equity in Anglo-Saxon jurisprudence. It must apply the provisions of the Convention, which prescribes how responsibility is to be determined.

The stipulations with respect to the determination of cases by deciding first whether loss or damage was sustained, and, second, whether such loss or damage was due to any of certain specified causes, relate to all cases over which the Commission has jurisdiction. However, it is clear that the jurisdictional provisions of the Convention embrace cases in which liability might have been fixed according to international law, whenever the evidence should warrant such action. From a general analysis of Article III, it will be seen that it includes cases of a character in which responsibility has repeatedly been determined by international tribunals under international law.

Article III of the Convention, by specific language, amplifies the jurisdictional provisions of Article I. and, as has already been observed, further throws light on the point that responsibility in the pending arbitration is fixed by a treaty and is not to be determined in accordance with international law. Article III declares that the claims to be decided are those which arose during the revolutions and disturbed conditions which existed in Mexico covering the period from November 20, 1910, to May 31, 1920, inclusive, and which were due to any act committed by forces subsequently enumerated in that Article.

The High Contracting Parties could have agreed, had they so desired, that the cases embraced by the jurisdictional provisions of the Convention should have been decided in accordance with international law. Had the parties so stipulated, the merits of each case should of course be decided in accordance with the evidence and the applicable rules and principles of law.

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The first category, found in sub-paragraph (1) of Article III, is "By forces of a Government *de jure* or *de facto*". Any distinction which it may have been intended to make in this classification is not clear, since from the standpoint of international law a government may be regarded as *de jure* by virtue of the fact that it is *de facto*. *Elton* case, *Opinions of Commissioners under Convention concluded September 8, 1923, between United States and Mexico, 1929*, p. 301. Doubtless in some cases falling within this category responsibility assumed by Mexico in the Convention could only be fixed, according to the terms of the Convention, *ex gratia*, and not conformably to international law. That law requires that compensation must be made for property appropriated to the use of belligerent forces and for unnecessary or wanton destruction of property. But there are many ways in which non-combatants may, without being entitled by law to compensation, suffer losses incident to the proper conduct of hostile operations, or losses resulting from acts of soldiers described as private acts of malice. In cases of this kind, compensation must be made *ex gratia*, by virtue of the provisions of Article III, sub-paragraph (1). See the *Solis* case, *ibid.* p. 48, and cases there cited; also the *Kelley* case, *ibid*, 1930, p. 82.

Sub-paragraph (2) is concerned with a category of claims growing out of acts of "revolutionary forces as a result of the triumph of whose cause governments *de facto* or *de jure* have been established". Had the Convention contemplated that questions of responsibility should be decided by the application of international law, sub-paragraph (2) of Article III would evidently have been superfluous, since a government is responsible for the acts of successful revolutionists. Ralston, *The Law and Procedure of International Tribunals*, pp. 343-344; *United Dredging Company* case, *Opinions of Commissioners under Convention Concluded September 8, 1923, between United States and Mexico, 1927*, p. 394. A second category stated in sub-paragraph (2) is concerned with the acts of the revolutionary forces whose classification is the principal issue in the instant case. If it had been provided that responsibility should be fixed conformably to international law, liability would exist in cases revealing proof of negligence or of absence of good faith in preventing wrongful acts on the part of the insurgents. There would be no responsibility in cases in which the respondent government was not chargeable with negligence. Hence, in that class of cases, responsibility is fixed by the Convention of September 10, 1923, *ex gratia*. *Solis* case, *supra*.

Sub-paragraph (3) deals with acts committed by forces arising from the disjunction of forces mentioned in the preceding paragraph up to the time when a *de jure* government was established. By the description, "forces arising from the disjunction of the forces" mentioned, presumably is meant forces that separated themselves from insurgents whose acts were finally responsible for the establishment of a *de jure* government. In cases involving acts of the former, it would appear that, if responsibility had been fixed in accordance with international law, the general principles just mentioned with respect to responsibility of a government for acts of insurgents would apply. And it may therefore be said that in assuming complete responsibility for the acts of such forces the Government of Mexico bound itself by the Convention to do so *ex gratia*, in those cases in which negligence in the matter of preventing injurious acts by such forces is not proven.

Sub-paragraph (4) is concerned with acts committed by "federal forces that were disbanded". Perhaps this classification is not as clear as it might have been. However, it would seem that reference is made to the acts of men committed after they were separated from federal forces. It appears

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therefore that Mexico has assumed liability for the acts of former federal soldiers irrespective of the question of negligence in the matter of prevention or punishment of wrongful acts.

It is specifically stipulated by Article II of the Convention that responsibility in cases before the Commission shall not be determined in accordance with international law. Provisions to this effect apply to all the five categories stipulated in Article III of the Convention. They therefore of course apply to acts referred to in sub-paragraph (5), although, as has been observed, the language of that sub-paragraph would appear to justify the construction that the Commission in dealing with the category of claims embraced by that sub-paragraph must take account, at least to some extent, of the general principles of evidence and of law that enter into the determination of such cases by strict application of international law. This sub-paragraph contains a proviso with respect to proof of the absence of precautionary measures. Liability for injuries caused by mutinies or mobs or some kinds of insurrectionists is assumed only in case it be established that the appropriate authorities "omitted to take reasonable measures to suppress insurrectionists, mobs, or bandits, or treated them with lenity or were in fault in other particulars". From the standpoint of international law with respect to the rights of aliens, the suppression of insurrectionists, mobs or bandits would appear to be a matter of importance only in so far as such suppression would have a bearing on the prevention of injuries to such aliens. With respect specifically to injuries committed by private individuals against aliens, the requirement of international law is that reasonable care must be taken to prevent such injuries in the first instance, and suitable steps must be taken properly to punish offenders. *Chapman* case, *Opinions of Commissioners under Convention concluded September 8, 1923, between United States and Mexico, 1930*, p. 121. Before an international tribunal can assess damages for a failure to meet this requirement, there must of course be convincing evidence of a pronounced degree of improper governmental administration. *Adler* case, *ibid.* 1927, p. 91. It would appear from the language of sub-paragraph (5) that at least to some degree Mexico has assumed *ex gratia* an obligation somewhat broader than that imposed by international law with respect to claims arising out of acts such as are embraced by that paragraph. With respect to this point, it is pertinent to take note of the broad language fixing responsibility on proof, among other things, of the fact that the authorities "were in fault in other particulars". Moreover, the language of this portion of the Treaty should be interpreted in connexion with Article II, which clearly provides that responsibility is to be fixed *ex gratia* and not on the basis of international law. And furthermore it is a common sense interpretation of sub-paragraph (5) of Article III that, if the High Contracting Parties had desired that the category of claims therein stated should be determined in accordance with international law, they would have expressed themselves to that effect. That could have been very simply done.

Mention has already been made of the reference in sub-paragraph (1) to "forces of a Government *de jure* or *de facto*". It may not be inappropriate to observe that, occasionally in connexion with the discussion of questions pertaining to international law and the practices of nations, somewhat loose use may be made of terms which can be conveniently employed without being technically and accurately defined. It is not altogether clear why in this sub-paragraph use should be made of any express or implied distinction between a government *de jure* and a government *de facto*. Reference however

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appears to be made to two different kinds of governments, although the word "government" is not repeated. It is possible that, since the word "government" was not repeated, it was intended to convey the meaning that the government mentioned was the same and that *de jure* and *de facto* are used synonymously. But this does not appear to be the meaning intended. From the standpoint of international law a government may be regarded as *de jure* by virtue of the fact that it is *de facto*, and it seems that the legal situation is the same from the standpoint of domestic law. All independent Governments on the American continents orginated in revolutions, which overthrew *de jure* governments, Certainly, when these new Governments, following the successful revolutions, began their independent existence, they were not only *de facto* within the territories they controlled, by virtue of the fact that the old *de jure* governments were therein extinguished, but they were also *de jure*. It would seem that, having the purposes shown by the preamble and the jurisdictional articles, the use of the term *de facto* in the Convention between the two governments may well be considered to relate to some so-called government in *de facto*, or otherwise expressed, actual, control of a definite area. It would seem that from the standpoint of international law, and in the light of numerous international precedents, the most appropriate use of the term "*de facto* government" is in its application to a situation of this kind.

Application has frequently been given to principles governing rights and obligations derived from such a situation. Thus, it has been asserted by governments and by international tribunals that, if aliens have been required to pay duties or taxes to insurgents who have gained control of territory, a government which regains control of the area should not exact double payments. Moore, *International Law Digest*, Vol. VI, pp. 995-996. Case of *Santa Clara Estates Company*, in the British-Venezuelan Arbitration, *Venezuelan Arbitrations of 1903*, Ralston's *Report*, p. 397.

In the case of *Santa Clara Estates Company*, *ibid*, Mr. Plumley, Umpire, held that the Venezuelan Government had no right to collect taxes which had already been paid to "a revolutionary government", which had gained control of a portion of the national territory, that is, of a certain district, and that the taxes so collected should be returned. In the *Guastini* case, *ibid*, p. 740, Mr. Ralston, Umpire, held, as expressed in the syllabus of the case, that "the legitimate government cannot enforce payment of taxes once paid to revolutionary authorities when the latter were for the time being at the place in question the *de facto* government". The Umpire said (p. 751):

> ".... During the period for which taxes were collected by the revolutionary government, the legitimate government (as we may believe from the 'expediente') performed no acts of government in El Pilar. It did not insure personal protection, carry on schools, attend to the needs of the poor, conduct courts, maintain streets and roads, look after the public health, etc. The revolutionary officials, whether they efficiently performed these duties or not during the time in question, displaced the legitimate authorities and undertook their performance. The legitimate government therefore was not entitled at a later period to collect anew taxes once paid to insure the benefits of local government which it was unable to confer."

In the course of his opinion, Mr. Ralston made use of principles frequently asserted by American courts in interesting cases with respect to the validity of the acts of so-called "*de facto* officers".

This situation with respect to so-called *de facto* governments having their existence by virtue of control by insurgents of certain areas of territory has

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been interestingly recognized in several decisions of the Supreme Court of the United States relating to acts committed within the so-called Confederate States. The case of *Baldy* v. *Hunter*, 171 U. S. 388, decided by that court in 1898, was concerned with the investment made by a man named Hunter, as guardian, in bonds of the Confederate States. After reviewing several decisions of the court, Mr. Justice Harlan, in the opinion which he rendered in behalf of the court, said (p. 400):

"From these cases it may be deduced—

"That the transactions between persons actually residing within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority;

"That, within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were during the war, under the control of the local governments constituting the so-called Confederate States;

"That what occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held invalid *merely* because those governments were organized in hostility to the Union established by the national Constitution; this, because the existence of war between the United States and the Confederate states did not relieve those who were within the insurrectionary lines from the necessity of civil obedience nor destroy the bonds of society nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame 'except when proved to have been entered into *with actual intent* to further invasion or insurrection.' "

Questions pertaining to the evidence generally

Questions pertaining to the use of evidence have already been discussed to some extent in connection with the proof of nationality. Certain further observations in relation to the treatment of evidence by this Commission and by other international tribunals may be pertinent in connexion with questions relating to the acts and omissions of which complaint is made by the claimant Government in this case.

The Convention which created this Commission stipulated in a widely comprehensive as well as specific manner what the Commission must receive as evidence.

And it must of course be assumed that, in the opinion of the framers of the Convention who acted for the two Governments, the provisions dealing with this subject prescribed a reasonable and useful procedure before the Commission.

Proceedings before any international tribunal very frequently involve—it may probably be said—unsatisfactory situations. This is especially true when an international tribunal must deal with a great number of controversies stretching over a long period of years. The framers of the Convention of September 10, 1923, obviously had in mind the practical needs of the particular legal machinery which they created and set in motion. No useful purpose can be served by the exercise of extraordinary ingenuity and resourcefulness in invoking technicalities of rules of domestic law that

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obviously have no place in proceedings before international tribunals such as this Commission. Perhaps the courts of Mexico, controlled by rules with respect to the admission of evidence so very much more liberal than those governing the courts of the United States, might feel obliged to exclude some of the things of which the Convention requires this Commission to make use.

Certainly, the courts of the latter country, to a much greater extent, would be constrained to reject many more of these things. Indeed, considering the difference between the procedure of the domestic courts and that of international courts there is generally speaking no real basis for comparison.

However, although the Commission cannot give application to rules of domestic law, it is certainly its duty to undertake to apply common-sense principles underlying such rules. It can test the testimony of witnesses in the light of their sources of information and their capacity to ascertain, and their willingness to tell, the truth. It can assuredly also apply common-sense reasoning with respect to the value of what might be called purely documentary evidence which it must receive. It can analyse evidence in the light of what one party has the power to produce and the other party has the power to explain or contravert. And in appropriate cases it can draw reasonable inferences from the non-production of evidence.

Counsel for both governments must be largely responsible for the record of evidence. It is their duty to be of all possible assistance in the formulation of sound judgments. That an international tribunal, unsatisfactory as its proceedings in the nature of things occasionally may be, can proceed rationally, without undertaking to function in a capacity in which it was not created, the capacity of a domestic court, is fortunately illustrated by a great number of proceedings that have antedated the presentation of the instant case. Illustrations may be drawn from a few cases determined by another international tribunal, that created by Mexico and the United States under the Convention of September 8, 1923.

In the case of *Melczer Mining Company, Opinions of Commissioners 1929*, p. 228, a claim presented by the United States, the evidence produced by both Agencies was of such an unsatisfactory character that it was impossible for the Commission to reach definite conclusions with respect to important issues of fact. There was no question as to the responsibility of the respondent Government for the seizure of certain properties by governmental authorities.

But affidavits as to the value of the property which were presented by the claimant Government were so lacking in certainty that an award was made in a sum that might be considered nominal in relation to the amount claimed.

In the *LaGrange* case, *ibid.* p. 309. it appeared from the evidence accompanying the Mexican answer that some men were summoned to give testimony, and that not one of them had any information concerning the facts underlying the claim. The Commission was of course bound to receive the testimony, and with respect to the value thereof said (p. 310):

".... It further appears that three persons in Ciudad Juarez were asked certain questions to ascertain whether LaGrange had a business in Ciudad Juárez and whether Domingo Trueva had a business in that city and whether the Government had confiscated a warehouse in which the claimant's goods were stored. The answers given by each of these persons showed that they had no knowledge of any of the matters with respect to which they were questioned."

The *Kalklosch* case, *ibid.*, p. 126, involved allegations on the part of the United States with respect to illegal imprisonment and ill-treatment of the

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claimant. Accompanying the Memorial of the United States was a lengthy contemporaneous consular despatch describing the occurrences involved in the claim, numerous affidavits and some contemporaneous correspondence. The following extract from the unanimous opinion of the Commission describes the evidence accompanying the Mexican Answer (p. 128):

"Accompanying the Answer is a statement of the Municipal President of Villa de Altamira in which it is stated that a Municipal Judge of the town who acted as Secretary of the Municipal Government and Director of Courts in the year 1912, made a sworn declaration that it was untrue that Louis J. Kalklosch was a prisoner in that year, or that he had been in that town, or in Columbus; and furthermore, that Kalklosch was never molested by Mexican authorities; that there were no police books or records to confirm his statements which could be proven, however, by testimony of well-known residents of the town of Altamira; and that the files of the town were burned by revolutionary forces which were quartered there during the last days of 1912. Pursuant to stipulations between the Agents, the Mexican Government further produced statements obtained from persons at Altamira in the month of March, 1927, to the effect that the claimant was never under arrest at that place."

The Commission was of course obliged to receive that evidence, and its analysis thereof is shown by the following extract, (p. 129):

"Unless the evidence accompanying the Memorial is to be rejected practically in its entirety, it must be concluded that Kalklosch was arrested without a warrant and without any cause. The statements that Kalklosch was not arrested and was not molested can only be accepted if the view is taken that in the affidavits accompanying the Memorial the affiants stated a mass of amazing falsehoods, and that the American Consul in 1912, produced out of his imagination, a lengthy report concerning arrest of Americans which never took place. Of course such things did not occur."

The Agent for Mexico called attention in oral argument to a recent act of the Congress of the United States, (Public No. 525—71st Congress, S. 2828), entitled, "An Act authorizing Commissioners or members of international tribunals to administer oaths, to subpoena witnesses and records, and to punish for contempt".

Legislation of this kind may point the way to methods of improving procedure before international tribunals. But it also illustrates the difficulties of effecting such a desirable purpose. It is of course purely a matter of speculation as to what might be accomplished by such legislation in dealing with thousands of cases in the course of proceedings interrupted for long intervals from time to time. It is also interesting to consider the question whether one nation can confer on a Commissioner appointed by another nation, or on another Commissioner selected by both nations, power to issue subpœnas, and whether it can empower an international tribunal, constituted in the conventional way, to punish for "contempt". It is further interesting to consider whether such powers could be of any use to a commission, when sitting in one country, to obtain the testimony of persons in another country. And in any event with respect to the use of a measure of this kind, in connexion with pending arbitration proceedings between Mexico and the United States, it seems to be obvious that such legislation could be of little or no purpose, unless identical legislation should be enacted by Mexico, and the two Governments should in effect make the law a common law applicable to the proceedings of the Commission. A detailed examination of the law mentioned would require the consideration of several interesting problems of domestic law and of international law.

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The attacks on the evidence submitted by the claimant Government in the instant case appear to be very extreme, particularly in view of the character of evidence produced by the respondent Government, and in view of its failure to produce evidence to throw light on questions of fact. A brief analysis of evidence in the record will serve to indicate the extent to which these questions have been solved.

A report of October 2, 1912, from a responsible official, the American Consul at Durango, furnishes the information that Russell was murdered by a force of revolutionists commanded by Luis Caro, whose band had recently captured Chalchihuites, Zacatecas. In a dispatch of October 3, the Consul amplified his previous report with authentic details that he had obtained through a special messenger.

In this despatch the Consul reported that, having received information that the "band of revolutionists under the leadership of Luis Caro", who had captured and sacked Chalchihuites on September 28, had left in the direction of the San Juan de Michis Ranch, he called upon the Governor of the State requesting protection for the ranch. The Consul further referred to information received from the bookkeeper of the ranch, a Mexican, with respect to the appearance at the ranch on September 29 of the revolutionary band headed by Luis Caro, the extortion of supplies and money from Russell, the departure of the revolutionists and the subsequent return of two of them who demanded more money in behalf of (as one of them stated) "My Colonel", and who finally murdered Russell.

In an affidavit executed October 12, 1912, by German Cortez, the bookkeeper of the ranch, and his son Arnulfo Cortez, both presumably Mexicans, who were present on the occasion when money and supplies were extorted from Russell, and who had detailed personal information concerning the murder of Russell, German Cortez testified that he heard the shooting; that he saw Russell in misery after being shot; that he heard one of the men boast of the killing. He testifies, concerning the identity of these men, that he "knew at once that they were Orozquistas". We have here the testimony of two eyewitnesses who, it appears, on September 28 saw the arrival at the San Juan de Michis ranch of forty-three men, including the leaders, Jorge Huerca and Luis Caro, entitled respectively Colonel and Lieutenant Colonel. One of the two men who returned when the murder took place explained to German Cortez, according to the latter's testimony, that the two had a message to deliver from their Colonel to Russell.

In a despatch of November 9, 1912, the Consul furnished the information that, according to the latest report, Caro had effected a juncture with the larger rebel force of Benjamin Argumedo, a signer of the so-called "Plan of Orozco". Considerable more concise information is furnished regarding the tragic occurrences in question.

Evidence furnished by Mexico does not appear to raise any doubt on the point that Russell was killed by Orozquistas. From an analysis of that furnished by the United States it becomes clear that Mexico is not justified in taking the position that there is no need of rebutting evidence on its part.

Under date of March 16, 1925, the Secretary of Foreign Relations transmitted a communication to the Governor of the State of Durango, calling attention to the claim filed by the United States and requesting information, special attention being directed to eight questions which were submitted. The Governor transmitted a reply under date of June 25, 1925 (Annex 2), which contains no very specific information, but does confirm the murder

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of Russell. It contains a resume of statements made by Juan Pablo Ramirez and Marguerito Hernandez. It is shown that some one handed these two persons the letter transmitted to the Governor by the Mexican Foreign Office, and asked them "if it were true or not that the occurrence took place concerning Hubert L. Russell". There is nothing in the summary given to indicate why it may have been considered that these two persons could furnish information. There is nothing to indicate that they had any personal information. Nevertheless, they apparently undertook to furnish details regarding the killing of Russell and submitted conclusions based on inferences that he killed himself. It is not altogether clear that these two persons so testified as to such conclusions and inferences. But the summary including these things seems to have been intended to convey information as to what the two persons said.

Another communication (Annex 3) of April 14, 1925, from the same source, furnishes little additional information, except that it is stated that certain persons had said that Russell was not the manager of the ranch but was only in charge of the fields, as was commonly known.

The Mexican Answer includes another communication, dated March 16, 1925, from the Secretary of Foreign Relations to the Agent Ministerial Publico Federal attached to the District Court at Durango. This communication also contains the eight questions to be answered.

Annex 6 contains the testimony of certain persons who were examined. The testimony first recorded is that of Fernando Vargas. His testimony reveals that he had no first-hand information. However, he does testify that he learned through public talk "that Russell became violent and fired on two or three persons who knocked at the door". His statement concludes with the following sentence: "Asked to state on what he based his statement, he replied that he based it on the knowledge that he has of the facts upon which he has made his declaration". He was asked as to what the "social position" of Russell was, and he spoke of Russell as a "modest or humble man".

Next, is recorded the testimony of Marielo Pineda. He was asked whether Russell was general manager of the San Juan de Michis ranch in September, 1912, and the witness replied in the negative. It would seem that there should be available much better sources of information on that point. The testimony reveals an absence of personal information regarding the occurrences in question, although the witness testifies "that he knows that the men who entered San Juan de Michis caused the death of Mr. Russell, but because the latter, intemperately and from the inside of the house where he was staying, attacked the people who had arrived". The statement concludes, as did the previous one, with the information that "asked for the reason of his statement, he replied: that it is based on his knowledge of the facts regarding which he has testified".

Next is recorded the testimony of José Mijares. He likewise furnished the information that Russell was not general manager of the ranch. His ignorance of the occurrence in question is shown by his answers, but he manages to furnish this information: "Asked to state whether Mr. Russell fired on the armed force, he being the aggressor, he replied that in reality, according to his knowledge, Mr. Russell fired on the armed force from the inside of the house where he stayed, until he was killed". The statement concludes with the customary information that the reason for the statement "is based on knowledge of the facts regarding which he has testified".

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Further testimony is furnished by Francisco Pineda. This witness also states that Russell was not general manager of the ranch. He testifies that he does not know anything concerning extortion of money from Russell nor anything regarding the return on September 29, 1912, of a portion of the armed force. Nevertheless, he testified, when asked whether some armed force made an attack and caused the death of Russell, that two or three persons who separated themselves from a group of armed men who passed through the ranch caused the death of Russell. He further testifies, in spite of the complete ignorance which his previous testimony has revealed, that Russell opened fire on his attackers and that "it is unquestioned that he be considered the aggressor".

To each of these witnesses was put the question, which, from the standpoint of interpretation of the Treaty, may be considered to be a mixed question of fact and law, whether the men who shot Russell were revolutionary forces or bandits. The form of this question as submitted by the Foreign Office is interesting; it reads: "Whether the homicide of Russell was committed by revolutionary forces, or *mas bien dicho*, by a party of bandits". It is not indicated on what information is based the conclusion that the murderers should preferably be classified as bandits. It seems not unnatural that the witnesses should not have classified them as revolutionary forces.

The character of the testimony of these persons is significantly shown by the denial of each of them that Russell was manager of the ranch. The contrary is shown by the evidence of the American Consul, Mr. Hamm, of the Mexican bookkeeper of the ranch, and of Allen C. McCaughan, owner of the ranch.

High Mexican officials, including the President of Mexico, described the magnitude of Orozco's movement, and the vigorous and prolonged military measure required to suppress it. It would certainly seem to be a reasonable supposition that Mexican military records should reveal considerable detailed information with respect to operations against participants in the movement and information of value in throwing light on the identification of the murderers of Russell. Yet the evidence accompanying the Mexican Answer contains no information indicating that the military authorities were requested to furnish information or, in case they were, what they supplied.

To a record of this kind, it is proper to apply tests and principles employed both by international and domestic tribunals in analyzing evidence in the light of what one party is able to produce and the other able to explain or contravert. It is not the function of the respondent Government to make a case for the claimant Government. But a claimant's case must not necessarily suffer by the non-production of evidence by the respondent. And certain inferences may properly be drawn from the non-production of evidence by the latter in the absence of any explanation as regards either failure to produce evidence or attempts to obtain it. See the *Kling* case and cases there cited, *Opinions of Commissioners under the Convention concluded September 8, 1923, between the United States and Mexico, 1930*, pp. 36, 44-46.

There have been advanced against the claim certain things, which might perhaps be referred to as unique defense to be presented to a tribunal.

Although an eye-witness saw Russell stagger after he had been shot and heard the boast of a man who stated that he did the shooting and considered himself "a pretty good shot", the Commission is asked to indulge in the hypothesis that Russell killed himself. It is further argued that blame at-

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tached to Russell because he went to the door of his house when some one knocked at it, and because he stayed on the premises where he was employed and failed to leave the country prior to the time when he was killed.

Perhaps even more interesting is the argument with respect to the responsibility of Allen C. McCaughan, owner of the San Juan de Michis ranch. It is said in the Mexican Brief that he is the man "who really should pay damages to the widow and two daughters of Russell", and further that he "has an indirect interest in having this claim decided favorably to the claimants, with the object of escaping the payment of damages". Should it be considered that McCaughan was civilly liable to make payment of "damages" because of the death of Russell, it would seem that it could with equally sound logic be argued that he should be criminally liable, and that a proper disposition of the case would be that McCaughan should stand the pecuniary responsibility and atone for the crime by his own death.

Another seemingly strange argument advanced in behalf of Mexico related to action taken by the United States in 1912, to give protection to American citizens in the region dominated by Orozco which high authorities of the Mexican Government explained was entirely out of its control, so that it obviously could not itself afford any protection there. The Mexican Agent called attention to correspondence from which it appeared that the American Consul at Chihuahua had been instructed to deliver to Orozco a copy of a communication dealing with, as it was said, the "enormous destruction, constantly increasing, of valuable American properties .... the taking of American life contrary to the principles governing such matters among all civilized nations", and "the increasing dangers" and "the seemingly possible indefinite continuance of this unfortunate situation". The copy which the American Consul was instructed to leave with Orozco was a copy of a communication which the American Ambassador at Mexico City had been directed on April 14, 1912, to send to the Mexican Foreign Office. The Consul was directed to make further representations to Orozco regarding what was termed "the practical murder under the positive order" of one of Orozco's chief lieutenants of an American citizen reported to have been taken prisoner while serving in the regular Mexican Army. It is shown by this correspondence that, in view of the fact that the Government of the United States had refused to recognize the belligerency of the régime of Orozco, he in turn refused to recognize American consular representatives or to permit them to address him. *Foreign Relations of the United States, 1912*, pp. 787-788.

The Mexican Agent advanced a contention to the effect that the Government of the United States by its action had forfeited the right to present the instant claim before this Commission. International law recognizes the right of a nation to intervene to protect its nationals in foreign countries through diplomatic channels and through such means as are afforded by international tribunals. From the standpoint of domestic obligations, governments consider it a duty to extend such protection. That there was a most unusual and imperative need for protection in Chihuahua is abundantly disclosed by available records emanating from both Governments.

The Government of the United States, in performing its domestic duties in harmony with its international rights, committed no such atrocious act as to forfeit its rights under international law and its rights under a Convention framed eleven years subsequent to these occurrences. It is a well-recognized right on the part of consular officers to communicate, in appropriate cases, with local authorities concerning the protection of nationals. The

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only authorities with whom the Consul at Chihuahua could communicate were those in control of that state in 1912.

Amount of Award

In connexion with arguments respecting the amount of pecuniary award claimed, numerous citations were made to rules and principles of domestic laws. The principles underlying the law of each country may be useful in connexion with the consideration of the subject of damages. But they cannot properly be invoked to any such degree as to attempt to make them controlling before an international tribunal in cases in which responsibility is fixed, either in accordance with international law or in accordance with the stipulations of a treaty. A nation cannot by some municipal law denying pecuniary redress relieve itself from making compensation required either by stipulations of a treaty or a rule of international law. Account being taken of applicable principles of domestic law and numerous precedents of international tribunals, no great difficulty is encountered in fixing a proper award of compensation to a widow and children on account of the death of the husband and father.

González Roa, Commissioner:

Commissioner González Roa expressed the following opinion with regard to the various points discussed:

The claim of Naomi Russell and of her children, Katherine and Huberta, has been presented to the Commission for the death of Hubert L. Russell, their husband and father respectively, which occurred on the 29th day of September, 1912, on the Hacienda of San Juan de Michis, State of Durango, as a consequence of wounds inflicted upon him by two armed individuals.

The main points argued before the Commission by the Agencies of the Governments of Mexico and of the United States, were those relating to the following:—first, to the capacity of the claimant, Naomi Russell, as the executrix of the estate of her deceased husband; second, to the nationality, both of the three claimants and of the decedent; third, the sufficiency of *ex parte* evidence for establishing such nationality and also the facts on which the international claim is founded; fourth, the character of the persons responsible for the damage, that is, whether they were members of a revolutionary force, of a group of rebels or whether, not being either one or the other, they were mere bandits; fifth, whether in the event that the murderers were classed as rebels or as bandits, there was negligence on the part of the Mexican Government in preventing the killing of Hubert L. Russell, and the killing once accomplished, in punishing the guilty parties; sixth, the right amount of compensation that should be awarded, on the assumption, that the responsibility of the respondent Government were accepted, subsidiary questions as to the manner in which payment should be made and also as to whether interest should be allowed or not, being included in the question last mentioned.

All the above issues arose from the study by both Agencies of the events in which Hubert L. Russell lost his life, which, briefly summed up, are the following:

On September 29, 1912, Hubert L. Russell, who managed the Hacienda San Juan de Michis, State of Durango, for the McCaughan Investment Company, the owner of the property, was living on it. Shortly before that

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date, on September 26, news was received at Michis that a band of armed men led by Jorge Huerca and Luis Caro, was prowling about the vicinity. On the 28th of that same month, forty-three of said men made their appearance and demanded of the manager, Russell, that he deliver to them $1,000.00, which demand was later reduced to $200.00, and this sum was handed over to the chieftains, Huerca and Caro, who on that same day, Saturday, left the Hacienda seemingly quite satisfied with the sum mentioned above. At about midnight of the following Sunday, September 29th, two armed individuals, men, appeared at the hacienda house demanding $100.00 from Russell and endeavoring to pass themselves off as envoys from the aforesaid leaders, Huerca and Caro. As Hubert L. Russell attempted to convince them of the utter impossibility of his acceding to their wishes, one of the two armed men fired at him and wounded him in the abdomen, upon which Hubert L. Russell proceeded to the house of the ranch bookkeeper, German Cortez, whither his assailants followed him, again insisting on the delivery of the $100.00. Seriously wounded as he was, the husband and father, respectively, of the claimants, returned to his own house for the ostensible reason of delivering the amount in question to his assailants, but most probably for the sole purpose of getting a rifle to defend himself against his attackers, as shortly after he left the house of German Cortez several shots were heard.

Hubert L. Russell was later found dead in his own house as a result of two gunshot wounds received by him, the first, as already mentioned, in his stomach and the second one in the head. It would seem logical to infer that this second wound was also inflicted upon him by the same people as the first. Prior to the date of the killing, the American Consul in the City of Durango and the Vice Consul, the latter being one of the Messrs. McCaughan, members of the company owning the Michis Ranch, applied to the Governor of the State of Durango and got him to send forces to protect the lives of Hubert L. Russell and of the other residents on the hacienda, and also the property thereon. The sending of the necessary troops, although effected with such despatch as the military conditions of the State allowed, unfortunately proved to be useless, as when the federal Government forces appeared on the scene of events, these had come to a head in the killing just described. Sometime afterwards the Mexican Government caught the murderers and executed them, fulfilling in this way to the satisfaction of the American Consul at Durango its international obligations to punish the wrong-doers.

1. STANDING OF THE CLAIMANTS

The Mexican Agent has raised objections to the manner in which the action has been brought by the Agency of the United States. He has argued at length upon the varying capacities in which it has been instituted by Naomi Russell, who appears alternately exercising a right of action as executrix, another as guardian of the children, and another collectively for mental suffering. The said Agent has raised objection to the failure to separate those causes of action, determining, when such separation should properly be made, it being required by the estates of each one.

The undersigned, as a matter of fact, considers that the action is confused and the lack of preciseness of clause (i) of section 2 of Rule IV of the Rules of Procedure contributes to such confusion.

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In any event, and in view of the explanations given by the Honorable Agent of the United States, the undersigned understands that three kinds of actions have been exercised, to wit: an action on behalf of the estate, for the money of which Hubert L. Russell was despoiled; second, another and personal action by each one of the claimants, which includes necessaries, and third, a further collective action based on the damage caused by the unfortunate death of Hubert L. Russell.

The above once laid down, the undersigned thinks that the standing of the claimants has been thoroughly established, although he takes the liberty of making the following observations so that it should not be supposed that by reason of the fact that he considers the standing of the claimants as well established, he considers that their actions are sustainable in the terms alleged by the Honorable Agent of the United States.

It may, as regards the action brought by Mrs. Russell in her capacity as executrix under the will, be said that her standing is complete, although the said action is subject to the suit as regards the law and the facts.

As regards the action for necessaries, the undersigned thinks that no objection whatever can, from the fact that the Mexican Law sanctions the universal practice of claiming for necessaries on the ground of civil responsibility arising out of homicide wrongfully committed, be set up against the claim *in limine*.

The law which applies, is in the opinion of the undersigned, the Mexican law, because international law abides by it.

Thorpe, referring to the German-American Commission, says the following:

"All issues with respect to parties entitled to recover, as well as issues involving the measure of damages, are determined not by the law of the domicile of the deceased but in private or municipal jurisprudence by the law of the place where the tort was committed." (Thorpe, *International Claims*, p. 69).

Aside from this, even though Mexico cannot be considered as a delinquent, the utmost that could at the very outside be done would be to apply to her the *lex loci delicti commissi* which has already been invoked by International Commissions, as shown by Mr. R. Y. Hodges in his Study entitled "The Juridical Bases of Arbitration", published in the "British Year Book of International Law":

"In the case of the *Canadienne*, the tribunal applied a principle of private international law. Two vessels had collided in Canadian territorial waters, and the accident was due to fault on both sides. The law to be applied was the *lex loci delicti commissi*. The law in force in Canada at that time was the same as that which obtained in England, and accordingly the loss would be apportioned by requiring each wrongdoer to pay half the loss of the other. The compensation awarded was calculated on this basis. The same principle was applied in the case of the *Sidra*." (P. 117, work cited above.)

As regards damage of a mental character, although the undersigned understands that the manner of bringing the action is a collective and not an individual one, as is apparent from the practice followed by other nations (see G. Ribert. *La Règle Morale dans les Obligations Civiles*, No. 183) the application of the rule of *lex loci delicti commissi* makes mental damage not allowable.

The legislation of Latin countries, inspired by Roman Law and also in our country by the old Spanish Law, rejects such compensation for damage of a mental character. That is why the decision of the Cour de Cassation

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of Mexico in the case of Dr. Gloner, reported in Volume 11, page 263 of the *Diario de Jurisprudencia*, contains the following words: "Glancing retrospectively at the source of our law, which is Roman law, we examine law 7, volume VIII, book 9 of the Digest, which reads: '*Cum liberi hominis corpus exeo, quod dejectum effusumve quid erit, laesum fuerit judex computat mercedes medicis praestitas, caetera que impedia, quae in curatione facta sunt; praeterea operarum quibus caruit, aut carituras est ob id, quod inutilis factus est. Cicatricum autem aut deformitatis nulla fit estimatio; quia liberum corpus nullam recipit aestimationem*'. Law one hundred and three, title one, book four: '*Liber homo in stipulatum deberi non potest, quia nec dari oportere intendi nex aestimatio ejus praestare possit*'. Our Codes have doubtless sought inspiration in that thesis of the Roman Law, when they refuse to admit that a human being is convertible into money. The Spanish law which governed until our own Codes were published, is inspired by the same ideas: law 1, title 45, partida VII defines damage as follows: "damage is an impairment or injury or detriment that one receives" to oneself or to one's property, by the fault of others; it includes damage to property as well as to person; and in law 9, title 15, partida VII, speaking of the valuation of the animal or slave who died from improper medical treatment, a damage that could be estimated, it adds: "But if the man should die owing to the fault of the physician or surgeon, then he whose fault it was that he died, shall suffer a penalty according in the discretion of the judge (but not compensation). A free man cannot be computed in terms of money".

Article 1471 of the Civil Code reads as follows:

"When fixing the value and the deterioration of a thing the sentimental value or that inspired by affection will not be taken into account, unless it be proven that the person responsible destroyed or damaged the thing with the intention of hurting the feelings of the owner; any increase allowed due to those causes may not exceed one third of the ordinary value of the thing."

According to the above provision, Mexico (the nation obligated) does not recognize any action for mental suffering, except when it is a case of malicious damage to property and only allows an increase of one third of the value. In all other cases no such action exists under the legislation of this country.

Moreover, the state is not guilty and in order to avoid any possible doubt, obligates itself *ex gratia*. "Damages caused by civil war to the persons and property of individuals are classed with those committed in contemplation of the public welfare, superior in interest", says Decenciere-Ferrandiere *(La Responsabilité Internationale des Etats, à Raison des Dommages subis par des Etrangers*, p. 149)". He then adds, quoting Brusa: "It is not a case of compensation owing by a state liable by reason of a fault, but of compensation". That is why responsibility for mental damage is not allowable against the state, as will next be shown.

Action exercised in cases of mental damage is, as Ripert says: "Inspired by a desire to bring about the punishment of the party responsible". According to Ripert also, it is not a case of compensation but of an exemplary act. This is what he has to say on the subject:

"What the sentence really contemplates is in reality not the satisfaction of the victim, but punishment of the party responsible. Damage does not have the character of compensation, but an exemplary character. If there is a criminal offense, the victim asks that something be added to a public penalty which is insufficient or badly measured; if there is no criminal offense, the victim

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accuses the guilty party who has succeeded in slipping through the meshes of the criminal law. There is a private penalty because it is necessary to pronounce such penalty by way of reparation." (p. 332)

That is the reason why in France decisions of the Counseil d'État have not granted mental damages so as to obviate the supposition that the State has deserved punishment.

Besides, sundry Claims Commissions have sanctioned the same doctrine.

That is why the Brazilian-Bolivian Tribunal, in claim No. 64, *Alfonso V. Aiello* v. *The Government of Bolivia*, stated that:

"The Claimant will not present a single judgment of governments, nor of arbitral tribunals, ordering that injuries due to accidental circumstances and *force majeure* be repaired, and far less that mental and indirect damage be compensated for."

The Indemnification Commission, composed of the German, Belgian, and Netherlands Ministers and of Plenipotentiaries of the United States, that fixed the amount of compensation claimed from China as a consequence of the Boxer insurrection, drew up a list of the facts that may not be considered as a proximate and direct result of the happenings of 1900 and denied compensation "in cases of rewards to employees to compensate them for suffering endured" and for "mental suffering and damage of every kind". (*Protection Diplomatique des Nationaux a l'Etranger, par Gaston de Leval*, pp. 114 and 115.)

Similarly, the International Commission for adjudication upon claims against Egypt, by the victims of insurrectionary events, clearly laid down that the Arbitral Court should not, in cases of murder, concern itself with anything but to ascertain, "whether claimants had been damaged in their material interests through the death of a relative". (Calvo, *Droit International*, Vol. III, p. 471.)

The legislation of the United States itself does not lay down in a uniform manner that mental damage is allowable and there are even decisions of the American Courts themselves that hold that they are not allowable. Thus, the decision in the *Demarest* case limits such right to recover, to a loss having a pecuniary value. (*Demarest* v. *Little*, p. 148, *Beal's Cases on Damages*).

Application of the *lex loci delicti commissi* is all the more necessary in that aliens would otherwise find themselves in a privileged position, either because their own foreign legislation was applied or else because the individual opinions of the judges would be the standard accepted.

One of the fundamental principles of protection of aliens is this, that they cannot be placed in a more favorable situation than the other inhabitants of a country. In the case of *Rosa Geldtrunk*, in the Arbitration Commission between the United States and Salvador, the judgment handed down rendered by Sir Henry Strong stated that proposition in the clearest terms. The following are the words of that eminent Umpire:

"The principle which I hold to be applicable to the present case may thus be stated: A citizen or subject of one nation who, in the pursuit of commercial enterprise, carries on trade within the territory and under the protection of the sovereignty of a nation other than his own is to be considered as having cast in his lot with the subjects or citizens of the State in which he resides and carries on business. Whilst on the one hand he enjoys the protection of that State, as far as the police regulations and other advantages are concerned, on the other hand, he becomes liable to the political vicissitudes of the country

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in which he thus has a commercial domicile in the same manner as the subjects or citizens of that State are liable to the same. The State to which he owes national allegiance has no right to claim for him as against the nation in which he is resident any other or different treatment in case of loss by war—either foreign or civil—revolution, insurrection, or other internal disturbance caused by organized military force or by soldiers, than that which the latter country metes out to its own subjects or citizens." (*Cases on International Law*, Hudson, p. 1165.)

2. EVIDENCE TAKEN WITHOUT NOTICE TO THE OPPOSITE PARTY

The Convention provides that evidence of all kinds may be received by the Court, including affidavits. The undersigned considers that this provision does not mean that any greater value is to be attached to such affidavits, than that which they have in accordance with the fundamental principles governing evidence. The question then arises as to what is the weight that such affidavits have. The answer is a very easy one.

The undersigned believes that he states a truth universal in character when he says that evidence taken without notice to the opposite party is valueless in contested actions (see *Prueba Testifical y Periciat* (Testimonial and Expert Evidence) by Lessona, pp. 5 and 11).

As though this were not enough, the two Nations signing the Convention consider affidavits as of very little value and have practically eliminated them from all serious controversies tried by their Courts. It will, in so far as concerns Mexican law, be sufficient to cite articles 213, 214, 303 ,304, *et seq.* of the Federal Code of Civil Procedure which regulate evidence. As for legislation in the United States, it will be enough to invoke the following expressions from the well known work by Wigmore, and the declaration likewise made by the Commission between the United States and Chile in the *Murphy* case.

"So that under the common law affidavits, that is, mere sworn statements, taken out of Court, are not admissible, because the opportunity to cross-examine is absent." (Treatise on the Anglo-American System of Evidence, by Wigmore.)

"All the preceding provisions and citations seem to establish, without a doubt, this rule: That *ex parte* affidavits are objectionable as evidence in accordance with the laws of Chile, the federal laws of the United States, and the laws of the States of the Union which have been already quoted." (*International Arbitrations*, "History and Digest", Moore, Vol. III, p. 2265.)

It is true that affidavits are at times admitted in the Courts of the United States, but that does not prevent them from being looked upon by those same Courts as of but little value. Admitted by way of exception when preliminary points or those of secondary importance are dealt with, they are of practically no value when it is a matter of important questions going to the merits. This is how Corpus Juris refers to them on page 372 of Volume II:

"138.B. Use as Evidence.—1.—Admissibility.—a. As to Interlocutory or Preliminary Matters.—The chief service as evidence performed by *ex parte* affidavits is as the basis of some interlocutory or preliminary action or of a provisional remedy. Where an affidavit is required to be made as a preliminary step in a proceeding, it is admissible merely for the purpose of showing the fact that it was made."

Moreover, American publicists look upon them as being of but very little value. Francis J. Wellman, in the work containing his "Reminiscences

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of Thirty Years at the Bar", warns judges against any inclination towards receiving affidavits and says: .... "are the least reliable kind of evidence, and are often not even read by the people who sign them".

The Honorable President of the United States, when rendering his decision in the *Tacna-Arica* case held that the manner in which affidavits had been presented made the road to the truth a difficult one.

When affidavits were filed in innumerable cases before the Court of Claims of the United States, the Honorable President of the Union became alarmed, and thereupon suggested to Congress that witnesses should, as one way of preventing fraud, appear personally to testify before the Court.

How is it possible then, that both Nations, considering this evidence as of such scanty value, should admit same in controversies of such great importance as international controversies? It is possible that the most elementary rule of procedure must be looked upon as abolished in matters of such transcendent importance? Is it believable that Mexico has undertaken to ascribed absolute force to affidavits, thus doing away with the principles of its Codes of Procedure? Is it, in the case of a Convention in which only one country is obligated, credible that the United States could require something which they themselves reject in the Courts that try their own citizens?

Now follows the opinion expressed in the *Revue Générale de Droit International Public*, in its number for July-October, 1930, on a similar subject when referring to the arbitral award of November 30, 1929, rendered in a controversy between Poland and France:

"To that end, in so far as concerns determination of the intention of the State contracting, the Polish Republic, it is quite natural to take into account the internal law of Poland in force at the time of the stipulation." (p. 567)

"That being so, how can one admit that Poland has consented to assume an obligation the performance of which would have constituted a violation of its own Code of Civil Procedure? How can it be admitted that the Polish Government wished to subject the Town of Warsaw to an arbitral judgment which would not, under Polish law, have had any juridical value in Poland? To propound questions like that one is tantamount to solving them."

"Aside from that, so far as France is concerned, this state could not have required of Poland something which France could not herself have admitted."

"French legislation is in point of fact in entire agreement with that of Poland in forbidding communes from submitting to arbitration. It must not be overlooked that the French Code of Civil Procedure in Article 1004 declares that no controversies subject to communication to the public attorney can be the subject of a reference. Now, according to Article 83 of that same Code: 'The following causes shall be communicated to the Attorney General of the Republic: 1. Those affecting.... communes....' ".

"It would, in the presence of such concordance between legislations, before admitting that the High Contracting Parties wished to depart from their respective laws, have been necessary to have had an absolutely explicit, precise and formal declaration, of a reciprocal nature, of their intention to do so. There is nothing apparent from the Franco-Polish Convention of February 6, 1922, to lead one to think that the High Contracting Parties wished to depart in so serious a manner from the rule in force in both countries which forbids communes to submit to arbitration." (p. 568)

Experience has on the other hand shown that evidence of that kind has in international tribunals led to continual errors. For that reason the Mexican Agent in the Commission of 1868 described Claims Commissions that trusted to affidavits as mere lotteries. For that same reason the Nicaragua and Santo Domingo Commissions, composed mostly of Americans,

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of great rectitude considered such *ex parte* evidence as of very little value, having at times gone so far as to describe the proceedings as truly farcical. For that reason also, the Claims Commission for adjudicating upon the damage caused as a result of the insurrection in Cuba established a Sub-Committee to collect the evidence to be taken, being mistrustful of *ex parte* evidence.

Furthermore, an eminent publicist, Edwin Borchard, in a lecture delivered at Louvain, considered that the advantage of international tribunals was that of rejecting *ex parte* evidence as judges would otherwise be greatly exposed to committing injustice, by deciding matters of great financial inportance and of great scope politically, on such *ex parte* testimony (*Bibliotheca Visseriana*, Louvain, 1924, Vol. III, Edwin J. Borchard, p. 51).

Edwin J. Borchard, on page 652 of his work called *Diplomatic Protection of Citizens Abroad*, states that as the Department of State does not possess any machinery for judicial investigations, it has laid down certain rules for the receipt of affidavits as *prima facie* evidence.

The use of affidavits in claims, in accordance with the standard of judgment adopted by the aforesaid Department of State, is however restricted to the presentation of the claim to the Department itself, as is shown by the following words of Secretary Bayard (Moore's *Digest*, Vol. 6, p. 615) :

"The practice of this Department is to require affidavits as prima facie proof of a claim before making any representations to the government alleged to be in default. So far, by the general practice of nations, the proceedings are ex parte. But if, after the claim has been presented, a commission is agreed upon for its adjudication, testimony in the usual form may be taken, both parties having an opportunity to be present and to examine and cross-examine witnesses. It is not usual, nor, in fact, would it be practicable to give a foreign government notice that a particular time depositions would be taken to sustain a claim to be made against it."

"Mr. Bayard, Sec. of State, to Mr. Buck, min. to Peru. No. 33 Oct. 27, 1885. For. Rel. 1885, 625."

How it is possible that the Claims Commission, like ours, having the ease of receiving witnesses and being it possible in conformity with the legislation of the two countries that the officers of the Special Commission obtain the evidence in a serious way, to establish the probative procedure on documents so incompletely formed as the affidavits? The Congress of the United States has only been right to issue on July 3rd. 1930 a law that permits the Commissioners to summon witnesses to be examined.

It has been said that international tribunals can guide themselves only by affidavits due to the hard law of necessity. The undersigned cannot admit such a doctrine, There is not any reason to declare the incompetency of international tribunals to perfect their evidence.

He is rather of Mr. Hale's opinion, Agent of the United States before the Anglo-American Commission, who considered that the affidavits did not constitute proof before the Commission, and that of the Commission between Chile and the United States, which in the *Murphy* case considered that *ex parte* proof did not constitute evidence but an element that in cetain cases could contribute with a secondary character to confirm or strengthen the conviction based on proofs of a more conclusive character. He rather leans, upon the opinion of Dr. Don Vicente G. Quezada, who in his arbitrage between Mexico and the United States declared that it was against the sovereignty of the Governments to condemn them on proofs with

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citation of the defending party and by virtue of which the relative declared in favor of the relative and the servant in favor of the master.

The undersigned is of the opinion that the principles established by the Brazilian umpire Castao d'Acunha, in the Peruvian-Brazilian Commission, constitute the true expression of international justice in this matter, when he established in an incontrovertible manner, that no matter how wide the powers of an arbitral tribunal are they are not so as to change the elemental principles of procedure and that the proofs must be received with the citation of the defending party to produce juridical conviction.

There exist but two procedures for a tribunal to investigate the truth about a fact that has been submitted to its consideration. They are, the procedure wherein only the interested parties present the proofs and that other called *de oficis* in the which the judges may use of their own initiative to obtain evidence. The Commission not being organized to gather the evidence by itself following its own initiative, it is necessary to consider carefully the evidence submitted by the parties in order that it may lead to the knowledge of the truth.

The undersigned considers that this Commission in view of the great number of cases to decide upon, of the importance of the questions submitted to it and the magnitude of the sums claimed needs to rely on evidence of a greater consistency than that of the *ex parte* proofs, rejected in other serious matters by all civilized nations of the world, inclusive the high contracting parties.

To deny the progress of juridical science in the matter of proofs when dealing on international matters, in spite of the extreme care exercised in the application of the principles that govern the proof when the internal law is applied, means to take both the international law beyond the Medieval Age and constitutes a serious obstacle to the progress of arbitration, because no nation will desire to be judged by proofs rejected by their tribunals no matter if it is a small sum of money claimed by a private citizen.

From all that has been said the final conclusion is reached that the affidavits are admissible in conformity with the Convention, but that this does not mean that they are given a weight that they do not have by themselves. In the opinion of the undersigned the documents received without the citation of the opposing party are not equal to the affidavits which contain testimonies without the opportunity of cross-examination. The former are better while the latter are clearly irregular and incomplete. It is true that exceptionally the affidavits may have some force in disputed cases but as it is well said in the decision rendered in the *Murphy* case they must be—

"*tenidos en consideración no como prueba (evidence) sino como elementos que en ciertos casos pueden contribuir en una extensión limitada, coloateral, o secundaria a confirmar o a reformar una convicción basada en pruebas de un carácter más concluyente.*" (Moore, *International Arbitrations*, p. 2265.)

To go further and to consider that this kind of proof is going to be the foundation for the greater part of decisions of a Commission means to take the risk of committing many injustices. At least Mr. Moore judges so in his recent work *International Adjudications*, Vol. I, which says: "To receive any evidence *ex parte* and irregularly 'is against general principles, and is fatal to the award' " (p. XXI).

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3. PROOF OF NATIONALITY

It has been discussed by the Agencies of both nations which should be the criteria applicable to the proof in relation with the natiomnality; while the Agent of the United States deems that this question falls within the general criteria that must govern the evidence, the Mexican Agent thinks that a proof must be rendered in conformity with the special legislation of the United States in order to prove the civil state and consequently the nationality. The undersigned believes that the soundest doctrine according to international law is the one expressed by Fiore in his *Private International Law* (Vol. II, sec. 534).

According to that author the proof "must be rendered in accordance with the law of the cuuntry where the interested party pretends to have acquired the citizenship, when the acquisition of same most be established, and according to the country of origin, when the loss of same must be proved."

It has been a much debated question the form of proving the nationality, very often in relation with the civil state (which is a necessary antecedent according to several legislations) : but the most accepted doctrine is in favor of Fiore's thesis.

While studying the form of evidence on nationality in the claim of Carlos Klemp, by the Commission between Mexico and Germany, the question was practically exhausted by its Honorable President, who after hearing the learned opinions of the two national Commissioners reached the conclusion "*que la nacionalidad de una persona es parte integrante de su estado civil y debe ser acreditada en la forma establecida en el derecho interno del país cuya nacionalidad invoque, principio aceptado por ambas partes en la presente reclamación y que está de acuerdo con la doctrina general de derecho internacional.*" (Fiore, *Derecho Internacional Privado*, sección 354, Borchard, *Diplomatic Protection of Citizens Abroad*, p. 486. Ralston, *The Law and Procedure of International Tribunals*, Ed. 1926. P. 160).

As the Honorable Umpire of the Commission between Mexico and Germany dealt with this subject thoroughly, revising the procedures of authorities and commissions, it seems to be unnecessary to insist on this particular.

The foregoing being established it is indispensable to see which law is the one applicable in case it is sustained that a citizen has the nationality of the United States.

As far as the undersigned knows in some states of the Union the Civil Register is established.

In cases where a written document exists in conformity with the law of the Civil Registry the original document must be produced or an authorized copy of it, according to the very law of the United States. So says Robinson, Professor of Elementary Law in Yale:

"The existence and the contents of a written instrument may be proved by the production of the instrument itself or, in certain cases where this cannot be done, by a properly attested copy or—where no copy even can be had, by oral evidence." (Sec. 295 Elementary Law).

From the foregonig the conclusion is reached that in all those cases in which in accordance with the law of the United States an instrument of the Civil Registry must exist, that document must be produced and in consequence the testimonial evidence is admissible only when it is proved that

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the Civil Registry does not exist or when it is impossible to obtain copy of the document by an unforeseen reason.

4. THE NATIONALITY OF THE MEMBERS OF THE RUSSELL FAMILY

The undersigned believes that in accordance with international law the nationality is a subject exclusively controlled by the internal regime of the States and, that being so, the International Tribunals which have to decide on the subject must restrict themselves to verify which law is the one applicable and to base their decisions upon law.

Two recent decisions of a great authority are sufficient to back this thesis.

On presenting its conclusions before the Permanent Court of International Justice, in relation with the case which promoted the Advisory Opinion number, 4, the French Government declared that the right to legislate over the nationality of foreigners is a sovereign right which cannot be renounced without formal declaration. The proper Court considered that said matter in principle and according to international law remains within the exclusive competence of one of the Parties.

In the discussion between Germany and Poland originated from clauses of the treaty of July 28, 1919, bearing on the nationality of minorities, the Arbitral Tribunal, resolved "that in the matter of nationality the competence of each States is, in principle, exclusive, unless there is an International Convention that limits it".

Many authorities sustain the same doctrine which can be condensed in the following words by Oppenheim; "*No toca al Derecho Internacional sino a la ley local decidir quien es y quién no es el que debe considerarse súbdito.*"

Now then, in conformity with the Constitution of 1857, according to article 30, foreigners are to be considered as Mexicans if they had Mexican sons when they do not manifest their resolution to retain their foreign national lity. Mr. Russell had a daughter (who is one of the claimants) born in the State of Durango, according to the declaration of the United States Agency. It has not been proved that Mr. Russell had manifested his resolution to retain his nationality. Under that precept the said Russell became a Mexican citizen according to the Constitution of the country in force at the time of birth of Miss Russell.

Now then, one may ask which is the foundation to consider as Mexicans according to said Constitution, those who have sons born in Mexico. The answer is very *simple*. It is the simple application of the *jus domicilii*.

Mr. Castillo Velasco, in his study of international law says that: "*supuso y con razón el Legislador que el extranjero que adquiere bienes raíces o forma una familia mexicana manifiesta la intención de establecerse para siempre en el país y adquiere en él un interes verdadero que lo hará amar a la República como a su verdadera patria.*" (*Pág. 83 de la obra citada*).

Mr. Weiss defended this *jus domicilii* with great energy at the meeting of the Institute of International Law which took place recently at Lausanne. Here are his words:

"*Contre ce jus domicilii je n'ai aucune objection. Un Etat ne saurait être tenu de tolérer la présence sur son sol de colonies plus ou moins nombreuses d'étrangers, conservant une fidelité jalouse à leur patrie d'origine tout en bénéficiant de la protection des lois et des magistrats du pays qu'elles habitent, et faisant au travail national une concurrence souvent inégale. Après quelques années de séjour, l'incorporation des éléments étrangers à la nation dont ils ont recherché l'hospitalité est entierement justifiée; c'est une question de haute moralité*

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et aussi de justice." (annuaire de l'Institut de Droit International—Travaux Préparatoires de la Session de Lausanne—Septembre 1927, Tome I, pags. 35-36.)

Could it be said, by chance, that it is against International Law to establish a doctrine that compels the foreigner to become a national without an express declaration of his own will? By no means. Bluntschli in article 564 of his *Codefied International Law*, declares that: "*cada Estado tiene el derecho de fijar libremente las condiciones según las cuales acuerda y retira la calidad de ciudadano del Estado.*"

On the other hand the learned writer, don Manuel de Aspiros, considers that every State is free to dictate the conditions that suits it best to grant to foreigners the national character which distinguishes its citizens. (*Código de extranjería*, Art. 25.)

Even more, this doctrine of granting the nationality to foreigners who would have sons in the country, is not an extravagance but a dear principle to Latin America, as is established in subdivision 5 of the Law of Brazil. Similar articles exist in other American laws as in the Constitution of Uruguay.

One may ask if it is possible that the interest of a private citizen be sacrificed to public interest.

The answer should be that foreigners are given the opportunity to keep their nationality and that the acquired nationality must not be considered as a punishment.

Anyway, Public Law prevails here over Private Law, as can be seen by the words quoted as follows from *Repertoire de Droit International*, published by Messrs. A. de Lapredelle and J. P. Niboyet:

"*Le choix à faire ne peut être qu'en faveur du droit public car ce sont les considérations de droit public, les considérations politiques, qui dominent, et de plus en plus, en cette matière. 'Une loi sur la nationalité est une loi de recrutement de ressortissants' (Pillaut, Du caractère politique de la notion de nationalité (notre Revue, 1915-1916, p. 14 et s., spécialement, p. 16); l'intéret souverain l'emporte sur les 'intérets individuels' (Louis-Lucas* loc. cit.*). Il ne peut en être — autrement parce que, au moins actuellement, 'c'est avec la nationalité .... que se crée non seulement la forme, mais l'être. la substance même de l'Etat' (de Lapradelle, Bulletin de la Société de Législation comparée 1917-1918, p. 341 in fine), parce que, si l'existence de nationaux est vraiment essentielle á l'Etat (supra, No. 15), leur détermination ne sera guère faite qu'en fonction des besoins de celui-ci.*" *(Pág. 256 de la obra citada).*

The above quotation which contains the modern doctrine, explains which has been the cause why some decisions rendered many years ago, deny in certain cases the nationality imposed by law. Those decisions are based on some erroneous conceptions of Public Law considering it as subdued to Private Law and representing scientifically a backward situation which the progress of Modern Law has entirely dissipated.

Now, as it has been shown that in conformity with the law of the country, Mr. Russell must be considered as Mexican, it is necessary to have in mind the nationality of the Russell family. In the Mexican law exists the principle of the national unity of the family, and, therefore, when the husband changes his nationality, the nationality of the wife and children is changed when the family resides in the country at the time of the naturalization of the father.

We quote from the same *Repertoire de Droit International* already mentioned which invokes the authority of the eminent internationalist Zevallos—

"15.—*M. Zevallos (*op. cit., *t. IV-V. p. 775) examine longuement la question suivante: 'Si le mari change de nationalité au cours du mariage, si le Mexicain par exemple, se*

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fait naturaliser aux Etats-Unis, ou si l'époux américain se fait naturaliser au Mexique, les époux acquiesent-ils la naturalisation, c'est-à-dire la nouvelle nationalité dont est investi le mari? Le mari a-t-il le droit, se demande Vallarta, d'imposer à sa femme autant de nationalités qu'il peut s'en présenter, sans son consentement et même, peut-être, contre sa volonté? Cette question peut-être discutée en théorie; mais la loi mexicaine la résout ainsi (art. 244 loi de 1886): Un changement semblable dans la nationalité de l'épouse et des enfants mineurs à l'autorité paternelle, pourvu que cette femme et ces enfants résident dans le pays ou leur mari et père á été naturalisé."

"On le voit: le Mexique adopte complètement le principe de l'unité de la nationalité dans la famille." (Obra citada, pág. 700).

Besides this reason with respect to Huberta Russell there exists also the one that said young lady was born in the country.

Assuming that Mr. Russell and the persons of this family acquired the Mexican nationality it may be questioned in what degree such circumstance affects the persons of the claimants.

It must be said that Mexico claims them as nationals, but at the same time the Government of the United States sustains that they must be considered as subject to the law if the United States. In other terms, it is a case of dual nationality.

From the foregoing expositttion it may be concluded that the Commission must excuse itself from taking cognizance of this case according to doctrine generally applied by the majority of the Claims Commissions, as expressed by Borchard, Pags. 558, which author remits himself to Alexander.

Where the undersigned considers that the subject has been the most clearly exposed is in the case of the Heirs of Maininat, decided by the American Umpire in the Franco-Venezuelan Commission.

In fact, as expressed by the Honorable Umpire, it is evident that the High Contracting Parties having the knowledge of the peculiarities of each legislation convened in that they should meet in a common ground, that is to say, in such a way that no law would prevail over the other.

It would be enough that Mr. Russell had changed his nationality for the claim to be inadmissible, since there cannot be an indirect offense to the State by an insult received by a foreign citizen, though a damage may be caused indirectly to other persons.

In Answer 14th given by the Government of the United States to the Basis of Discussion for the Conference on Codification of International Law called by the League of Nations, the American thesis was perfectly exposed in the following words:

"Where the injured person dies as a result of the injury, leaving heirs of a different nationality, heirs of the nationality of State against which the claim is made have been denied the right to claim through the decedent's State. Burthe v. Denis, 133 U. S. 514, Moore, Digest, VI, 628-629. It has been held that heirs may not appear as claimants, unless their nationality is the same as that of their ancestor. Lizardi (U. S.) v. Mexico, Moore's Arb. 1353; Wiltz (France) v. United States, January 15th, 1880, Moore's Arb. 2243, 2246; Heirs of Maxan (U. S.) v. Mexico, July 4th, 1868, ibid 2485." (*Sociedad de las Naciones.—Bases de Discusión, pág. 24*).

It does not matter that the Russell family had regained the American nationality (if it ever regained it) because it is sufficient that during any length of time since the damage was caused until the date of the decision, any person had had the nationality of the defendant government to prevent the right to claim. So expresses Section 2 of the Circular of the State Department, relative to claims of May 15, 1919, and which is cited in Answer 13th of the United States to the same Basis of Discussion:

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".... the Government of the United States, as a rule, declines to support claims that have not belonged to claimants of one of these classes from the date the claim arose to the date of its settlement." (*Pagina 23 folleto citado*).

5. EVIDENCE OF THE FACTS ON WHICH THE DAMAGE IS CLAIMED.

In spite of the lack of seriousness of the evidence consisting of the witnesses examined without the citation of the opposing party, the undersigned, in view of the documentary evidence consisting of different communications from the authorities, and the admission of several facts by the Mexican Agent, he deems proven the following facts: first, that Mr. Russell was surprised in his ranch by a group of individuals; second, that the same Mr. Russell was assaulted afterwards by two individuals; and third, that Mr. Russell died as a consequence of this second assault.

The undersigned believes that the authors of the damage were "Orozquistas," although in several instances they have been qualified as bandits by the persons whose testimony has been invoked. The reason of his belief is that where the facts took place were within the revolted region, that menbers of the band were numerous, that it is admissible that the two men who committed the homicide were members of the band and that the different clues which are suggested by the different points of the evidence makes believe that said assailants formed part of the forces raised in arms against the Government of Señor Madero.

6. IMPRUDENCE

It is said by the illustrious Argentine lawyer L. A. Podesta Costa in his work *La Responsabilidad del Estado por Daños Irrogados a las personas o a los bienes de los Etranjeros en Luchas Civiles*, that the practice and doctrine have established that there is no international compensation when the foreigner has been the cause of the damage done to him, either by causing it directly or through his imprudence in exposing himself to a known or perceivable peril as in both cases the imprudent attitude of the damaged person means a serious offense.

Did Mr. Russell know that he was in a region where public peace was altered?

Did the same Mr. Russell know that by remaining isolated in a little place reached by the rebellion was to expose himself to a known peril?

Did he know that due to indiscipline proper of rebellious people some members could cut from the rest of the column with the sole intention of making depredations?

Did he know that by being a foreigner and the head of a business he exposed himself to a peril which he could have avoided by moving to the nearest town?

Setting these questions is at the same time to answer them in view of the antecedents of the present case.

An affirmative answer leads to the conclusion that Mr. Russell was unfortunately imprudent, and that, therefore, Mexico is not under the obligation to indemnify according to the resolution of the Institute of International Law, which in a meeting at Neuchatel in 1900, approved a resolution by virtue of which "*la obligación de compensar desaparece cuando las mismas personas dañadas han provocado el acontecimiento que ha producido el daño,*" and that "*especialmente no existe obligación de indemnizar a aquellos que han vuelto*

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al pais en contravencion a un decreto de expulsion ni a aquellos que se dirigen a una comarca, o en ella procuran ejercer el comercio, cuando saben, o deben saber, que han estallado trastornos".

7. ALLEGED NEGLIGENCE

The undersigned arrives at the conclusion that there was no negligence on the part of the Mexican Government. As a matter of fact when the occurrence took place there was an abnormal condition prevailing in the region where the said events occurred and the Government was in no position to afford any other help but what was practically at its disposal. It did more than it was required. General rule number 3 of the Claims Commission organized by the American Military Governor of Santo Domingo, provides that the State is not responsible when the revolt "was of such importance that the Government was unable to guarantee life and property in the zone in which the damage occurred". In spite of all and though the Consul of the United States asked for help shortly before the events took place, the Government of the State of Durango sent troops in the best possible way. If the troops took such a road that in the opinion of the Agent of the United States was the tardiest, it cannot be doubted (even admitting that the road which is supposed to be the longest might have been the cause of the delay) that the authorities acted in absolute good faith. The rapidity displayed by the Government in its acts of repression to the extent of causing the death of the assailants, is a proof of it, because it cannot be imagined that the Government of the State of Durango had the earnest desire to punish the criminals, on the one hand, and that it had no desire to prevent the commission of the crime, on the other hand. No Government has ever assumed the obligation of guaranteeing that all of its measures are infallible.

It suffices for the discharge of its obligation that it does not proceed with malicious indifference. On the other hand, the criticism made regarding the various movements of the armed forces dispatched by the Government of Durango, are *a posteriori*, without appreciating or even having regard to the hardships encountered by the Government in the mobilization of its troops. Mexico cannot be adjudged responsible on mere suppositions, when the American Consul himself fully realizes the righteousness of the conduct followed by the local authorities of the State of Durango.

The principles that govern the responsibility of states in case of an insurrection are clearly set forth in the following words of Mr. Hershey:

"... but the law of necessity or the physical inability (*force majeure*) furnish adequate protection under such circumstances usually absolves Governments from responsibility in these cases. The general rule is that 'a sovereign is not ordinarily responsible to alien residents for injuries they receive on his territory from belligerent action, or from insurgents whom he could not control, or whom the claimant Government had recognized as belligerents' they are 'not entitled to greater privileges or immunities than the other inhabitants of the insurrectionary district.... By voluntarily remaining in a country in a state of civil war they must be held to have been willing to accept the risks as well as the advantages of the domicile'.

"These principles have been repeatedly 'enunciated by our leading statesmen, as also by those of your, and they have almost unanimous sanction of leading authorities on International Law. Almost invariably they have been applied by European States in their relations with each other, though frequently ignorant in their dealings with weaker States, more particularly in the cases of China,

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Turkey, and the Republics of Latin America." (*Essentials of International Public Law and Organization.*—Hershey, pages 259-260).

8. INTERPRETATION OF THE CONVENTION FROM THE STANDPOINT OF EQUITY AND THE FACTS OF THE CASE

According to Bouvier's Dictionary, equity consists in "equal justice between the contradicting parties". "This is, as he states, its moral meaning (Mexico feels morally bound) with relation to the rights of the parties that are controverted claims". Mexico therefore considers that equity is also applicable to it, as well as to the claimant party, and that if International Law provides for an excessive remedy, when it is applicable it must be reduced in Mexico's benefit. Mexico considers that its obligation is *ex gratia* and that the two contracting parties established the situation even in those cases in which the practice of Nations would bind the Nation.

In other words,the obligation is based on the fact of having admitted the existence of a gratuitous obligation and not on a right. This enlightens the whole Convention. The undersigned therefore, considers that all extensive interpretations not subject to the terms strictly applied to the Convention, is contrary to the spirit of the High Contracting Parties.

Making a brief analogy with the Venezuelan Convention it follows, furthermore, that the precedent of said Convention limiting responsibility is applicable to this Convention, inasmuch as the obligation founded on equity is much stronger in the Venezuelan Conventions.

The Venezuelan Conventions are not *ex gratia* and under their provisions, all claims must be decided in strict accordance with equity, without regard to technical points, nor to any of the provisions of Municipal Law. The Mexican Convention is *ex gratia.* All technical objections are applicable as well as the provisions of the local legislations when international law (not opposed to equity) makes them applicable. Furthermore the Commission must base its decisions on justice. The Convention also makes reference to the moral character of Mexico's obligation which is lacking in the Venezuelan Conventions. On the other hand, the Special Convention has various limitations, as that relating to the classification of forces not existing in the Venezuelan Conventions.

It seems to me that it is not the object of equity to interrogate international law. Such is the view entertained by Merigniac, in his *Traité d'Arbitrage*, Section 305, quoting the words of the President of the Italian-Venezuelan Commission, in the Sambiaggio Case where he states that:

"*Estimamos, sin embargo, que nunca se le recordará demasiado (al Arbitro de equidad) conformarse todas las veces que pueda a las soluciones del Derecho Internacional mitigadas en el caso que proceda por la equidad como hemos dicho.*" "*Obrando de otra manera arriesgarla frecuentemente seguir caminos falsos, que, por grandes que sean su autoridad y su experiencia personales no pueden evidentemente llevar a deducciones tan seguras como aquellas que han sido aprobadas por una larga prática internacional y el uso constante de los pueblos civilizados.*"

On the other hand, Mr. Alvarez in one of his works says:

"*Ce procédé d'interprétation, en même temps qu'il ne prète pas aux abus, permet d'adapter constamment les rapports réglementés aux necessités de la vie. Il n'est pas arbitraire, mais l'application stricte des notions de justice et d'equité, il puise sa raison d'être dans les transformations mêmes de la vie juridique et n'a pas d'autre but que de les suivre. Loi, justice et équité deviendront ainsi, dans la mesure du possible, synonymes; et legislature, publicistes, et judges contribueront, chacun pour sa part, a faire qu'à l'avenir règne plus de sincerité entre les peuples et plus de fraternité dans les rapports internationaux*".

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The undersigned does not consider that a broad interpretation may be applied in the liberal sense in which would happen in a Memorandum that was handed by the Department of Foreign Relations in 1921 to the Chargé d'Affaires of the United States in Mexico and which made reference to a counter-proposition for a Convention relative to the adjustment of claims. Now then, as may be seen by the text of the draft Convention presented in accordance with the counter-proposition, no promise was ever advanced to pay for damages caused by opposed insurrectionary forces. According to the proposed Convention insurrectionary forces were excluded, for Mexico never contemplated that any responsibility would be demanded of her for the acts of unsuccessful revolutionists. Consequently, the invitation of the Mexican Government had its limitation (limit). The Mexican Government could by no means offer to pay by acts of "Orozquistas" when it has always refused claims of its own citizens for damages caused by said forces. It was the Government of the United States that asked for the addition of the second part of subdivision 2 of Art. III, which gave rise to the enlargement of scope of the arbitration and Mexico then demanded the addition of subdivision 5, excluding insurrectionary forces. Mexico has never promised to pay unlimitedly.

It is natural, on the other hand, that Mexico put in a limitation when it proposed, in its own initiative that claims may be submitted to arbitration in accordance with justice and equity, although it did not fail to express that it would do so *ex gratia.*

It follows from this that from the beginning the Mexican Government had as a view not to submit itself defenseless to an arbitration, but to limit its responsibility to the extent to which it purported to be bound only.

Under these circumstances, the enlargement of that responsibility is against the spirit of the Treaty itself.

On this point the undersigned declares that the words of the Treaty signed by both Governments are to him deserving of great respect and that he believes that the only way to show that respect is to strictly adhere to its items.

Particularly the High Authority of the President of the American Commission, Mr. Warren, is of great weight. This distinguished gentleman, who has interpreted with great precision the terms of the Convention in his lecture delivered before the American Bar Association, when he still had fresh in his memory his personal impression of the 1923 Conference and who knew well what was the intention of the President of the United States whom he represented, deserved in the opinion of the undersigned, the greatest consideration, for his ample legal knowledge and his extensive experience as a diplomat. Therefore, the undersigned believes that Mr. Warren, as well as the other Commissioner, the Hon. John Barton Payne, an eminent jurist also, knew well the scope of the words that they used, applying them undoubtedly in their own precise meaning, in accordance with the authorities in the English language as well as in the scientific field of jurisprudence. The undersigned considers that the words "revolutionists", "insurrectionists" and "federals" were used in their regular meaning, but if they all were, without a reason, interpreted as synonyms, in that case the forces not comprised within fractions 2, 3 and 4 of Art. III, would undoubtedly be included in fraction 5. It follows from this that at any cost acts of "Orozquistas" cannot produce direct responsibility from the Government of Mexico, but only for acts of omission.

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Apart from this, the undersigned is of the opinion that the authorities on language are a great value, as demonstrated by Mr. Moore in his recent work on arbitral decisions in which he abundantly makes reference to dictionaries.

The undersigned does not consider it on his part an improper act when he mentions the opinion of Mr. Warren inasmuch as the opinion expressed by the latter before the American Bar Association was a public matter.

9. CLASSIFICATION UNDER WHICH THE OROZQUISTAS FALL.

Considering that the damage was caused by Orozquistas the fundamental question arises in this case to determine what kind of forces were they, because as to certain forces the Mexican Government considers itself bound, unless there is a well founded defense that may be opposed to the position maintained by the claimant government, while regarding other kind of forces there can be no responsibility unless the claimant government proves negligence or leniency.

The Hon. Agent of the United States bases the fundamental principle of his argument in the consideration that the Special Claims Convention, in its preamble, states that the High Contracting Parties desired to settle and adjust amicably claims arising from revolutionary damages, and in that Article I speaks of all claims against Mexico for losses or damages suffered during the revolutions and disturbed conditions which existed in Mexico in a specified period of time.

As the undersigned sees it, the American Agency considers that the Convention comprises all claims presented and caused by revolutionary acts. From this the American Agency believes that no claim can remain outside of the Convention and that jurisdiction is bestowed for all acts claimed to be of a revolutionary nature. Thus the activities of Pascual Orozco are by said Agent held to be revolutionary acts included within the Convention.

The undersigned wishes to call the attention to the consideration that in the draft of the Convention presented by Mexico, before the definite texts were adopted, the preamble made reference to all claims for revolutionary acts and Article I to claims arising during the revolutions which existed in Mexico. Article III speaks simply of revolutionary forces. In fraction 1 the expression "revolutionary forces" opposed to those which established governments did not exist and in fraction 4 reference was made only to "acts of bandits". It can be readily seen that in Mexico's proposedConvention the acts of insurrectionists of any sort whatsoever were not included. Both the preamble as well as fraction 1 refer to all claims when evidently some of them were outside of it (revolutionary acts of a civil character, among others), which shows that the word "all" was then understood as is understood now, that is, that it refers to those caused by such forces as in a limitative manner Article III of the Convention refers. That is the reason why in the Santa Isabel decision it was there held that "acts of individuals characteristically revolutionary in nature may be insufficient for that purpose" (to be the ground for a claim).

When the expression in fraction 2 (before fraction 1) of Article III relative to "forces opposed to those as the result of whose cause governments *de facto* or *de jure* have been established", was put in, it was necessary to also put in the exception relative to "insurrectionary forces" in fraction 5 (before fraction 4), with the purpose of not including, (even though they were not revolutionary forces) all kinds of forces opposed even insurrect-

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ionary forces. This explanation clearly shows what was the arrangement intended to be created within the Convention and shows also why when the jurisdiction of the Commission was extended to insurrectionary forces referred to in fraction 5 thereof, it was necessary to put in Articles I and III the words "disturbed conditions".

In addition to the above considerations, it must be further stated that there is no need of studying the preamble or Article I of the Convention inasmuch as Article III thereof declares that the claims which the Commission shall decide are those which arose from acts of the forces specified in the Article itself.

Therefore, claims connected with forces not therein specified, cannot be decided by the Commission. It is to be noted that this is the only occasion wherein the Convention uses a peremptory expression directing what claims there must be a decision of, since in the preamble it only speaks merely of a desire to "settle and adjust" and in Article I reference is only made as to a certain period of time.

Furthermore, Article III is referred to in other clauses which fix its scope.

In Article II mention is made of an obligation assumed *ex gratia*, when the damages were caused by any of the forces enumerated in Article III. Consequently the Government of Mexico has assumed no *ex gratia* obligation nor does it deem himself morally bound save in such cases as are specified in Article III.

That is the reason why in the Santa Isabel decision it is declared that: "The moral obligation was conditioned on the requirement that the damages or losses were caused by any one of the forces specified in Article III and in such terms as are therein contained".

Finally, in Article VIII the High Contracting Parties agree to consider the decision of the Commission as finally conclusive upon claims arising from any of the causes enumerated in Article III of the Convention, undoubtedly because they considered that said claims were alone in contemplation of the Convention.

It follows therefore that whatever is not included in Article III is not included either within the Convention.

Apart from these considerations, the Santa Isabel decision establishes clearly the often repeated principle that the Commission must limit itself lest it go out of the terms of the compromise, to determine if the forces which caused the damage are or are not comprised within Article III and to determine, immediately following the soundness of the claim.

The principal paragraphs of the decision are here quoted:

"*2. En la apreciación de las reclamaciones, pues, es siempre cuestión preliminar, la de comprobar la comprehensión de los sucesos en los términos de la Convención, es decir, comprobar si los causantes de tales sucesos fueron algunos de los elementos especificados en su Art. III, consistiendo siempre esa comprobación en la ventilación de un problema histórico.*

"*Por consiguiente, la cuestión preliminar, para el examen y la decisión de los lamentables sucesos de Santa Isabel que determinaron la presentación de las reclamaciones conjuntamente bajo el Núm. 449, consiste en verificar si tales sucesos deben ser clasificados como actos practicados por alguno de los elementos estipulados en el artículo III de la Convención, y, si concurrieron las circunstancias especificadas en el párrafo 5o. en el caso de ser considerados como actos de bandolerismo.*"

"*En los términos de la Convención, actos de mero bandolerismo pueden determinar el pago de una indemnización mientras, que actos provenientes de individuos característicamente revolucionarios pueden ser ineficaces para aquel fin, puesto que lo esencial no es que el acto sea revolucionario, sino que provenga de alguno de los elementos especificados en el artículo III.*" *(Páginas 10, 11 y 17 de la Sentencia de Sta. Isabel).*

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The whole argumentation of the Hon. Agent of the United States is directed to make Mexico pay for insurrectionary forces. Now then, the Commissions of Equity sitting at Venezuela and other nations consider that acts of insurectionary forces could not be origin to indemnities. The reason was a plain one and it consisted in the fact that international law, which in this point entirely agrees with equity, provides that no payment will be made for insurrectionary forces.

The celebrated case of the *Aroa Mines*, was decided by the learned Umpire of the British-Venezuelan Commission of Equity:

"Damages will not be allowed for injury to persons, or for injury to or wrongful seizure of property of resident aliens committed by the troops of unsuccessful rebels." (Ralston, *Venezuelan Arbitrations*, p. 344).

The same Ralston's *Report* (*Venezuelan Arbitrations*) contains many cases from which it appears that several decisions rendered according to equity ratified this doctrine.

The Dominican Claims Commission of 1917 appointed by the North-American Military Governor (and presided over by a North-american) laid down the following rule;

"*1°. —El Gobierno sólo es responsable por las expresiones o requisiciones o empréstito, forzoscs o no, hechos por sus agentes o autorizados subalternos, cuando éstos hubiesen obrado en su carácter público y en interés del servicio que estaban prestando al gobierno.*"

The Nicaraguan Mixed Claims Commission of 1914 (formed by two Americans and one national from Nicaragua) which rendered its decisions in some way relaxing the rules of international law relating to the responsibility of the Government-rules which are more strict than those now followed in Nicaragua (these are the very words of the report) resolved:

"VIII.—*El gobierno no es responsable por daños hechos a propiedad o bienes ocupados por insurrectos en movimientos revolucionarios que fracasaron.*"

Still more, the German Commission, which contains the same provisions of Article III has declared that the damages caused by insurgent Pascual Orozco may not be considered as a ground to claim an indemnity.

The undersigned will quote later the decision rendered in the *Griese* case which adopts the doctrine that there is also contained in some other decisions: 27 Testamentaría de Hugo Beel; 29 Fischbein Hnos., and 48 Goeldner. The former textually says:

"*En vista de tales antecedentes historicós me inclino a la opinión de que, a la fecha precitada, los orozquistas no caben en ninguno de los incisos 1°., a 4°., del Art. IV de la Convención, especialmente, que no caen bajo el concepto del inciso 2°., segunda alternativa, que habla de las fuerzas contrarias a las fuerzas revolucionarias que hayan establecido al triunfo de su causa gobiernos "de jure" o "de facto", porque en el mes de abril de 1912 las fuerzas orozquistas no combatieron contra otras fuerzas revolucionarias sino que se encontraron en lucha contra las fuerzas de ungobierno constitucional establecido y por tanto, "de jure", como sin duda lo era entonces el del Presidente Madero.*"

The obligation to decide in accordance with equity not only exists on account of the Convention. It must be decided also in accordance with Justice and justice as stated in the case of the *Aroa Mines*, is nothing else but the application of the law.

Why then the Hon. Agent for the United States tries to sustain that Pascual Orozco must be qualified as a revolutionary? This is what the undersigned will study at present.

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Examining the question simply from the standpoint of Art. III, since to this provision the Commission is directed by the terms of the Convention, the conclusion may be reached that in fact the Agent of the United States bases his theory in two propositions that the forces under consideration are included in paragraph 2, and that they are excluded from paragraph 5.

Therefore, in the opinion of the undersigned it is necessary to examine, first, if such forces are within paragraph 2 and, second, reaching the conclusion that they are not, if they may be included in paragraph 5 of same Art. III.

There is no need of examining if they are included in paragraphs 1, 3 and 4. The reasons are perfectly obvious.

They may not be within paragraph 1 because the Orozquista forces did not constitute a Government neither *de jure* nor *de facto*, since it must be understood that the Governments whose acts bind the Mexican Nation are the Governments of the country and not those called local governments. This is confirmed by Mr. Warren's speech delivered before the United States Bar Association in which he made some comments in the following terms by which he referred to international law:

"Under the rules established by the custom of nations as legally obligatory upon sovereign states, a *de facto* or a *de jure* Government is responsible for the acts and deliquencies of its own agent." (*Reports of American Bar Association*, Vol. I, 1925, p. 210).

The fact that the Foreign Relation Office of Mexico in a recent declaration considers that the *de facto* Governments may be considered as equal as the *de jure* Governments does not indicate that the Mexican Government has never had the intention to bind itself with regard to acts of local governments since it would be sufficient in order to explain the existence in the Convention of these two terms, to recall here that the Government of Sr. Carranza was considered by the American Government as a *de facto* Government; that the United States recognized the said Government with the character of a *de facto* Government and that some times, the Governments of de la Barra and de la Huerta have been deemed as Governments *de facto* by American writers. In order to avoid all kinds of discussions with regard to this particular and needing the agreement of the two High Contracting Parties, the Convention makes reference to the American distinction.

The undersigned cannot admit that the intention of the Mexican Government was to bind itself by the acts of the so-called local governments. The reason is very simple. Because sovereignty is indivisible. A body (the Nation) cannot have but one head (the Government).

Pradier Foderé in note No. 11, page 561, Vol. I, Hugo Grocio's work *Le Droit de la Guerre et de la Paix*, says:

"*11) L'âme des sociétés, comme le fait remarquer Boecler, sur note de Grotius, c'est une volonté unique, qui commande avec une suprême autorité; et Puffendorf en tire cette conséquence, 'qu'un Etat ne peut être gouverné régulierement, qu'autant que tous les citoyens en général, et chacun d'eux en particulier, sont gouvernés par une seule âme; c'est-à-dire qu'autant que le pouvoir souverain, sans être divisé en aucune manière, s'exerce par une seule volonté dans toutes les parties et dans toutes les affaires de l'Etat.' (Lib. cit. chap. v. ? 3.) Voir J. J. Rousseau, Contrat Social, liv. II, chap. II et liv. III, chap. XIII. Ces principes ont été consacrés par le droit public moderne. L'article 1er du titre III de la Constitution du 3-14 sep. 1791, porte, en effet, que la souveraineté est reproduite, indivisible, inaliénable, imprescriptible.' La même disposition est reproduite dans l'article 25 de la constitution éphémère du 24 juin 1793 dans les arts 17 et 18 de la déclaration des droits, du 5 fructid., An III La République Française est UNE et INDIVISIBLE'*

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dit l'art. 1er. de la constitution du 22 frimaire, An VIII. Si le senatus-consulte organique du 26 floréal, *An XII substitue le gouvernement imperial au gouvernement républicain, son art. 1er porte que le gouvernement de la République n'est que 'confié' à un empereur. La constitution du 4 novembre 1848 reproduit la maxime que 'la République est une et indivisible' (Art. II du Préamble), et que 'la souveraineté est inaliéable' (art. 1er, chap. 1er). L'art. 1er, enfin, de la constitution du 14 janvier 1852, 'reconnait, confirme et garantit les grands principes proclamés en 1789, et qui sont la base du droit public des Francais.' La seule différence qui existe entre la theorie politique des publicistes des derniers siècles, et le droit public moderne, c'est que, de nos jours, la souveraineté réside dans la nation, qu'elle lui appartient, et qu'aucun individu,* aucune fraction du peuple ne peut s'en attribuer exclusivement l'exercice."

Equity Commission between Holland and Venezuela in the case of J. M. Enriquez, decided the following:

"While the government of General Rivera might have been a *de facto* government for certain municipal purposes within the State or District, when, for the time his was the supreme force he had power to compel respect and obedience, it lacked all of the characteristics of a *de facto* national government that could speak and act in the name of Venezuela." (*Venezuelan Arbitrations*, p. 899.—Moore.)

Only the countries inhabited by gregarian tribes are apt to have several leaders.

Those so-called local governments are not Governments. The Argentine publicist Podesta Costa in his work *Ensayo sobre las Luchas Civiles y el Derecho Internacional*, thoroughly expresses himself on the subject: "The pretended public authority that executes only acts of individual force and does not dispose of coercive force upon the majority of the inhabitants of a region or country, is not a Government".

The fact as it is said that the legitimate Government must not collect taxes received by the momentary occupant of a region, is not founded in the legal existence of a *de facto* Government, but on the ground that the legitimate Government has not attended to the public services. Never the countries that have opposed themselves to the collection of taxes twice, have pretended to sever the sovereignty of the States.

Neither can the forces be considered to fall within the meaning of subdivision 3—inasmuch as they fall within the meaning of subdivision 2—and because the period to which subdivision III refers to is limited until the establishment of a *de jure* Government. Subdivision III in referring to the disintegration of forces referred to the case in which a *de facto* Government having been established after the triumph of a revolution, as occurred in the triumph of the movement that overthrew the Government of General Díaz and that which overthrew the one of Carranza, the federal forces were disbanded. The provisional Governments of de la Barra and of de la Huerta proceeded to disband the troops that were already unnecessary, which troops, although they were disintegrated through legal measures, remained dependent upon the national Government while the soldiers so disbanded and which constituted said troops that no longer belonged to the army, would go to their homes.

In the case of the Orozco rebellion, the *de jure* Government of Madero was already established.

Neither can they be considered within subdivision 4° because it refers to the disbanded federal forces, that is to say, to the forces of Huerta when these remained under the responsibility of the Constitutionalist Army after the agreement signed at Teoloyucan.

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Therefore, it is pertinent to study subdivision 2° that reads:

"Por fuerzas revolucionarias que hayan establecido al triunfo de su causa gobiernos "de jure" o de facto o por fuerzas revolucionarias contrarias a aquellas."

The undersigned will begin by stating that it cannot be supposed that the Government of Madero was a Government established as a consequence of a revolution. The Government of Madero was a Government *de jure* established by virtue of a perfect election. On November 3rd, 1911 the Chamber of Deputies made the declaration to the effect that Madero had been legally elected. According to authors the election was perfectly legitimate. Mr. Manuel Bonilla, Jr., referring to confidential report 1034 of the American Ambassador in Mexico, addressed to the Secretary of State on October 7, 1911, used the words of said report stating:

"No se emplearon ni soldados ni policías y las casillas electorales quedaron perfectamente libres y abiertas a los votantes, pero se utilizó en todas las formas posibles el terror del nombre del señor Madero", es decir, que no se empleó otra arma que el nombre del señor Madero, que según es bien sabido, era incapaz de cometar ninguna maldad." (10 Años de Guerra,—Tomo I, Pág. 303).*

In turn, the internationalist Hyde states:

"Francisco I. Madero had been elected to the Presidency of Mexico in October, 1911, and entered upon the duties of his office the following month". (*International Law*, Vol. I, p. 71).

The revolution that overthrew General Díaz is separated from the election of Madero by a Government which peacefully its power delivered to him.

Studying said article according to the English text, it is readily observed that said subdivision has two extreme phases, i. e., the one relative to the revolutionary forces at the triumph of whose cause Governments *de jure* or *de facto* have been established and the one relative to forces opposed.

In interpreting said text the Agent of the United States has endeavored to demonstrate that the word "them" which covers the masculine and the feminine, refers to forces and to Governments *de jure* or *de facto*. The plain grammatical construction leads one to the conclusion that he is mistaken, because the expression "governments *de jure* or *de facto*" is a relative complement to the subject "revolutionary forces" and the second phrase, governed as it is by the first, naturally refers to the same subject and not to the complement.

This interpretation is fully confirmed by the explanation given by Mr. Warren. The discretion and importance of this diplomat, as well as the fact that he delivered his address before the most important bar association of his country, immediately after the treaty was signed, gives singular weight to his words. The said Mr. Warren (one of the Plenipotentiaries who signed the Convention) in his aforementioned address before the Bar Association clearly expresses that the subdivision refers to forces opposed to the revolutionary forces and not to forces opposed to Governments *de jure* or *de facto*. His words are the following:

"The Government of Mexico is responsible, under the peculiar circumstances existing in Mexico during the disturbed period, for the acts of revolutionary forces apparently opposed in the earlier stages of the uprising to the particular revolutionary forces which finally triumphed but equally intent upon the task of defeating and forcing out of the then existing government." (*Reports of American Bar Association*, Vol. I, 1925, p. 210-211.)

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The truthfulness of this statement is confirmed by the fact that the Commission between Mexico and England that has exactly the same terms of the Special Convention, decided that a claim involving forces opposed to Governments *de jure* or *de facto* was inadmissible.

In the Baker claim, etc., p. 170 and 171 of the Mexican report, the matter is thusly summed up:

"*6. Estando la mayoría de la Comisión convencida de que la hospedería la ocuparon soldados de las fuerzas de Félix Díaz y que saquearon los cuartos de los Sres. Baker, Webb y Woodfin, la cuestión que surge en seguida es la de si se puede, conforme al artículo III de la Convención, tener por responsable al Gobierno Mexicano por estos actos, en otros términos, si los felicistas caen dentro de alguno de los incisos del artículo III y en tal caso, dentro de cuál de ellos.*

"*Es nuevamente la mayoría de la Comisión la que contesta afirmativamente esta pregunta y que opina que el inciso 5. del artículo III es aplicable al caso bajo discusión.*

"*En opinión de acquéllos, se deben considerar a las fuerzas felicistas como fuerzas separadas y simplemente como tropas levantadas en armas contra el entonces gobierno "de jure", es decir, como rebeldes.*"

The undersigned considers that the doctrine of paying for rebels is contrary to the practice of the United States such as was exposed in the American Answer of May 22, 1929, to the Society of Nations regarding the basis of discussion for the Hague Conference on Codification. In that answer the Government of the United States stated the following:

"*Les Commissaires estiment que les Etats-Unis ne peuvent être tenus pour responsables de dommages causés par les actes de rebelles sur lesquels ils ne pouvaient exercer de contrôle et dont ils n'étaient pas en mesure d'empecher les actes.*" American and British Claims Commission; *Traité du 8 mai 1871*, Moore's Arb. 2985; *Prats (Mexique) c. Etats-Unis, ibid.* 2886-2900; Alleghanian *(Perou) c. Etats-Unis, ibid. 1622; reglement adopté per la* Spanish Claims Commission, Moore, *Digest.* VI, 971-972."

Moreover, that practice is in accord with equity and with the principles observed in an uninterrupted line:

"Held by Duffiend, Umpire in the German-Venezuelan Mixed Claims Commission, late sitting at Caracas:

"That the late civil war in Venezuela from its onset went beyond the power of the Government control. Under such circumstances it would be contrary to established principles of International Law, and to justice *and equity*, to hold the Government responsible." (Claim of Otto Kummerow vs. Venezuela.)

"The precedents form an unbroken line, so far as the umpire has been favored with a chance to study them, supporting the usual unresponsibility of governments for the acts of unsuccessful rebels. It was so held by the eminent Sir Edward Thornton in all cases which he decided as umpire in the United Mexican Commission. (Moore, Vol. 3, pp. 2977-2980.) So held by the United States and British Claims Commission of 1871. (Moore, Vol. 3, pp. 2982-2987, 2989). So held by the United States and Mexican Claims Commission of 1868 (Moore, Vol. 3, pp. 2900, 2902, 2973). So held concerning the non-responsibility of the United States in the civil war of 1861. (Moore, Vol. 3, pp. 2900-2901). So held in substance and effect by the United States Venezuelan Mixed Commission now sitting at Caracas. Even the cases which were claimed to qualify or oppose this rule and were not specifically attacked by the umpire in the Sambiaggio case above referred to are not opposed to the rule laid down when all of the facts appear."

This doctrine based on equity was exposed in unequivocal terms none the less than by Ralston in the session of April, 1928, of the American Society of International Law:

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"In other words, there could not be a different view adopted in our dealings with the South American countries from the rule which we have adopted ourselves. We have with very great emphasis, for instance insisted that the Southern Confederacy was in no respect the Agent of the United States and that the United States was in no degree responsible for any actions which was at any time taken by the States of the South. So that, to that degree, we are in accord with the General South-American doctrine. *Of course there are exceptions to that, for instance where the revolutionists become successful ones.* There the action of the revolutionists becomes by a sort of doctrine of adoption, if you will, the action of the government finally recognized as legitimate, and that responsibility has been held to exist in South American states." (Proceedings of the American Society of International Law at its twenty-second Annual Meeting. April, 1928, p. 77.)

Ralston himself explains in eloquent terms why the doctrine of imposing obligations to Latin American countries (in contemplation of the terms of an equity Convention) for acts of unsuccessful rebels has been repudiated. By admitting such responsibility the States of Latin America, as may be deduced from the words of Ralston himself, would come to find themselves in a situation of manifest inferiority:

"I remember, and perhaps may be pardoned for referring to a personal experience when it was my fortune now twenty-four years ago to be the Umpire of the Italian Venezuelan Mixed Claims Commission, this was one of the questions which met with most consideration before the other Americans who were at work there and before the Commission over which I had the honor of presiding. The Italian Commissioner looked at the subject from what seemed to me at least a rather crude point of view. He said to me 'Venezuela ought to be held responsible for all these acts'. I asked him why, and he said: 'Because Venezuela is a bad child and ought to be whipped.' Well, that doctrine possessed at least the merit of simplicity but it did not, as it happens, appeal to me very much, and I remarked that I was not there for the purpose particularly of whipping Venezuela, that if Venezuela had violated the rules of international law it was, of course, my duty to decide against her, but if she had not, I did not conceive that it was incumbent upon me to administer any measure of castigation. Well, my view did not at all commend itself at the time to him and I do not know that it has to this day, for he still happens to be living. He said, 'Well, if I had thought that you and the American umpires were to treat Venezuela from any such point of view as this, that you would not accept our claims as we put them forward, I would have recommended my government to send Pierantoni.' The Commissioner was a man whose services had been largely in the consular division of the Italian Government. Well, perhaps they should have sent Pierantoni, but as it was they sent a very able and excellent man, a man however, who could not see why Venezuela should be treated with any respect as a member of the family of nations." (Vide, pp. 77-78).

In view of the foregoing considerations the undersigned believes that it would not be in accord with equity and much less with justice to impose upon Mexico responsibility for acts of Orozco and his followers, since Orozco was an unsuccessful rebel as is fully proven by history. Orozco occupied only the Capital of one State of the twenty-eight of the Republic and was defeated.

In this particular, the undersigned will take the liberty of invoking the authority of foreign historians, though he could cite many Mexican historians preferring to resort to the authority of foreign publicists as proof of impartiality.

In fact, the North-American Historian, Priestley, in his History of Mexico, refers to Orozco as a rebel.

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Espasa's Dictionary states, that Orozco led "a rebellion against Madero". The English historian, Dillon, says: "Pascual Orozco rose in rebellion against Madero".

It is argued at length about the existence of a plan of Orozco. Two North-American historians will tell us what was that plan of Orozco:

"The following day, Pascual Orozco, Junior, turned traitor at Chihuahua. The money demand which he had sharply pressed upon Madero immediately after the American Military order of February 4 had been followed by repeated threats of resignation. He would withdraw, he said, from the service of a government which was not keeping its pledges to its supporters and was discredited at Washington .... unless he received two hundred and fifty thousand pesos." (*The Political Shame of Mexico*, Edward I. Bell, p. 168).

On the other hand Mr. Gruening says in many instances that "Orozco rebelled in Chihuahua" and gives the same explanation as Mr. Bell above cited.

"Next, General Pascual Orozco, piqued because Madero refused to reward his services to the Revolution against Díaz with a hundred thousand pesos, headed a rebellion." (*Mexico and its Heritage*. Ernest Gruening, p. 302.)

Is Mexico to be bound to pay for acts of this individual and his followers against the universally accepted practice; against equity; against justice; against the intention which the State possessed of binding itself, and against the doctrine applied in Latin America, when the Nation has not admitted such responsibility?

The undersigned does not consider that it may appear unexplainable that Mexico obligated itself to pay for forces which were successful, that is to say, for revolutionists, because such obligation exists according to international law. The answer is simple: it bound itself because it considered that law required it.

Moreover, supposing that the English expression should be doubtful and supposing also, without admitting, that the English text alone should be taken into consideration, it follows at least, that the expression is doubtful.

Now then, in case of doubt the benefit should be accorded to the respondent Government that is, Mexico, in the present case:

"*El principio "in dubio mitius" debe ser aplicado en la interpretación de los Tratados. Si de consiguiente, el significado de una estipulación es ambiguo, debe ser preferido el significado que es menos oneroso para la parte que asuma la obligación, que interviene menos en la supremacía territorial, o personal, o que envuelve menos restricciones sobre las partes.*" (Oppenheim, International Law, Vol. I, p. 702.)

"*Semper in dubiis benigniora praeferenda sunt*" *dice la regla del Digesto.*

In case of doubt the benefit should also inure in favour of the country which *ex gratia* has bound itself, which is Mexico.

The rule of the Digest which established, according to a law of Emperor Pius, that he who is sued through an act of his own liberality is to be condemned as little as possible, is applicable.

The Decision in the *Santa Isabel* case clearly establishes that the responsibility of Mexico must be "*depurada y reconocida en los estrictos o indisputables términos de la Convención, y una vez que haya duda o puntos de vista favorables y desfavorables, sutilmente apreciables, la equidad ordena no reconocer en el caso una responsabilidad asumida de un modo general ex gratia.*"

Still more, in case of doubt, the meaning which the word imports in the defendant country should be controlling:

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"Lorsque le mot employé dans un traité aurait un sens juridique distinct dans l'un et l'autre État, on devrait lui donner le sens qui lui est attribué dans l'État auquel la disposition du traité se réfère." Fiore Pasquale.—*Nouveau Droit International Public. T. 2, No. 1036, Pr. 399-400.)*

In case that a difference should arise between two languages, the Permanent International Court of Justice has decided in favor of the most restrictive interpretation.

"Where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties." (Publications of the Permanent Court of International Justice. Series A, No. 2, p. 19.)

Under such circumstances what does the Spanish text signify? Subdivision 2 in using the feminine "them" (*aquellas*) very clearly establishes that the said expression refers to "revolutionary forces" and not to Governments *de jure* or *de facto*.

Now then, the Spanish text is also an authentic text that has an authority equal to the English text. According to international law, it is necessary to make an interpretation based in harmony of both texts and in no way on one text alone. Hyde says:

"When a treaty is executed in more than one language, each language being that of a contracting party, each document, so signed and attested, is to be regarded as an original, and the sense of the treaty is to be drawn from them collectively." (Moore, Dig. V. 252, citing United States v. Arredondo, 6 Pet. 691, 710; also Little, Commissioner in United States-Venezuelan Arbitration under convention of Dec. 5, 1885, Case no. 18, Moore, *Arbitrations*, IV, 3616, 3623.)

The Agent for the United States has insisted in contending that since the English text was the one discussed in the Conferences of 1923, it alone should control, thus rejecting the Spanish text, as if it had been stipulated in the Convention that the English text should control, and all this, as against the Rule of International Law which, as Heffter says "what has not been clearly offered is not understood as stipulated."

To fix the situation such as the undersigned understands it with reference to the discussions had at the Conferences of 1923, the undersigned himself begs to copy the declarations he made in the session of May 12 of this year. (Sixth session of the hearing of the Russell case.)

"Agredezco mucho al señor Bouvé que haya dado una explicación tan extensa sobre un particular tan importante. No hablaría yo de este asunto si se hubiera tenido el carácter de Comisionado en las Conferencias de Bucareli. Habiendo tenido esa posición necesito hacer aclaraciones con referencia a lo dicho por el señor Bouvé sin contradecirlo, naturalmente, cuando lo que él dice está fundado en documentos que yo reconozco que tienen validez."

"El primer punto es el que se refiere a una negociación posterior. Efectivamente, hubo esa negociación posterior, y la prueba de que la hubo obra en los cambios existentes en el texto de las Convenciones firmadas."

"Sobre el segundo punto relativo al carácter de Plenipotenciarios de los Comisionados, voy a llamar la atención sobre que en primer lugar, la credencial que yo presenté, fué como representante personal del Presidente y que no tenía la contrafirma del Ministro de Relaciones; y cuando el señor Warren (hombre de gran importancia por su inteligencia y posición política) deseaba que se hicieran constar en minutas nuestras pláticas, yo entonces acepté bajo la condición de que los Comissionados Mexicanos hacían constar que se reunían con el único objeto de cambiar impresiones a fín de llegar a un entendimiento entre los dos países;

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de modo que se habló de cambio de impresiones y no de negociaciones de Plenipotenciarios. Hay esta circunstancia también: el Gobierno Americano tomó la posición entonces de no reconocer a los funcionarios mexicanos. Las cartas dirigidas al señor Paní no tenían carácter oficial. Las relaciones diplomáticas fueron reanudadas después de la Conferencia. Era una contradicción que nosotros negociaramos como Plenipotenciarios cuando todavia no habían sido reanundadas las relaciones (se convino no poner reconocimiento de Gobierno). Si fué reconocido hasta después, no cabe duda, que antes nosotros no éramos Plenipotenciarios; de manera que todo confirma que la negociación tuvo un carácter, diremos, completamente distinto del que tienen las negociaciones entre Plenipotenciarios. No se reunen plenipotenciarios para negociar que se nombren otros plenipotenciarios. Esto en el uso diplomático seria absurdo."

"*Ahora, que hubo negociaciones antes y después, lo comprueban los documentos. Hay en la publicación mexicana un proyecto americano de Convención y otro mexicano anteriores a la Conferencia, un proyecto de la Conferencia y una Convención firmada que no es en todo igual a la de la Conferencia.*

"*Por fin, hay un punto de gran importancia y es que para que un texto controle al otro, se necesita que haya dos textos. En la Conferencia los Delegados Americanos no conocieron el texto español. Se trató en ella simplemente de una versión hecha por los Delegados Mexicanos. ¿Cuándo se negoció el texto español? Cuando los dos Gobiernos los estudieron. La negociación de las palabras españolas no pudo hacerse en inglés. Se consideró, pues, el valor de las palabras castellanas y se aprobó el original por los dos Gobiernos, habiéndose dado igual fuerza a los textos en los dos idiomas, pues no se pactó que el texto en determinada lengua controlara el Tratado, como pasó en la Convención con Francia.*"

"*Al concluir doy las gracias al señor Bouvé por haber tratade esto asunto con la perfecta cortesía que ha usado al exponerlo.*"

The undersigned states that he considers extremely abnormal that portion of the negotiations relative to the Convention should be brought up, without having been presented as proof. Proof has never been rendered in this particular and if it had been so, the undersigned would have been opposed to it supported by precedents of high merit, among others, the English rule to the effect that the preliminary activities should never be taken into consideration, and on Article 1341 of the Napoleon code.

And supposing that it had been presented as proof, the undersigned does not consider it of any importance because, as Sir Frederick Pollock, observes, the purpose of drafting the agreements in writing, is to declare the intention of the Parties in a permanent manner and avoid disputes about the terms of the agreement.

The reason is convincing and is brought forth by Señor Fachiri in his study published in the *American Journal of International Law*, as follows:

> Before it can acquire binding force it must be ratified, by whatever procedure the constitution of the high contracting parties requires, be it the crown as in Great Britain, or the legislature. The ratifying authority was not present at the negotiations; it may have before it the minutes summarizing the debates, but it is impossible for it, even if it would, to estimate and weigh all the implications arising or deducible from discussions from which it was absent. The authority whose consent alone gives force to the treaty, is, in practice bound, and, I submit, entitled in principle, to base its action upon the text and nothing but the text (*American Journal of International Law*, October, 1929, Vol. 23, pág. 746).

On the other hand, it was never stipulated that the English text would control the Spanish text of the Convention afterwards submitted to the Mexican Senate and not even that it would control the Spanish draft that was not yet negotiated. It was only recorded that an English original was approved in the Conferences although it was not a definite one.

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It is considered—without any stipulation—that the English text must control. The reason is that the discussion as to the negotiation was carried on in English and an English text was approved. The undersigned considers such a doctrine without any foundation and deems that one example will suffice to demonstrate its unrighteousness.

In the Sixth International American Conference held at Havana several Conventions were approved and some of them have already been ratified by the United States Senate. As may be seen by the minutes of the Conference from the inaugural session of January 6, 1928, until the final session of February 18th of the same year, all the negotiations were carried on in Spanish. The Convention drafts and the Resolutions were approved in Spanish. Not even one text in English was discussed nor even one minute was drawn in English. All this appears from the *Diario de la Conferencia* and from the final minutes that were profusely published. Is it possible that the American nations come now to contend that the Spanish text is the one that controls and that the English is a secondary language, alleging that the approved texts were merely translations? The undersigned cannot believe it in any manner.

The rule is that the negotiations are incorporated to the treaty and therefore they have not as pretended by the American Agent, the character of an equal agreement and with the same force as the treaty itself, in considering without there being any stipulation that the English text controls the Spanish text.

Even applying the international precedents that, as has been expressed, allow to consider some times the preliminary negotiations, that is to say, judging the matter for a moment in a manner favorably to the American Agent's viewpoint, the undersigned deems that his contention is not sustainable.

Upon drafting the seventh advisory opinion, the International Court of Justice declared:

"The court's task is clearly defined. Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or been substituted for it." (*American Journal of International Law*, January, 1930, Vol. 24, p. 5.)

The stipulation being clear there is no reason for invoking any document. A similar conclusion was reached in the case of Lotus by the same High Tribunal.

Even supposing that a text was doubtful the interpretation must be made in favor of the least binding effect upon the States, that is to say, in the sense of the least obligation. In the sentence relative to the jurisdiction of the International Commission over the Oder River, the same Court said:

".... It will be only when, in spite of all pertinent considerations, the intentions of the parties still remain doubtful, that the interpretation should be adopted which is most favorable to the freedom of states." (Same *American Journal of International Law*, p. 8.)

Furthermore, the undersigned considers that, according to the words of Anzilotti and Hubert, stated before the same High Court of Justice, interpretations should not be considered when they go beyond the intention of the parties. Now, the intention of the Agency of the United States is to retain the addition made to subdivision 2 and consider as without any value the addition made to subdivision 5, which is altogether contrary to the intention

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of one of the Parties, if not of both of them, that admitted an addition as a condition to the other.

The foregoing considerations, in the opinion of the undersigned, clearly show that the forces referred to in subdivision 2 are the opposing forces to those that established a government *de jure* or *de facto*.

In the case of Orozco the Orozquista forces were opposed to a government and not to other forces that might have established a government *de jure* or *de facto*.

It is well known that Orozco rose in arms against the Government of Madero, and having controlled the State of Chihuahua and a small portion of the States of Coahuila and Durango, he was defeated by the forces of the legitimate Government that recovered control of the territory and routed the rebel forces.

The foregoing should be sufficient to show that the Orozquista forces do not fall within subdivision 2 and therefore, that the Mexican Government does not assume a direct liability for damages caused.

However, the examination of subdivision 5 leads to an identical conclusion, because it shows that such Orozquista forces fall within its terms in such wise that the Mexican Government does not assume liability for the damages that they caused, except in the case of lenity or omission.

The above-mentioned subdivision contains the following terms:

"(5) *Por motines o tumultos o fuerzas insurrectas distintas de las mencionadas en las subdivisiones* (2), (3) *y* (4) *de este artículo o por bandoleros, siempre que en cualquier caso se compruebe que las autoridades competentes omitieron tomar las medidas apropiadas para reprimir a los insurrectos, tumultos o bandoleros, o que los trataron con lenidad o fueron negligentes en otros respectos.*"

Now, such subdivision in making reference to the insurrectionary forces other than those referred to under other subdivisions of Article III, comprises insurrectionary forces other than those already mentioned.

What is the interpretation that can be attached to that term of "insurrectionary forces other than those referred to"?

If it be considered that it was intended to state that insurrectionary forces are different from those already mentioned, that all forces are revolutionary forces, then we must find out the meaning of the word "insurrectionist".

Now, an "insurrectionist" as distinguished from a "revolutionist" is one who has not succeeded, since, properly speaking, the revolutionist is the one who has succeeded.

The criterion to distinguish revolutionary forces is of three species: grammatical, legal and historical.

When making the grammatical study of the meaning of the word "revolution" in its political sense, the undersigned should begin by quoting the authorities in the language.

Webster's dictionary, in giving the meaning of the word "revolution", says:

"7. (Politics.) A fundamental change in political organization or in a government or constitution; the overthrow or renunciation of one government, and the substitution of another, by the governed."

On the other hand, the Dictionary of the Academy gives the following definition of the word "*revolución*"

"*Cambio violento de las instituciones políticas de una Nación. Mudanza o nueva forma en el estado o gobierno de las cosas.*"

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Grammatically, therefore, a revolution has two characteristics:

1.—The fundamental change of the political organization of a government or of its Constitution.

2.—That as a result of the revolution a government be substituted by another.

Authors confirm this grammatical interpretation, inasmuch as Halleck, in quoting Wiesse, calls wars of revolution those whose object is to obtain the freedom of a State or of one of its portions, and to that effect cites cases in which that freedom has been obtained (p. 5).

Decenciére Ferranciére, in his work on *The International Responsibility of the States*, quoting American authors, says: "The revolution from its beginning has shown a change in the people's will, a change that has crystallized in some form in its final outcome" (p. 137).

A rebel who has not succeeded, therefore, is one who has not established a government *de jure* or *de facto*, and from this point of view Orozco is a rebel. Admitting for a moment that it was meant to say in subdivision 5 that insurrectionary forces were not only those forces comprised in that subdivision, but also those comprised in the preceding subdivisions, one reaches the conclusion that the subdivision comprises those that did not succeed.

To be sure, high authorities in International Law consider that an insurrection is a general movement that comprises both the revolutionaries (that are such because of having established governments by virtue of their success) as well as other different insurrectionists, that is, those that did not succeed. Below are quoted unimpeachable authorities showing that the word insurrection has a meaning of general order and not a meaning of limitative order, such as, it seems, was contended by the Agent of the United States.

"*Insurrección*"—*Levantamiento, sublevación o rebelión de un pueblo, etc.*—(*Diccionario de la Real Academia.*)

"*Insurrecto*"—*Levantado o sublevado contra la autoridad pública.*—(*Diccionario de la Real Academia.*)

"*Insurrection*"—F., fr. L. *insurrectio*, fr. *insurgere*, insurrection. See Insurgent.)—1. Action or act of rising against civil or political authority, or the established government; open and active opposition to the execution of law in a city or state: .... usually implying less magnitude and success than there is in case of rebels recognized as belligerent.—(Webster's Dictionary.)

"*Insurrection*"—A rebellion of citizens or subjects of a country or state against its government.—(Bouvier's Law Dictionary.)

"*Insurrection*"— *L'insurrection est un soulevement général ou du moins dans des proportions redoutables contre un gouvernement dans le but de le renverser.*

On nomme "insurgé" celui qui prend part à l'insurrection.

La rébellion est le refus d'obeir à l'autorité, appuyé au besoin par la force; elle peut être le fait d'un individu aussi bien que de plusieurs.

Ainsi restreinte, l'insurrection mène à la guerre civile ou intestine, et en produit toutes les conséquences. (*Diccionario de Diplomacia y de Derecho Internacional de C. Calvo.*)

"*Revolution*" —A successful rebellion.—(Dictionary of Words and Phrases Used in Ancient and Modern Law, Arthur English, p. 699.)

"149 *insurrección*"—*Es el levantamiento del pueblo armado contra el gobierno establecido o contra una parte de este gobierno, o contra alguna o varias de sus leyes, o contra alguno o varios de sus funcionarios. La insurrección puede limitarse solamente a una resistencia armada, o encaminarse a fines más transcendentales.—Instrucciones a los ejércitos americanos en campaña, dadas por el Dr. Lieber.*)

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Rights and Duties of Foreign Powers as Regards the Established and Recognized Governments in Case of Insurrection

Article 1.—International law imposes upon third Powers, in case of *insurrection or civil war,* certain obligations towards established and recognized Governments, which are struggling with an insurrection.—(*Resolutions of the Institute of Interuational Law.*—Page 157.)

The Convention signed in Havana over Rights and Duties of the States in case of civil strifes—(already ratified both by the United States and Mexican Governments), considers synonymous in different articles: civil strifes, rebellion and insurrection. For example, in article III it refers to the insurrectionist ship equipped by the rebellion, from which it may be deduced that insurrection and rebellion are the same.

From this it follows, that if it be understood that insurrectionary forces were all those comprised in article III, those of subdivision 5 are different from those comprised in all the other subdivisions.

The interpretation given by the American Agency tends to render subdivision 5 ineffectual with reference to insurrectionists.

The United States Government established the difference between revolutionaries and insurrectionists, having done so upon submitting its draft of Treaty. (Art. XIV, page 24 of *La Cuestión Internacional Mexicano-Americana durante el Gobierno del General don Alvaro Obregón.*)

Can it be said that the generic term is *revolucionarios* and that it also comprises the insurrectionists of subdivision 5?—The undersigned does not think so. He deems that the generic word is *insurrectos,* revolutionaries being a subdivision of *insurrectos,* if one desires to interpret subdivision 5 in such manner that *insurrecto* is a generic voice that comprises successful insurrectionists (that is, revolutionaries) and unsuccessful insurrectionists. The reasons which he adduces are the following:

1.—To consider the word *revolucionario* as generic is contrary to the text of the Convention, because subdivision 5 speaks of "insurrectionary forces other than those mentioned in subdivisions (2), (3) and (4)" and does not speak of other revolutionary forces.

2.—Because that view is contrary to the view of the authors that consider the word *insurrección* in an unlimited sense and the word *revolución* in a limited sense.

3.—Because it is contrary to equity, since compensation would be asked for certain acts of insurrectionists (that is, when there would be insurrectionists opposed to revolutionaries before the establishment of a Government *de jure* or *de facto.*) The jurisprudence of the Venezuelan Commissions established that no compensation may be asked for unsuccessful rebels, as can be seen in a decision already quoted, the Mina de Aroa. The Venezuelan tribunals were courts of equity, and judging in accord with it, absolved the Venezuelan Government of any responsibility.

4.—The interpretation is contrary to the opinion of Mr. Warren, given before the Bar Association, since from it, it can be seen that Mexico assumed only liability for acts of revolutionary forces *apparently* opposed to other revolutionary forces and that the forces, which in his opinion, subdivision 2 referred to, were forces which were also successful. Under the erroneous interpretation that the undersigned is contesting, compensation would be awarded for forces completely opposed and not apparently opposed as well as for unsuccessful forces.

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Under any event, the interpretation in the case now under consideration could not signify any advantage to the contention of the American Agent, for even supposing (without admitting) that revolutionary forces were involved, they were not opposed to other revolutionary forces but to a Government *de jure*.

Finally, in case of doubt it must be considered that the Government did not assume responsibility for acts of revolutionaries, when these could also be considered as rebels. That is why the Nicaraguan Commission rejected responsibility for "insurrectionists" that took part in revolutionary movements that were unsuccessful and the Santo Domingo Commission stated, as a rule, that "the Commission does not consider responsible to the State for damages and injuries caused by revolutionists" who were unsuccessful.

The undersigned deems to have fully made clear the point relative to the Orozquista forces. At the same time, he declares that he does not wish to enter into an examination of the jurisprudence of the General Commission, because, although on the one hand he does not think to have settled jurisdictional questions of the Special Commission, on the other hand, he deems that the competent authority in the matter would be this Special Commission and none other. All this, without considering that particular precedents revoke general precedents and that posteriority revokes anteriority. (The Convention of the Special Commission was signed after the General Commission).

The undersigned does not wish to enter into details regarding the fact that Orozco issued a manifesto because such act, in his opinion, does not have any important significance, since the manifesto does not consist in merely writing it but rather in holding a particular intention, and Orozco, except overthrowing the Madero Government, did not have other aims. Besides, the fact of having a plan does not characterize a revolutionist. What characterizes him, from the viewpoint of the authorities, is that the movement should meet with success. All rebels may have a plan, but few of them succeed. The plan is a secondary element.

Neither are the foregoing considerations weakened by the fact that in some documents the word *revolución* appears, as it must be said that according to the text of the same (as in the message of President Madero to Congress) that word was taken in the same sense as the word *rebelión*. The statements made in the interior of the country cannot be considered to have been inspired in an *ánimo confitendi* and, therefore, do not have the force of an international confession. The doctrine that interior acts of this nature do not determine the responsibility of the State was resolved by the Senate of Hamburg in the *Croft* case, the 7th of February, 1856, between Great Britain and Portugal.

There are various notes of the United States Government which grant Orozco different denominations, but the decisive ones in this matter, are those that especially refer to Orozco's international character, that is, the note of the United States Government to the Government of Mexico, inserted in the one addressed by the Department of State to the United States Ambassador in Mexico, dated April 14th 1922, and the corresponding answer of the Secretary of Relations of Mexico.

Through them, the American Government assumed that Orozco was a rebel, and the Mexican Government establishing principles of International Law expressed its regret that the United States Government should have treated the rebel Orozco as if he had been exactly the equal of Mr. Madero's Government *de jure*, which policy was considered by Orozco as

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one that might bring about his recognition as a Government. Those notes are of great importance because they comprised the legal situation of Orozco from the point of view of both Governments.

With reference to the statement made by Mr. Lascuráin, Minister of Relations of Mexico, expressing the regret which had been caused to the Mexican Government by the fact that the United States Government should have officially addressed the rebel Orozco in an equal footing with the legitimate Government, the undersigned takes the liberty of stating that he considers the attitude of the Mexican Government as perfectly justified. Indeed, the condition of a friendly Government towards a stirred nation, should be that of completely ignoring the rebels, because "the insurrectionists do not exist so far as it (the Government) is concerned" (Vide, Bidau, page 196—*Public International Law*). "When an insurrection breaks out against a legitimately constituted Government, the foreign governments who seek to maintain with it peaceful relations, must carefully withhold themselves from any measure tending to exert the least influence in the interior of that country whose peace is altered". (Carlos Calvo, page 239, Vol. I of *Droit International*.)

Let us proceed to examine what was the situation of the matter, by virtue of the note transmitted to the legitimate Government and to Orozco:

First. The United States Government in the said note makes considerations of a general character, and expresses its criterion on the responsibility of the Mexican Government and the Mexican people, and thus, Orozco received a communication which referred to the Government and the people of Mexico, and not merely a simple verbal statement over a specified case of an outrage to a foreigner.—Second. The United States Government expressed to the Mexican Government that it had communicated with Orozco, and thus, it did not limit itself to Orozco's attention to a specific right.—Third. As if all this were not enough, as it appears from the telegram of April 17th, 1912, addressed by the American Consul in Chihuahua to the Secretary of State, the same Consul starts negotiations with Orozco over the status of Consuls and accepts a privileged situation granted by Orozco to these officials; and later, the same Orozco, in a telegram addressed to the Secretary of State, confirms the status of Consuls granting them the same prerogatives as they had before the Madero Government, in such manner that he considered them as accredited before him.

Consequently, it appears that the relations of Orozco with the Consul in Chihuahua were not simply of a representation or of a complaint, but they referred to a policy of a general order.

As if this were not enough, the situation is enlightened by the address of the President of the United States on March 14th, 1912, by means of which the exportation of arms to Mexico was prohibited, which signifies that the legitimate Government was prohibited the purchase of arms in the United States with the object of suppressing the rebels, even though this prohibition was no obstacle for the sale of arms, dynamite and powder to alien manufacturers who requested them, to such a degree that, as it appears from the note of April 13th, 1912, the United States Ambassador ordered the American Consul in Veracruz to express in the most emphatic manner to the authorities of the Port in the name of the President of the United States, that said ammunitions should be sent immediately, stating that the attitude of Port authorities was gravely suspicious. In other words, the United States Government not only declared itself neutral (which is the situation produced by the recognition of belligerence), but exerted its influence to allow the

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acquisition of arms by private residents within the territory under the control of the Government, and prevented the legitimate Government from acquiring ammunitions and ordered the delivery of official despatches to Orozco.

The advantage that is obtained by belligerance is to be able to deal directly with the rebels to whom recognition is extended. The undersigned believes that the statement according to which such negotiations are informal, is not sufficient to alter the facts. He, therefore, believes that the attitude of the Mexican Government in expressing its regret to the United States Ambassador was perfectly justified, specially if it be considered that Orozco felt encouraged in his rebellious attitude because of the facts above-mentioned.

10. DISPERSED SOLDIERS

The individuals that caused the death of Mr. Russell did not constitute a part of any formal group. They were two individuals not under the command of an officer. They went with the sole purpose of committing an act of robbery. They were in substance two individuals loosened from the main body of a larger group.

Under such conditions international law does not admit any responsibility against the respondent country. It will be sufficient to quote a few precedents:

Before the French-American Commission of 1884 the question was brought up in the case of *Louis Castelain* v. *The United States* (pages 104 and 105 of the Report of Mr. Boutwell, Agent for the United States), and there it was held that the assaulting soldiers were not considered as forming part of the American authorities, that is, of forces at the service of the Nation:

"The record showed that Castelain was engaged in the sale of groceries and small wares, and that his stock included a supply of spirituous liquors. On the evening of the 21st of April, 1864, a small number of soldiers belonging to the United States Army went to the house of the claimants for the purposes of obtaining, either by purchase or otherwise, a quantity of liquor. Castelain refused to furnish it, he having been warned that the sale of liquor to soldiers was contrary to the regulations of the Army. Upon the refusal of Castelain an attack was made by the soldiers, and he and his wife were seriously injured.... The claim was disallowed by the unanimous action of the Commission, and they say: 'This was a cruel and malicious attack upon the claimants, probably by some soldiers, from motives of personal revenge. We do not find any act committed by the authorities creating a responsibility on the part of the United States'."

Thorpe, *International Claims*, page 57, quotes several resolutions in the following manner:

"(h) Acts of men of Army and Navy.

"Adjudicated cases in arbitration have been favorable to a belligerent sovereign where soldiers committed injuries when unaccompanied by officers, or where officers were unable to enforce discipline." (Antrey Case, Cl. Comm. U. S. and Mexico, 1868; Moore Arb. 3672; Weil Case, id. 3671.)

In the Nicaraguan Commission, which was a Commission of equity, the President of the Commission, in his Report to the Government, stated the following:

"*Muchos reclamantes creyeron que cualquier hecho cometido por cualquier individuo de la tropa, aunque fuera delito cometido en contravención de toda ley y órdenes, causaba*

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responsabilidad al Gobierno, convirtiendo así a cada soldado raso en representante con plenos poderes del Gobierno." (Pág. 43 del Informe.)

The Commission with Germany, in the *Diener* case accepted the jurisprudence referred to, in the sense that no liability may be attached for acts of dispersed soldiers. This precedent is of importance because it deals with Conventions that are, practically, the same.

In this regard the undersigned begs to call attention to the fact that the Convention refers to "forces" and not to individuals which may not constitute a force (except in the case of mutineers or bandits). Therefore, it is necessary, at the outset, to begin looking up what is a force.

The authors, when speaking of forces, describe them in a precise form.

Fiore (*Nouveau Droit International Public*, volume 3, paragraphs 1306 and 1313) submits the following rules to distinguish armed forces (*force armée*):

1.—To have a responsible leader.
2.—To openly carry arms and make war in a loyal manner.
3.—To have a distinctive sign, permanent and recognizable from a distance, and in the absence of that sign to make prominent enough that such circumstance is not a medium to make war disloyally. Furthermore, the character of the combatants should appear clearly from their military conduct.

Article I of the Convention of the Hague (which was subscribed by the two High Contracting Parties) on July 29th, 1899, enumerates more specifically the same requirements.

11. CURRENCY IN WHICH PAYMENT MUST BE MADE

8. The undersigned Commissioner having dealt at great length on the subject of the responsibility of Mexico, and firmly believing that in this case it cannot be allowed, he deems it unnecessary to enter into considerations of the form in which payments are to be made. He simply limits himself, in this respect, and in order to leave record of his opinion in the matter, to state that in his belief any condemnatory decision cannot be awarded on any other basis than Mexican gold.

Indeed, Mexico is the respondent country and the obligation is to be met in its currency or its equivalent, with the sole condition that it must be in gold. The currency of the respondent country served as a basis for the resolution of the Court of The Hague in the case of the Pious Fund of the Californias, and that doctrine conforms with international law, with equity and with local American law, as confirmed by the opinion of the eminent publicist Brown Scott. (Vide *la Monnaie* en *Droit International. Paiements Internationaux.—Recueil des Cours*, 1929, II—No. 27, page 273).

The Presiding Commissioner, Dr. H. F. Alfaro:

The undersigned is in agreement, in substance, with the conclusions of the Honorable American Commissioner as regards the fact that the nationality of the claimants and their standing to prefer this claim, has been proven. He likewise holds, in accordance with what has been set forth by both Commissioners, that the facts which gave rise to the present claim have duly been proven, and that there are reasonable grounds for classifying the individuals who slew Hubert L. Russell as Orozquistas.

The Agents have, both in briefs and in oral arguments, discussed at length the question relating to the classification of the movement headed by Pascual Orozco against the Government that existed in the Mexican Repu-

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blic in 1912, there having arisen out of that controversy the issue—of capital importance in the present case—of determining whether the acts which culminated in the death of Russell fall within the stipulation of the Convention of September 10, 1923, for the purposes of grounding thereon a claim against the Government of Mexico.

This issue, as put to and upheld before the Commission, is reduced to the interpretation of subdivision 2 or Article III of the Convention cited above. It is evident that the divergence in its entirety arises out of the disparity of languages between the party respondent and the party demandant, and from the interpretation which they, in accordance with their respective languages, place upon the provisions they invoke by way of support.

The Commissioners of each nation, on their side, lean towards the points of view set forth by the respective Agents and propose conclusions agreeing with those stated by the latter. It is not the intention of the undersigned to analyse in detail the arguments and points of law set forth by his Honorable colleagues on this Commission, nor is it indispensable therefor, seeing that both of them have, from their respective viewpoints, exhausted the subject with their acknowledged ability.

From the discussion which arose in regard to the true meaning of the pronoun *them*, which is the final word of subdivision 2 of Article III, it results, according to the statements of the American Agent and from the opinion of the American Commissioner, that said pronoun is grammatically susceptible of several constructions, that is, that the said pronoun may be applied equally to the substantives *forces* and *Governments*. This last application is the one upheld by the American Commissioner, as he considers it the more correct grammatical construction in the English tongue.

From the foregoing it results that the English text of said subdivision 2 of Article III of the Convention is ambiguous or confused. This confusion does not exist in the Spanish text, which is perfectly clear and correct.

It has been alleged that in virtue of the declaration made by the American Commissioners at the conference at which the Special Claims Convention and the General Claims Convention were drawn up, at the meeting of August 15, 1923, preference should be given to the English text in case of doubt or divergence between the Spanish and English texts.

The last part of said declaration reads as follows:

"The negotiations connected with the formulating and drafting of the General Claims Convention and the Special Claims Convention were conducted in English. The texts of such conventions as hereinafter set forth in the records of these proceedings were prepared in English and are approved as the originals."

The conventions were signed twenty-six days later, in Spanish and in English, without any stipulation as to which of the two languages should prevail in the event of any divergence. But even assuming that the absence of such stipulation could give rise to doubts as to the interpretation of the above-mentioned Conventions, so as to make it necessary to determine which of the two languages should be considered as controlling, it should be taken into account that in the instant case there are data or circumstances that allow the issue to be cleared up.

It would, in that connection, seem to be helpful to consider the texts of the Conventions between Mexico and Germany, Spain, France, Great Britain and Italy, which contain exactly the same wording as the subdivision mentioned above. It must therefore be concluded that the translation made

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from the "original" English text of subdivision 2 of Article III of the Special Claims Convention is correct and represents the true intention of its negotiators. This conclusion is strengthened by the explanations given by the American Commissioner, Mr. Charles Beecher Warren, at a lecture read by him before the Bar Association of the United States of America and which has been quoted by the Agent of Mexico and by the Mexican Commissioner, if not as an element of evidence, at least as coming from a competent authority upon that particular subject and one of irreproachable character as regards impartiality.

The undersigned holds that in order to fix the responsibility of Mexico in this case it is not—as suggested by the American Commissioner—allowable to place a liberal and comprehensive construction upon the Convention, as this is conclusively opposed by the stipulation in Article III, which determines in a restrictive sense, what claims are the ones that the Commission must examine and decide, and which are none other than those which arose during the period from November 20, 1910, to May 31, 1920, inclusive, and were due to any act of the forces enumerated in subdivisions 1, 2, 3, 4 and 5 of Article III aforesaid.

It is, in the opinion of the undersigned, obvious that notwithstanding that the Mexican Nation expressed its desire to settle and amicably adjust claims arising out of losses or damages suffered by American citizens within the period from November 20, 1910, to May 31, 1920, inclusive, it wished to limit its responsibility—as stated under the second heading of Article II —to those losses or damages that were occasioned by any of the causes enumerated in Article III of the Convention. If it were otherwise there would be no reason for the existence of Article III.

The foregoing once laid down, the undersigned declares that he is substantially in accord with the exposition of the Honorable Mexican Commissioner, tending to show that the Government of Mexico should not be held responsible for the acts of the rebel forces of Pascual Orozco.

Decision

The claim presented by the United States of America on behalf of Naomi Russell, in her own right and as administratrix and guardian, is hereby disallowed.

Gonzáles Roa, *Commissioner:*

The undersigned agrees with the decision of the Presiding Commissioner making reference to what he has epressed previously.

Commissioner Nielsen, dissenting.

The reasons why I dissent from the decision disallowing this claim are indicated by the opinion which I wrote under the plan adopted by the Commissioners to express their views respecting the issues involved in the case. However, when I formulated that opinion I had not before me the views of the Presiding Commissioner nor those of the Mexican Commissioner.

To my mind questions of procedure raised in the case are very important, and I desire therefore to comment briefly on such questions, in relation to which my views evidently differ from those of the Presiding Commissioner and from those of the Mexican Commissioner.

The Convention of September 10, 1923, provides for a Commission of three members. The decision in each case must be reached, in my opinion,

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by discussion among those members respecting the question of liability or non-liability of the respondent government. The discussion of that question requires a comparison of the views of all the members and not solely a comparison of the views of the two Commissioners appointed, respectively, by each of the Governments parties to the arbitration. If such an interchange of views is to be effected, as was done in the instant case, to some extent by an exchange of written opinions, it seems to me that the Commissioners should have before them the opinions of all three members, and that the Presiding Commissioner should not refrain from expressing any views in writing until after the submission of written opinions by the other two Commissioners. The instant case was promptly dismissed following the preparation of the third opinion. The procedure followed in this case seems to me to conform in its fundamental features to that prescribed by arbitration treaties which provide for two Commissioners and an Umpire, rather than with that established by a Convention creating a Commission of three members. Undoubtedly the former may at times possess certain advantages, but the latter is that which is prescribed by the Convention of September 10, 1923.

The Presiding Commissioner states that he "is in agreement, in substance, with the conclusions of the Honorable American Commissioner as regards the facts that the nationality of the claimants and their standing to prefer this claim, has been proven", and that he "holds, in accordance with what has been set forth by both Commissioners, that the facts which gave rise to the present claim have duly been proven, and that there are reasonable grounds for classifying the individuals who slew Hubert L. Russell as Orozquistas". By "facts which gave rise to the present claim", I assume is meant the allegations of the American Memorial, and therefore it appears that ultimately there is no disagreement as to questions of evidence raised in the case.

The Presiding Commissioner states that the issue before the Commission is reduced to the interpretation of subdivision (2) of Article III of the Convention of September 10, 1923, and "that the divergence in its entirety arises out of the disparity of languages between the party respondent and the party demandant". To my mind this is too narrow a statement of even the jurisdictional issue apart from questions of nationality. That issue must be whether the claim is within the jurisdictional provisions of the Convention, and account being taken of the most specific provisions, whether the claim is within any of the categories enumerated in Article III and not only whether it is within sub-paragraph (2). It seems to me altogether too expeditious a method of rejecting the claim to consider only subdivision (2) of Article III. Both Agents discussed subdivision (5) of the Article. Certainly the claim is within some jurisdictional provision of the Convention. As has been pointed out in my other opinion, it is inconceivable that an arrangement, consisting of two treaties, for the settlement of all outstanding claims between the United States and Mexico since July 4, 1868, should provide for the settlement of all Mexican claims but exclude some American claims, so that not even jurisdiction is stipulated for their determination.

It is to me a strange disposition which the Presiding Commissioner makes of the case, according to his judgment, when he assigns the reason for disallowing it that Mexico's responsibility under the Convention is limited "to those losses or damages that were occasioned by any of the causes enumerated in Article III of the Convention". The United States, of course, made no contention contrary to that view. And obviously the United States cannot

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properly be considered to contend that the claim falls *outside* of Article III, when the United States contends that it is within sub-paragraph (2) of Article III.

It seems to me that the Presiding Commissioner indulges in the same strange line of reasoning when he says that he "holds that in order to fix the responsibility of Mexico in this case it is not—as suggested by the American Commissioner—allowable to place a liberal and comprehensive construction upon the Convention, as this is conclusively opposed by the stipulation in Article III, which determines in a restrictive sense, what claims are the ones that the Commission must examine and decide, and which are none other than those which arose during the period from November 20, 1910, to May 31, 1920, inclusive, and were due to any act of the forces enumerated in subdivisions 1, 2, 3, 4, and 5 of Article III aforesaid".

From the most casual glance at my opinion it will of course be seen that I have never even hinted at a suggestion that the Commission has power to decide claims other than those that grow out of acts of forces stated in sub-paragraphs (1), (2), (3), (4) and (5) of Article III of the Convention. Moreover, I am unable to perceive how there can be attributed to me any view to the effect that the Commission may pass on claims growing out of acts of forces other than those specified in the provisions just mentioned, when as a matter of fact I clearly submit the conclusion that the instant claim falls within one of those provisions, namely sub-paragraph (2) of Article III. I am, of course, therefore unable to perceive how the Presiding Commissioner can argue that my interpretation holding the claim to be within sub-paragraph (2) is wrong for the reason, which he states, that the jurisdiction of the Commission is limited to claims growing out of acts coming within sub-paragraphs (1), (2), (3), (4) and (5) of Article III.

Apart from the question of the broad jurisdiction which it seems to me is contemplated by the Convention as revealed not only by the jurisdictional provisions of Article III but by other jurisdictional provisions which it is proper to consider in construing the meaning of those of Article III, it is interesting to take account of the technical meaning of the expression "liberal" construction. From that point of view, the interpretation which I put upon sub-paragraph (2) of Article III may to my mind be called a "literal" interpretation, and the interpretation which the Presiding Commissioner uses when he concurs with the Mexican Commissioner must be regarded as extremely "liberal". I have indicated in my opinion the view that the meaning which my associates inject into the meagre language under consideration can only be evolved by a process of judicial re-writing of that language to the extent of the interpolation of very much more than is found in the provisions under consideration as the framers of the Treaty drafted them. As I have already pointed out, I consider that there is no justification in any sound principle of construction for such re-writing, or in other words, such liberal interpretation. It was this point which to my mind was controlling on the most vital issue in the case.

In relation to this point it is interesting to note the statement of the Presiding Commissioner that the English text of sub-paragraph (2) of Article III of the Convention is ambiguous or confused, and that the confusion does not exist in the Spanish text, which is perfectly clear and correct. I am unable to agree with those conclusions. On the one hand, I think it is obvious that, account being taken of grammatical construction, common sense meaning, and the general purposes of the Convention, the English text, without distortion or interpolation, conveys a definite meaning and expresses a

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reasonable purpose. I have discussed this point in my opinion. My views with respect to grammatical construction are not reflected by what is stated concerning them by the Presiding Commissioner. I think it may be said that both grammatical and legal interpretation are grounded on what may be called the principle of the "last antecedent", according to which relative and qualifying words, phrases and clauses are applied to immediately preceding words or phrases. On the other hand it seems to me illogical and incorrect to say that the Spanish text, *as construed by my associates*, is perfectly clear and correct, when as a matter of fact in order so to construe it they must resort to additions and odd interpolations—and I think it may be said—imagination. The confusion is emphasized when account is taken of sub-paragraph (5).

It seems to me that it is somewhat strange to say, as the Presiding Commissioner does, that it "has been alleged that in virtue of the declarations made by the *American Commissioners* at the conference at which the Special Claims Convention and the General Claims Convention were drawn up at the meeting of August 13 [15], 1923, preference should be given to the English text in case of doubt or divergence between the Spanish and the English texts". (Italics mine.) As a matter of fact the American Agent emphasized the identic declarations of the *Mexican Commissioners* and the American Commissioners. And the paragraph which the Presiding Commissioner quotes is a joint declaration of both sets of Commissioners and follows the separate declaration of the Mexican Commissioners which reads as follows:

"The Mexican Commissioners stated in behalf of their Government that the text in English of the special claims convention and the text in English of the general claims convention as hereinafter written as a part of these proceedings are approved by the Mexican Government and in the event that diplomatic relations are resumed between the two Governments these conventions as hereinafter set forth will be signed forthwith by duly authorized plenipotentiaries of the President of the United Mexican States."

Certainly in a situation in which it is desired to reconcile two texts or to explain a divergence of meaning in the texts—if indeed one exists—it is proper to refer to declarations such as those quoted above which were made in connection with the negotiation of the Conventions.

And to do that seems to me to be more useful than to consider the texts of certain other Conventions mentioned by the Presiding Commissioner which were concluded by Mexico with Germany, Spain, France, Great Britain and Italy. He states, not altogether accurately, that these Conventions "contain exactly the same wording" as that of the Convention between the United States and Mexico; and he draws the conclusion, the logic of which I am unable to perceive, that "the translation made from the 'original' English text of subdivision (2) of Article III of the Special Claims Convention is correct and represents the true intention of its negotiators".

Just what bearing the same, or the different though somewhat similar, language of certain Conventions concluded by Mexico with a number of countries has on the correctness of a Spanish translation of the English text of a Convention concluded by Mexico with the United States is not clear to me. Nor am I able to perceive in what way the fact that Mexico made some Conventions with certain countries other than the United States can show "the true intention" of the negotiators of a Convention made by Mexico with the United States. In my opinion a proper construction of the language of the Conventions made by Mexico with other countries would

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show the intent of the negotiators of those Conventions, and a proper construction of the language of the Convention made by Mexico with the United States would show the intention of the negotiators of that Convention. Possibly comparisons might be useful. The Presiding Commissioner in connection with his reasoning on this point refers to an address made by Mr. Charles B. Warren. A very small fragment of that address was read to the Commission. The Presiding Commissioner does not explain how, in his opinion, his views with regard to translation are supported by Mr. Warren's speech.

The reference made by the Presiding Commissioner to a Convention between Mexico and France seems to me in this connection particularly inapt. During the course of the oral argument in the instant case, the Mexican Agent read from an opinion of the Mexican Commissioner in the Mexican-French Arbitration who is also the Commissioner in this pending Arbitration between Mexico and the United States. It was developed, however, that the opinion from which the Agent read was one at variance with that of the two other members of the Commission. The Mexican Agent refused to produce the opinion or opinions of the other members. The Mexican Commissioner volunteered to produce it but failed to do so. Repeated requests on the part of the Agent of the United States failed to bring about its production. In the circumstances it seems to me that, instead of drawing the conclusion which the Presiding Commissioner submits, to the effect that the Convention between Mexico and France may be cited as supporting the Mexican Government's contentions in the instant case, it is natural to indulge in a strong presumption that the judicial construction of that Convention opposes those contentions and supports the contentions of the United States.

The Presiding Commissioner fails to mention the language or the numerous judicial interpretations of the so-called General Claims Convention concluded between the United States and Mexico. That Convention in terms is linked with the so-called Special Claims Convention and is a part of the general plan of the two Governments to settle all outstanding claims of each Government against the other since July 4, 1868. Certainly the language of that Convention and its construction by the Tribunal created by the Convention should be valuable in connexion with the interpretation of the so-called Special Convention.

Rule IV, 4, (c), provides that the Commission will not consider any matter of claim or defense not set forth in appropriate pleadings or amendments. Article II of the Convention of September 10, 1923, requires each Commissioner to make a solemn declaration "that he will carefully and impartially examine and decide . . . all claims presented for decision". Even if no such provision existed, it would seem that it is the obvious duty of Commissioners to act as Judges. Of course they must interpret the Convention of September 10, 1923, and deal with pertinent legal questions according to their best judgment. But the above-quoted provisions are proper limitations on their activities. And they must determine cases on the record, so that their action will not in effect be an *ex parte* disposition of a case precluding that hearing through representatives which the Convention secures to both Governments.

The Mexican Commissioner makes some observations, to me rather remarkable, with respect to questions of evidence. Perhaps since he concurs in the Presiding Commissioner's opinion it should be considered that the conclusions he submitted were largely if not entirely abandoned. However,

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his attacks on evidence used by the American Agency are to me astonishing in view particularly of the kind of evidence which accompanies the Mexican Answer.

I am constrained to express my astonishment at the manner in which the Mexican Commissioner makes use of a quotation from Vol. I of a recent work, *International Adjudications*, by the distinguished jurist John Bassett Moore. The Commissioner, it will be seen from the following excerpt from his opinion, undertakes to attribute to Judge Moore certain views respecting the lack of the value of affidavits as evidence in an international arbitration:

"To go further and to consider that this kind of proof is going to be the foundation for the greater part of decisions of a Commission means to take the risk of committing many injustices. At least Mr. Moore judges so in his recent work 'International Adjudications', Vol. I, which says: 'To receive any evidence *ex parte* and irregularly "is against general principles, and is fatal to the award."' (Page XXI.)"

This quotation from Judge Moore's work is not found on page XXI which is cited by the Commissioner, but at another place in the book In the passage in which the quotation appears (pp. XXXI-XXXVI) the author deals with the private settlement out of court of differences by arbitrators or referees. With reference to numerous citations, it is pointed out that arbitrators "must, unless they would have their award held void, strictly observe rules of procedure prescribed by statute or by the agreement of submission" that "the exercise of undue or improper influences, applied by one of the parties to one or more of the arbitrators, by separate conference, or other ways of approach, is a lawful defense to an action on the award". Arbitrators, it is said, "are not to consider themselves as representing separate parties, and the advocates of opposite sides". And in connection with such obviously elementary truths there is the statement quoted by the Mexican Commissioner that "To receive any evidence *ex parte* and irregularly 'is against general principles and is fatal to the award' ".

The passage in Judge Moore's work from which the Mexican Commissioner quotes is found under the heading of "Arbitration", the sub-heading "In Municipal Law", and the further sub-heading "American Law". The extracts which Judge Moore quotes in this passage are taken from an opinion of the Supreme Court of Massachusetts rendered in 1852 in *Strong* v. *Strong*, 63 Mass. (9 Cushing) 560. In that case suit was brought to give effect to a private award which had been rendered in connection with a dispute between two men in relation to the management of some agricultural property and some mills. The excerpts which are cited by Judge Moore, and one of which is reproduced by the Mexican Commissioner for the purpose of attributing to Judge Moore views respecting the evidential value of affidavits in international arbitrations, are found in passages of the court's opinion relating to the effect in English law on a private award of fraud, partiality or other misconduct.

The quotation reproduced by the Mexican Commissioner relates to an attempt on the part of one party to an arbitration corruptly to approach an arbitrator in an *ex parte* manner. The quotation is found in the following passages of the opinion:

"The leading modern case is that of *Walker* v. *Frobisher*, decided by Lord Eldon, 6. Ves. 70; to the effect, that if an arbitrator receive any evidence *ex parte* and irregularly, it is against general principles, and is fatal to the award.

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"In so deciding, Lord Eldon did but follow an already strong *set* of legal opinions. The greater prevalence of arbitration in modern times, while it has led the courts to adopt more liberality of construction regarding defects of mere form or honest errors, (see *Peters* v. *Peires*, 8 Mass. 398) has, at the same time, been followed by more strictness of judgment as to the character and conduct of arbitrators in the relation of impartiality and integrity, both in the equity and the common law tribunals.

"The doctrine in the case of *Walker* v. *Frobisher*, was afterwards affirmed by Lord Eldon himself in *Featherstone* v. *Cooper*, 9. Ves. 67, in which case he says, that arbitrators must understand 'that they are acting corruptly, acting as agents; and that their award ought to be set aside, where they take instructions or talk with one party in the absence of the other'. The same doctrine has been recognized as a sound principle by the courts of common law in England". (p. 572.)

Undoubtedly the perpetration of a fraud by a party to an arbitration by the irregular, *ex parte* presentation of some evidence to one or all arbitrators, should, generally speaking, invalidate any international award, just as it was explained private awards may be invalidated by such crude forms of corrupt methods.

The nature of the Mexican Commissioner's strange argument is doubtless made clear by the citations and explanations which I have made. From a most casual glance at the passage in the work of Judge Moore, it will be seen that he made not even the slightest reference to the subject concerning which the Mexican Commissioner says Judge Moore expresses certain views. And I hazard the suggestion that nowhere throughout the voluminous writings of the renowned jurist is found a statement by him indicating views such as are attributed to him by the Mexican Commissioner.

I shall comment but briefly on certain other observations made by the Mexican Commissioner respecting questions of evidence. In some respects it would be difficult for me to do more than that. For example, his opinion contains the following sentence:

"When affidavits were filed in innumerable cases before the Court of Claims of the United States, the Honorable President of the Union became alarmed, and thereupon suggested to Congress that witnesses should, as one way of preventing fraud, appear personally to testify before the Court."

Of course if there were innumerable cases filed, it would be impossible to cite all of them, but it should be possible to cite one, or at least to indicate where one might be found. This is not done by the Mexican Commissioner.

Further discussing the question of evidence the Commissioner says:

"In spite of the lack of seriousness of the evidence consisting of the witnesses examined without the citation of the opposing party, the undersigned, in view of the documentary evidence consisting of different communications from the authorities, and the admission of several facts by the Mexican Agents, he deems proven the following facts: first, that Mr. Russell was surprised in his ranch by a group of individuals; second, that the same Mr. Russell was assaulted afterwards by two individuals; and third, that Mr. Russell died as a consequence of this second assault."

It is not clear to me to what admissions of the Mexican Agent reference is made. The Agent denied that so-called "Orozquistas" killed Russell, and indeed he asked the Commission to find that Russell killed himself. If the Commissioner here refers to Mexican so-called evidence when he speaks of a "lack of seriousness of the evidence", his characterization may in a sense be proper. This, however, is true, in my opinion, not because

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Mexico failed in the present, as well as in all other cases, to cite the United States to be present when certain testimony was taken. Neither Government has taken such action, so obviously impracticable in the present arbitration. The testimony submitted with the Mexican Answer was analysed to some extent in my opinion and in greater detail by the American Agent in his oral argument. Undoubtedly it reveals a lack of seriousness. But considering the methods employed to procure it, the persons from whom it was taken, and the character of the things they said, it can not, in my opinion, properly be said that there is not a serious aspect to the presentation of such so-called testimony to an international tribunal. Unsatisfactory situations frequently arise in connection with questions of evidence before such tribunals. However, the evidence accompanying the American Memorial at least reveals earnest—and undoubtedly it may be said with regard to the instant case—successful attempts to obtain reliable information concerning facts upon which conclusions of law could be predicated.

With respect to certain things which were read during the course of oral argument by the American Agent from an American public document and a Mexican public document in relation to the so-called Bucareli Conferences which were held in Mexico in 1923 and which are referred to in my previous opinion, the Mexican Commissioner in his opinion states:

"The undersigned states he considers extremely abnormal that portion of the negotiations relative to the Convention should be brought up, without having been presented as proof. Proof has never been rendered in this particular and if it had been so, the undersigned would have been opposed to it supported by precedents of high merit, among others, the English rule to the effect that the preliminary activities should never be taken into consideration, and on Article 1341 of the Napoleon code."

The Commissioner quotes in his opinion certain things which he stated during the course of oral argument with respect to these conferences. However, the Commissioner also stated many other interesting things which he does not quote.

Doubtless extracts from the records of the conferences might have accompanied the Memorial as evidence. And if they had been so used, conformably to the Convention of September 10, 1923, the Mexican Commissioner would not, in my opinion, have had a right to object to their use. I am unable to understand, in view particularly of things which the Commissioner, in the course of the oral argument, stated with respect to these conferences, why he should have objected to the reading from public documents dealing with well known events. Among all the rules that have been invoked and applied with respect to interpretation of treaties *when interpretation is necessary*, there is probably none which has been invoked more frequently than has that with respect to the use of the negotiations leading up to the conclusion of a treaty. The Commissioner, while objecting to the use of these records, stated that the transactions they record were confidential. As a matter of fact undoubtedly those records and the transactions recorded therein are probably as well known as any that have entered into the relations of the two countries in time of peace. The Commissioner, while deprecating the use of these public documents, declared that there *were subsequent negotiations* and also *prior negotiations*, although no such things appeared in the record of the instant case.

As against the use of these records, the Commissioner cites an excerpt from the opinion of a court which found that there was *not need of interpreting* on account of the clearness of the text before it. Of course, it is impro-

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per to interpret when there is no need of interpretation. But a mass of judicial pronouncements and pronouncements of authorities on international law can be cited to support the rule I have mentioned. The subject is discussed in my opinion.

The Commissioner, in arguing during the course of oral argument that the Bucareli Conferences had no official character, pointed out that diplomatic relations had not been restored at the time when these Conferences took place. To be sure the powers which the Commissioners to the Conferences had were not described in technical terms as those of plenipotentiaries But certainly the Governments when represented in conference by delegates named by the President of each country were in some kind of relationship. And it is interesting to note that, while the Mexican Commissioner argues that the conferences must be regarded as unofficial because of the absence of diplomatic relations, at another time insists that, even prior to the relationship established by the conference of Commissioners, there could be, or as he puts it, there were negotiations between the two Foreign Offices of the Governments.

In view of the difficulties of questions of jurisdiction, and in view of the reference to things not in the record, and in view further of the well known principles of interpretation in relation to the use of negotiations leading up to the conclusion of a Treaty, the American Commissioner suggested that, if there were in the Foreign Offices of the two Governments things such as had been referred to outside of the record, it might be desirable that matters of that character should be furnished as evidence by either or both Agents.

And with respect to the suggestion made by the Mexican Commissioner as to the impropriety of making use of such evidence for purposes of interpretation, I made a brief observation which perhaps it may be proper to quote, in view particularly of the fact that the Mexican Commissioner has quoted at length from some of the things which he said during the course of oral argument. I made the following observations:

"I did not want to make any improper remark. I hope it was not construed as such when I referred to those things. I should think that since Dr. Roa himself referred to them, although they are not before the Commission, he would regard them also as pertinent matters to consider if they should be put into the record so that the rest of us could refer to them. But I realize that there may be some divergence in views as to whether their production and use would be proper."

With reference to a point of interpretation the Mexican Commissioner in his opinion undertakes to recall with respect to the Government of Sr. Carranza and other Governments the following:

".... the United States recognized the said government with the character of a *de facto* government and that some times, the governments of de la Barra and de la Huerta have been deemed as governments *de facto* by American writers. In order to avoid all kinds of discussions with regard to this particular and needing the agreement of the two High Contracting Parties, the Convention makes reference to the American distinction."

Similar statements were made by the Commissioner during the course of oral argument. No records have been furnished with bearing on these recollections, and no American writers have been cited.

In connexion with the discussion of the subject of nationality, the Mexican Commissioner advances an argument to which able and resourceful counsel did not resort. It is said that according to Article XXX of the

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Mexican Constitution of 1857 (not now in force) Russell, the man who was murdered, and all the members of his family became Mexican citizens, because a child was born to his wife while she was temporarily in Mexico in the year 1909. That Article provided that aliens who acquired real estate in Mexico or had children born there, were Mexicans if they did not declare their intention to retain their nationality. It is said that it has not been proved that Russell "manifested his resolution to retain his nationality". In connexion with this argument with respect to a law of this kind it is said that foreigners are given the opportunity to keep their nationality. It is further said that it "does not matter that the Russell family had regained the American nationality (if it ever regained it) because it is sufficient that during any length of the time since the damage was caused until the date of the decision, any person had had the nationality of the defendant government to prevent the right to claim". The conclusion is submitted that "the Commission must excuse itself from taking cognizance of this case". It is further said, however, that "it is a case of dual nationality".

I am unable to understand this kind of reasoning. I do not perceive how there can be dual nationality if the Russell family lost American citizenship. Neither do I perceive how there can be any question of regaining American nationality when obviously the surviving members of the Russell family are native Americans, as was Russell, and none ever lost American citizenship by virtue of the operation of American law. Nor can I understand how the Mexican Commissioner, if he holds such views respecting the absence of American nationality, can agree with the two other Commissioners that, as stated by the Presiding Commissioner, "the nationality of the claimants and their standing to prefer this claim, has been proven". And I do not comprehend how there could properly be any consideration of this claim on its merits, if the Commission had not, as the Mexican Commissioner argues, power to take cognizance of the claim because of the absence of American nationality.

Generally speaking, the law of nationality is a domestic affair. But questions of nationality interestingly enter into international relations, and there is the highest authority to support the view that at least in two respects international law is directly concerned with the subject.

Dr. Oppenheim states the following general principle of the law of nations with regard to the status of persons in ceded territories:

"As the object of cession is sovereignty over the ceded territory, all such individuals domiciled thereon as are subjects of the ceding State become *ipso facto* by the cession subjects of the acquiring State." (Oppenheim, *International Law*, Vol. I, 3rd edition, p. 381)

With respect to international law in relation to a prohibition against the imposition of nationality on sojourning aliens against their will, Dr. Hall says:

"It is unquestionably not within the competence of a state to impose its nationality in virtue of mere residence, of marriage with a native, of the acquisition of landed property, and other such acts, which lie wholly within the range of the personal life, or which may be necessities of commercial or industrial business. The line of cleavage is distinct between the personal and the public life. Several South American states have unfortunately conceived themselves to be at liberty to force strangers within their embrace by laws giving operative effects to acts of a purely personal nature." (Hall, *International Law*, 7th edition, p. 226)

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If the two other Commissioners should have joined the Mexican Commissioner in his contention and the claim should have been dismissed by virtue of such contention, then the United States would have had no opportunity to be heard with respect to what would have been the controlling point in the case; that point was nowhere raised in any pleading or in briefs or in oral argument. The Commissioners would in effect have been in the situation of persons, who while they were supposed to act as judges would also have acted as counsel in some *ex parte* proceeding. Moreover, in order to sustain this contention, they would have had to take some *ex parte* testimony or, as the Mexican Commissioner evidently does, dispense with testimony and presume its existence.

He declares that it has not been proven that Russell manifested intention to retain his nationality. But neither has the reverse been proven. There is nothing in the record bearing on the question whether Russell did or did not make an election such as was contemplated by the Constitution of 1857 and by Article I of the Law of 1886 which evidently carried out the intent of the Constitution. It is assuredly a sound principle that when the decision on a plea to the jurisdiction is dependent on a question of evidence, the party denying the jurisdiction must produce evidence conclusive with respect to its contentions. Moreover, in view of the provisions of the Constitution of 1917 which is also concerned with what might roughly be termed an election, it seems to me to be doubtful that the abrogated Constitution of 1857 governs that matter.

To be sure, the view may well be taken that the Commission may itself raise a jurisdictional point at any time in a proper manner. But the point which the Mexican Commissioner raises is not one of jurisdiction, because there is no question that Russell was a native American or that his wife and children were born American citizens. The Commission therefore has jurisdiction. The issue raised by the Mexican Commissioner is whether the fact that a child was born to Mrs. Russell in 1909 worked a forfeiture of rights accruing to her and her children under a Treaty concluded about fourteen years later between the United States and Mexico. If the situation of dual nationality existed, then if the present arbitration had provided that cases should be decided in accordance with international law, a question might have been raised with regard to the right of the United States to press the claim.

But the cases before this Commission are not to be decided according to international law. There is nothing in the Convention of September 10, 1923, that deprives the survivors of Russell from the benefits of rights secured to them under the Convention, because a child was born to Mrs. Russell while she was temporarily in Mexico in 1909.

It may be interesting to consider whether there is not a concept of Mexican citizenship better than that underlying the Mexican Commissioner's arguments. I think that the privilege of nationality may be considered the highest one which a nation confers. Does Mexican law bestow it on a man simply because he buys land in Mexico, or because a child is born while his wife may temporarily be within Mexican jurisdiction?

Contentions such as those under consideration were effectively disposed of in the *Rau* case before the Mexican-German Commission, Case No. 13, under the Convention concluded March 16, 1925. The very positive rejection of the contention that the birth of a child or the acquisition of real estate in Mexico deprived a person of his rights of nationality was participated in by the Mexican Commissioner, the German Commissioner and

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the Presiding Commissioner. A distinguished Mexican, Ignacio Vallarta, was quoted by the Commission at great length. Writing in 1880, he expressed what seems to me to be a higher concept of the dignity of Mexican nationality, as is shown by the following extracts from the long quotation which the Commission makes:

"More than sufficient are these natural suggestions of simple good sense, in order to condemn as absurd the meaning which it should have been desired to give to the supreme text, by stating that every alien who is the owner of real estate and who does not take oath to preserve his nationality, is at once converted into a Mexican. It is not interpretation but destruction, by making ridiculous and odious the law which under the pretext of obeying its literal sense, is put into contradiction with the dictates of reason and the requirements of justice; that by forcing it to pass as liberal it is divorced from the spirit animating it and from the very principles which it has attempted to sanction....

"It is very evident and should be even for the most obscure mind, that it cannot be understood as meaning that it would impose an enforced nationality upon aliens, punishing them by forcing them to lose the nationality of their origin provided that upon acquiring real property do not manifest their decision to conserve their own nationality. The manifest spirit of our text far from wishing to decree any penalty, on the contrary desires to grant to the alien a favor by offering him the advantages of a complete assimilation with its nationals. This, being evident, does not need demonstration, just as the contrary assertion, being absurd, does not require to be refuted; to consider nationality as a punishment, is an absurdity which does not exist even among savages." (*Exposición de Motivos del Proyecto de Ley Sobre Extranjería y Naturalización*, pp. 34—35.)

Another contention which the Mexican Commissioner makes and which was not advanced by counsel for Mexico appears to me likewise to be a remarkable one. It is said "that it cannot be supposed that the Government of Madero was a Government established as a consequence of a revolution", and it is further asserted that that Government "was a Government *de jure* established by virtue of a perfect election". While it may be conceded that there was a perfect election in the days of President Madero, it is difficult for me to accept seriously a contention that the unhappy period of civil war from the time Mr. Madero took up arms in 1910 to the time when he succeeded in overthrowing the Government of President Díaz had nothing to do with the establishment of the Madero Government which, it is argued, must be considered as having its origin in a perfect election. And I will not attribute to the framers of the Convention of September 10, 1923, an idea that the purposes of the Convention can be given effect through such a method of reasoning.

My previous opinion probably contains some observations bearing on the views which the Mexican Commissioner expresses in respect of the controlling effect of Mexican law relative to the rights of persons to recover damages and relative to indemnities sanctioned by Mexican law. Matters of this kind are of course governed by international law before tribunals required to apply that law. And in the present case they are controlled by the Convention which determines responsibility and requires that the cases shall not be determined in accordance with international law. No nation can conveniently explain that, because its local laws forbid indemnities, it is not liable for damages in cases coming before international tribunals. It would indeed be a convenient method for a nation to employ to relieve itself from responsibility *under international law or under treaties* by simply explaining the absence of responsibility under its own law. The

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position of members of the family of nations is not such that reliance can be put on expedients of that kind. If a State desires to maintain a position among the members of the family of nations, it must meet its obligations under international law and under treaties, and not expect to enjoy the advantages of that law and of treaties, while explaining that *its domestic laws* relieve it from international responsibility.

The Mexican Commissioner, in dealing with this point, refers to the *Canadienne* case in the Arbitration between the United States and Great Britain under the Special Agreement of August 18, 1910, American Agent's *Report*, p. 427. He stresses the reference by the Tribunal in that case to the *lex loci delicti commissi*. But of course the Tribunal did not invoke the *lex loci delicti commissi* with respect to the responsibility of the United States *under international law* for damages caused by an American public vessel. Such responsibility under the law of nations is of course well established. Bequet's *Repertoire du Droit Administratif*, 25 p. 175; case of the *Madeira*, Moore, *International Arbitrations*, Vol. 4, p. 4395; case of the *Confidence*, *ibid.*, Vol. 3, p. 3063; case of the *Sidra* in the American and British Arbitration under the Agreement of August 18, 1910, American Agent's *Report*, p. 453; case of the *Lindisfarne*, *ibid.*, p. 483.

It was in dealing with the question of admiralty law to determine which vessel was guilty of faulty navigation that the Tribunal deemed it to be proper to have recourse to the *lex loci delicti commissi* and gave application to the International Rules of the Road applying in 1897 on the St. Lawrence River between Montreal and Quebec.

In connection with this argument with regard to the controlling effect of local law, the Mexican Commissioner advances what is to me a seemingly very strange contention, namely, that aliens can never enjoy privileges different from those of nationals. The fallacy of this concept has of course been pointed out so frequently that I think no comment is necessary.

Conformity by authorities of a Government with its domestic law is not conclusive evidence of the observance of legal duties imposed by international law or treaties, although it may be important evidence on that point. Acts of authorities affecting aliens can not be explained to be in harmony with international law merely because the same acts are committed toward nationals. There is of course a clear recognition in international law, generally speaking, of plenary sovereign rights with respect to matters that are the subject of domestic regulation within a nation's dominions. But it is also clear that domestic law and the measures employed to execute it must conform to the supreme law of members of the family of nations which is international law, although there are certain subjects the domestic regulation of which can in nowise contravene that law.

Arbitral tribunals have repeatedly awarded indemnities in favor of aliens because of mistreatment in connection with imprisonment. It has been no defense in such cases that nationals suffered the same or similar mistreatment. Indemnities have been awarded because of lack of proper protection of aliens or of inadequate measures for the apprehension and punishment of persons who have committed wrongs against aliens. It has not been considered to be a proper defense in such cases that no better police or judicial measures were employed in cases affecting nationals. The question at issue in such cases is whether or not the requirements of international law have been met. Indemnities have been awarded because of injuries suffered by aliens as a result of the acts of soldiers or of naval authorities. It has been no defense in such cases that the Government held responsible

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afforded no redress to nationals for tortious acts of authorities. Precedents of diplomatic and judicial action illustrating the general principle could of course be indefinitely multiplied

The Mexican Commissioner uses without definite citation a quotation which it is said is found in Bouvier's Law Dictionary. He states that "according to Bouvier's dictionary, equity consists in 'equal justice between the contradicting (sic) parties' ". Whatever may be the application of this quotation or purported quotation to issues in the instant case, it seems scarcely to be necessary to observe that this Commission is not called upon to apply the system of equity jurisprudence that arose in the English Court of Chancery in the exercise of extraordinary functions. And on the other hand it may be observed with reference to the citations which the Commissioner makes in another part of his opinion relative to provisions of Mexican law with respect to evidence, that this Commission is not a Mexican domestic court governed by Mexican procedure, but is an international court whose proceedings are regulated by a Treaty and by international practice.

The Mexican Commissioner discusses the steps taken by an American Consul in 1912 with a view to the protection of his nationals. With respect to the action of the Consul in communicating, in a serious emergency, under instructions from the Government of the United States with local *de facto* authorities, the Mexican Commissioner states that he "believes that the attitude of the Mexican Government in expressing its regret to the United States Ambassador was perfectly justified". No explanation is given, so far as I can see, as to the bearing of these views relative to matters of etiquette or international practice on the legal issues involved in the instant case.

The references to rules of international law relative to responsibility for acts of soldiers committed in their private capacity, and for acts of insurgents, seem irrelevant in the instant case, since according to Mexico's desire all cases coming within the jurisdiction of the Commission must be decided as declared by the Convention without reference to international law, and in accordance with provisions of the Convention of September 10, 1923.

I have pointed out that the Presiding Commissioner has postulated certain views which neither the American Agent nor I expressed. Therefore his opinion in rejecting *such* views can have no bearing on the question of the correctness or incorrectness *of the conclusions which we expressed* with respect to the question of Mexico's responsibility in the instant case.

I think I have shown that, since he deals with but one of the points involved in the question of jurisdiction raised in the case, and since there are other points of which obviously account must be taken, there being no question that the claim is within some jurisdictional provisions, clearly no satisfactory reason is given for refusing jurisdiction.

I have touched on some of the points in the Mexican Commissioner's opinion which perhaps are not covered in the opinion which I previously wrote conformably to the plan adopted by the Commission for the disposition of the issues raised in the case. I have stressed my discussion of arguments and other matters in the Commissioner's opinion which appear to be entirely outside of the record.

Since the Mexican Commissioner finally states that he concurs in the conclusions of the Presiding Commissioner on the jurisdictional point which the latter discusses, it appears to be clear, in view of what has been pointed out with respect to those conclusions, that the Mexican Commissioner did not adopt any satisfactory basis for his final conclusions.

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In other words, he agreed to the rejection of certain hypothetical views, leaving undisposed of the real contentions advanced by the American Agent and my own views sustaining those contentions. In making this statement of course I have in mind the scope of the Mexican Commissioner's concurrence apart from those points in which it relates to proof of nationality and other matters of evidence. I think I have shown that this final concurrence with the Presiding Commissioner is in contradiction of a great mass of things which he (the Mexican Commissioner) has stated in his opinion.

It can probably be correctly said that no intensely difficult issue has been raised in this case. However, I think that the opinions of Commissioners dealing with the contentions advanced by the two Governments show that the solution of all questions with respect to the scope and effect of relevant provisions of the Convention of September 10, 1923, is not so extremely simple that it may be found solely in the inflection of a pronoun in one of the texts of the Convention.

SUPPLEMENTARY OBSERVATIONS BY THE MEXICAN COMMISSIONER, FERNANDO GONZÁLEZ ROA, IN REGARD TO THE DECISION IN THE RUSSELL CASE

The undersigned has had before him the document recently filed, under date of June 20th of the current year, in the form of a dissenting opinion in the Russell case, by the Commissioner of the United States. The undersigned considers that it is his duty, as Mexican arbitrator, and as an honest man, to make certain observations on the understanding that he will confine himself to clarifying or correcting any statements referring to himself, as it having been agreed during the discussions, that he would state his opinion in writing so as to give form to the judgment, and that whether the result were his conformity or inconformity, he would merely place on record his concurrence or the fact of his dissenting, confining himself to what had previously been said, the undersigned does not, in a subsequent document, wish to argue those points on which he did not have the honor of concurring with the Honorable President of the Commission.

The present document will follow the same order as that adopted by the judgment.

PROCEDURE

1. The undersigned has been surprised by the arguments advanced by the Commissioner of the United States, to the effect that the procedure followed is, under the Convention of September 10, 1923, irregular, as the President should abstain from stating his points of view in writing until after knowing the opinions of the other two Commissioners. The undersigned has not found, either in the Convention or in the Rules, anything forbidding the method adopted in drawing up the judgment in this case. Rather is it otherwise, there is the antecedent that the International Boundary Commission, Mexico and the United States, as extended by the Convention of June 24, 1910, lays down in article III a system identical to that of the Special Claims Convention. In spite of this, the *Chamizal* case was first voted upon by the Commissioners appointed by the parties, and after that by the Third Commissioner, the votes on each one of the questions having been taken on the understanding that the Commissioners of the Parties had stated the reasons they desired before being acquainted with the opinions of the Third Commissioner. Notwithstanding the fact that the Agent of the United States filed a protest at that time against the decision, and alleged

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all those reasons which he deemed relevant, he did not mention the observation now made by the American Commissioner.

2. The undersigned holds that the attitude of the American Commissioner in formulating a dissenting opinion, from Washington, cannot be reconciled with that of the Government of the United States, which has considered any proceedings by the Commissioners outside of the place stipulated in the Special Claims Convention, as illegal.

3. According to clause 4 of Rule XI of the Rules of Procedure, whenever any member of the Commission dissents from an award he is to make and sign a dissenting report. There is no rule authorizing a Commissioner to make a dissenting report in regard to the opinion of another Commissioner who did not form part of the majority upon any given point. The undersigned holds that as regards certain points on which he did not have the honor of concurring with the Honorable Presiding Commissioner, and as to which the President and the American Commissioner were in agreement, that the latter cannot make a dissenting report under the procedure stipulated. He is, of course, free to make such criticisms as he may think fit, but not under the Convention and the Rules.

4. Lastly, the undersigned finds that it is impossible to reconcile the character of judicial decisions with the peculiar form of the document filed.

INEXACTITUDES IN THE DISSENTING OPINION

A considerable portion of the document is based on erroneous assertions. In that connexion, the undersigned inserts the relevant portion of a rectification made by the Mexican Agent, and filed with the Secretaries.

"On page 14 of his Dissenting Vote, Mr. Nielsen clearly insinuates that the Mexican Agency did not admit any of the facts in claim No. 44, as had been stated by Licenciado Fernando Gonzalez Roa.

"Mr. Nielsen is reminded of the following facts, admitted by the Mexican Agency: that on September 29, 1912, there was shooting on the 'San Juan de Michis' ranch, between Russell and two men; that Russell was wounded in the stomach during the shooting, without its being known for certain who had fired first; that Russell died after being wounded in the abdomen, although it is not known whether that was the wound that caused his death or another one found in his forehead and which nobody knew how it had been caused; that the Governor of Durango was asked for protection; that next day, in the morning, on being informed of the facts, the Governor of Durango sent forces to protect the 'San Juan de Michis' ranch. Finally, the Mexican Agency admitted Mr. Russell's death, notwithstanding the fact that no Death Certificate from the Civil Registry was produced in the record and in spite of its not having been shown that the books of the Civil Registry had disappeared or were mutilated.

"On pages 18, 19 and 20 of the Vote, Mr. Nielsen states that the Mexican Agency did not, in oral argument, challenge Mr. Russell's nationality, in accordance with Art. 30, Subdivision III, of the Mexican Constitution, 1857.

"This is not so. The Mexican Agency did raise objection to this point. (See pages 9, 10 and 11 of the shorthand version of the Fifteenth Sitting held on the 26th March, 1931.)

"Mr. Nielsen states on page 22 of his vote, that in the judgment pronounced in claim No. 13, Enrique Rau, in the Mexican-German Claims Commission, the three Commissioners rejected the argument that the birth of a son or the acquisition of real estate in Mexico confers Mexican nationality.

"This is not exact, either Mr. Fernando Iglesias Calderón, the Mexican Commissioner, in the Rau case and others, has always, on this point, decided

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in favor of the proposition upheld by the Mexican Agency. The following is a transcript of the relevant part of the judgment:

" 'Mexican Commissioner: I agree with the decision in the proposed judgment and *dissent*, for reasons to be stated in my separate opinion, *from the decision given in regard to Subdivision III of Art.* 30 *of the Political Constitution of* 1857'.

"On page 23 of his Vote, Mr. Nielsen stated that the Mexican Agency had never averred that the Government of President Francisco I. Madero emanated from a popular election and not as a result of a revolution.

"This is not so. (See paragraphs 32 to 37 in the Brief of the Mexican Agency, presented in this very claim.)

"Finally, Mr. Nielsen stresses the fact that the Mexican Agency quoted the Vote of the Mexican Commissioner on the Mexican-French Claims Commission in connection with the *Pinson* case, and yet this Vote and the opinion of the other Commissioners have never been shown either to the Agent or to the Honorable Commissioner of the United States notwithstanding their having asked for them several times.

"The Mexican Agency did not, properly speaking, invoke Dr. González Roa's opinion in the *Pinson* case, *but only the authorities and precedents therein quoted,* and they were read from that opinion solely for the sake of convenience i. e., so as not to take to the sitting all the books and documents from which opinions and precedents were taken.

"On several occasions, also for the sake of convenience Mr. Bouve did not take with him to the meetings books or original documents, but simply read his quotations from notes prepared beforehand, confining himself, at the hearings, to stating the title of the books and the pages on which the quotations were to be found.

"Neither Mr. Bouve nor Mr. Nielsen can complain of not having had the opportunity of examining the quotations read by the Mexican Agency from Dr. González Roa's Vote in the *Pinson* case, for as regards these quotations, the names of the books and authors, as well as the pages, were given, and the short comments were inserted in full in the shorthand version which was in due course, distributed among the Members of the Commission. (See pages 23, 24 and 25 of the shorthand version of the Twelfth hearing, held on the 25th March last.)

"The Mexican Agency has found itself in the painful necessity of making these rectifications, so that it may not be thought there is on its part any tacit admission of inaccurate facts."

The above relieves the undersigned from enlarging unnecessarily upon this and from defending himself against the charge of considering, officially and *ex parte*, questions that are irrelevant.

THE LEX LOCI DELICTI COMMISSI

The Commission of the United States has called attention to the fact that the undersigned invoked the *lex loci delicti commissi*. He explains that said law is not applicable under international law.

The undersigned cannot see how this assertion can be consistent, and still less why any given precept of that law should not, when in accordance with equity, be applied: as though it were not possible for equity and law to be in accord seeing that international law cannot be considered as an assemblage of iniquities.

Aside from this, the fact has been overlooked that under the Convention, not only equity, but justice as well, must be applied, and justice is nothing other than the application of the law, according to the celebrated decision in the *Aroa Mines* case, as formulated by an illustrious American Umpire.

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In spite of the obvious contempt with which the United States Commissioner looks upon the quotation from Thorpe, an American authority, in regard to application of the local law, the undersigned wishes to insist upon this particular point in order to point out that that publicist has, in support of his proposition, relied upon the following very weighty American authorities which he mentions. Furthermore, the aforesaid writer has done nothing more than transcribe an administrative decision of the American-German Claims Commission, and this will not, I assume, meet with the same contempt on the part of the Commissioner of the United States.

"All issues with respect to parties entitled to recover, as well as issues involving the measure of damages, are determined, not by the law of the domicile of the deceased, but in private or municipal jurisprudence by the law of the place where the tort was committed.—(*Spokane & I. E. R. Co.* v. *Whitley*, 1915, 237 U. S. 487, 495, 35 Sup. Ct. 655, 59 L. Ed. 1060, opinion by Mr. Justice Hughes; *Northern Pac. R. Co.* v. *Babcock*, 1894, 154, U. S., 190, 197-199, 14 Sup. Ct. 978, 38 L. Ed. 958, opinion by Mr. Justice White; *American Banana Co.* v. *United Fruit Co.*, 1909, 213 U. S. 347, 356, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas 1047, opinion by Mr. Justice Homes; Story on Conflict of Laws, 7th edition, 1872, section 307; Wharton on Conflict of Laws, 32d edition, 1905, section 478) here by the law of nations and the application of the governing principles above announced.—(*International Claims*, George C. Thorpe, pp. 69-70.)"

This doctrine is not, therefore, Thorpe's own invention but that of a Commission on which a majority of the Commissioners was composed of eminent American jurists.

The United States Commissioner rejects the citation relating to the *Canadienne* case, which contains a reference to the *Sidra* case, and argued that it was merely an Admiralty question, and therefore, that the precedent of application of the *lex loci delicti commissi* would not hold good in the instant or Russell case.

The undersigned does not see how a principle applied in admiralty cases cannot be applicable to any other case. The precedents set by the American-German Claims Commission, mentioned above, are absolute proof to the contrary.

It was not in that case, as assumed by the United States Commissioner, merely a matter of Conflict of Laws. If England and the United States submitted to a Court of Arbitration the question of responsibility for a collision due to the act of their own officers, it was because it was a matter of Public International Law, as both nations would otherwise have violated their own sovereignty by submitting a purely private question to an international tribunal.

The resemblance existing between the responsibility it is now sought to exact from Mexico for the acts of its officials, and that exacted in the *Canadienne* case, is perfectly clear. It is, in both cases, a matter of responsibility exacted from a State; it is, in both cases, a matter of the acts of public officials; it is, in both cases, a matter of damage to an individual, whose case has been espoused by the claimant power.

If in the *Canadienne* case laws of an internal character were being applied under a covenant contained in a diplomatic instrument, this would only mean that the rule had all the more solidly been incorporated into international law. Aside from this, the undersigned wishes to draw attention to the fact that in the *Canadienne* case international law was invoked, and

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also the existence of local laws. This is just what has happened in the Russell case, as the American Agency also invoked the law of this country in regard to the obligation to furnish necessaries.

The undersigned further wishes to correct this point, that in the *Sidra* case (rejected by the United States Commissioner together with the "Canadienne" case) not only Admiralty questions were dealt with, but also questions of Civil Law, and it was stated that it was an accepted principle of international law, that as the event that caused the damage had taken place in territorial waters of the United States, the law applicable was that of the United States itself. What is the reason, then, that what is right in this case is not right in other cases in which the same reason exists?—Is it that what is right on the water, is not right on the land?—Justice is the same, whether the subject thereof be dry or wet.

The American Commissioner asserts that the undersigned has advanced the very strange pretension that aliens must enjoy the same situation as nationals.

The undersigned wishes to draw attention to the fact that this is not a case of a pretension upheld for the first time by the Mexican Government; so far back as 1839, in the *Baldwin* case, the Mexican Commissioners announced that when an American citizen has voluntarily placed himself under the rule of the local laws of another country, he must accept them as they are, and they went so far as to maintain that such aliens do not, where laws are badly and imperfectly applied, have any rights of complaint exceeding those of Mexicans themselves.

When that illustrious diplomatist, Mr. Matías Romero, in his capacity of Minister of Finance, answered certain expressions of opinion of the Minister Plenipotentiary of the United States in Mexico, Mr. John E. Foster, in January, 1879, he said this: "It is not logical to expect that any Government exists that will consent to place aliens on a better footing than nationals".

Even so far back as the beginning of the last century, England was laying down international jurisprudence in a case known as the "Indian Chief" case, where it was said, in a paragraph which is one of the *loci classici*: "For no position is more established than this, that if a person goes into another country and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country".

In that same judgment, the utmost arrived at is that a distinction is laid down between certain Oriental countries and western nations. It was said that in Asiatic countries aliens might share the national character of the enterprise for which they were working, while in western countries the character of the country of residence was to prevail. Does the American Arbitrator by any chance wish to revive this obsolete distinction, in order, at this date, to apply it in the West? The undersigned here transcribes the actual words of the aforementioned decision:

"..... still it is to be remembered that wherever even a mere factory is founded in the Eastern parts of the world, European persons trading under the shelter and protection of their establishments are conceived to take the national character from that association under which they live and carry on their commerce. It is a rule of the law of nations applying peculiarly to these countries, and it is different from what prevails ordinarily in Europe and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habit of the countries. In the western parts of the world

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alien merchants mix in the society of natives .... and they become incorporated to almost the full extent. But in the East from the oldest time an immiscible character has been kept up: foreigners are not admitted into the general body and mass of the society of the natives; they continue strangers and sojourners, as all their fathers were; not acquiring any national character under the general sovereignty of the country, and not trading under any recognized authority of their original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade."

It is, on the other hand, widely known that at the Fifth Conference of the American States, the Delegation from Uruguay proposed that it be embodied in a treaty, that all men shall be subject to the laws and authorities of the country of their residence and shall enjoy the same civil rights as nationals; and that they may in no case claim any further rights nor exercise them otherwise than in the manner provided by the laws and constitution. The undersigned considers this whole doctrine as in entire accord with international law, equity and justice, under which diplomatic interposition is only allowable in the event or denial of justice.

Aside from this, there are innumerable authorities that maintain the principle of equality of the alien with the national, as is shown by the following citations:

Webster, Secretary of State, in the case of the claims made by Spain against the United States, as a consequence of disorders that occurred in New Orleans in 1851, upheld that principle. (Calvo, Vol. III, p. 1286.)

In case of war, an alien is not entitled to satisfaction for any wrongs that may result to him, on terms other than those existing as regards nationals. That was the opinion of Thornton, Umpire, on the Claims Commission, Mexico and the United States, 1868, which was the forerunner of the present Claims Commissions (to such an extent that the Rules of Procedure thereof were stipulated in this Convention) (*Blumenkron*, *Buentello* and *Schlinger* cases), as also that of Commissioner Bainbridge in the *Uptore* case before the Claims Commission, United States and Venezuela, 1903.

It was also decided, in the Cadenhead case, before the Anglo-American Court of Arbitration, that when a United States soldier acted in accordance with the law of his country in depriving a man of his life no international liability whatsoever ensued. This case is to be found in the report rendered by the American Commissioner, as Agent of the United States on that Commission.

In the commentaries in the new edition of the work called "Leading Cases on International Law" by Pitt Cobbett, it is, in the case of *Giles* v. *The Republic of France*, stated as follows:

"The rules governing the relation of resident neutrals to the territorial Power in time of war are merely a branch of those general rules relative to domiciled aliens which have already been described (y). As to injuries sustained by them through war, neither they nor their Government will have any ground of complaint against the territorial Power, unless the injury in question was due to or attended by some unfair discrimination against them as neutrals, or unless that measure of protection which Governments are bound to extend to their subjects, whether citizens or not, was unreasonably withheld." (P. 375, op. cit.)

Hatschek's recent work contains the following statement, transcribed below:

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"So, in the case of disturbances, the foreign state which suffers in the person of its citizen is no more in a position to obtain compensation from the state the scene of the incidents than the latter is to guarantee its own citizens against loss."—(*An Outline of International Law*, by Dr. Julius Hatschek, p. 280.)

As will be seen, that principle under which aliens and nationals are placed on the same footing in cases like the present, is not so very absurd. Rather does the undersigned consider that it is not he who is introducing a new doctrine into international law (*non licet omnibus adire Corinthum*) but that it is the Commissioner of the United States himself who is, in laying down in so absolute a manner the privileges of the alien over the national and in proclaiming the inapplicability of the local law (the undersigned assumes that he does so even in the event of its being only a matter of fixing the *quantum* to be paid) attempting to introduce into such law an eminently pernicious doctrine which would mean the elimination of the basic principle that domicile incorporates the alien into the nation where he is so domiciled. This doctrine is contrary to the principles upheld by the United States itself, as will be seen from the following quotations from the German member of the Claims Commission, the United States and Germany, Dr. Kieselbach:

"Early in the history of the United States, the Supreme Court through its eminent Justice Story (mentioned above) had expressed the principle that: 'whenever a person is bona fide domiciled in a particular country, the character of the country irresistibly attaches to him'—*Livington* v. *Maryland Insurance Company*, 7 Cranch 506 (1813); and in agreement therewith, the same principle was applied to objects with regard to which, again in the words of Justice Story, the court stated: 'that the property of a house of trade, established in the enemy's country, is condemnable, as prize, whatever may be the personal domicile of the partners'." (In *The Frienschaft*, 4 Wheaton 105.)

"The principle recognized thereby, that whosoever entrusts his person or his interests to a foreign country also assumes the risk connected therewith, has been utilized in numerous decisions, e. g. *Lamar's Ex.* v. *Browne*, 92 U. S. 187, 194, and *Young* v. *United States*, 97 U. S. 39, 60 and particularly in the cases growing out of the Spanish-American War. Thus *in re Juragua Iron Company, Ltd.* v. *United States*, 212 U.S. 297, the plaintiff, an American corporation incorporated in Pennsylvania but domiciled in Cuba, was deemed 'enemy .... with respect of its property found and then used in that country' (i.e., Cuba)."

"The same principle was stated as follows by Chancellor Kent in his Commentaries on American Law (Vol. 1 p. 74—14th edition):

" 'The position is a clear one, that if a person goes into a foreign country, and engages in trade there, he is by the law of nations, to be considered a merchant of that country'.

"But it is incompatible with this if for the interests standing behind such a natural or juridical person domiciled abroad, which as such are hardly recognizable in their individuality and nationality, a national protection is claimed in international law because the act causing the damage had economic consequences for such interests belonging to another nationality.

"Such a claim for protection must seem all the more doubtful, since it would lead to endless complications if pressed by all nations—a consideration which in the earlier periods of its development seems to have prompted the United State to refuse to espouse such claims."—(*German American Claims Commission* pp. 119-120.)

To consider, in the face of international tradition, that an alien is in a better position than the nationals of the country of his domicile, is to raise every alien individual to the rank of an international power, or at least to that of a diplomat clothed with a special status.

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In this connexion, the undersigned remembers having, at the Sixth Conference at Havana, called attention to the serious consequences of the practice followed in connection with improper diplomatic interposition in the case of damage suffered by aliens. This has gone so far as to hold that a nation subjected to fantastic claims has given a sort of insurance guaranteeing that the business of the alien shall always be profitable and that no such thing as community of fortune, like that so ably described by the Delegation from the Argentine Republic exists.

The undersigned urged the need of putting an end, once for all, to so dangerous and insecure a situation for countries subjected to claims like those now existing, under which foreign investments, as the result of such claims, become credits of one nation against another, and commercial competition supported by the State, is substituted for international cooperation. The observation of the American Commissioner, to the effect that a country proclaiming equality between aliens and nationals, in the manner upheld in this case, deserves to be excluded from the family of the nations, would not, therefore, seem to be appropriate. (The respective speech was published in the Report of the Department of Foreign Affairs of Mexico.)

EX PARTE EVIDENCE

The Commissioner of the United States maintains his proposition in support of evidence taken without notice to the other side. He enlarges more particularly upon a quotation made by the undersigned from a recent work of that eminent internationalist Mr. Moore, on *International Adjudications*. The Commissioner of the United States calls attention to the fact that Judge Moore refers to cases in which evidence was taken before a Judge, by coming before him, in an *ex parte* manner.

The case of evidence taken without notice to the other side, in such a way that neither the opposite party nor the Commission can control same, is similar to the case referred to by Mr. Moore. The opposite party cannot, in either case, control the testimony. That kind of evidence, taken without notice, and before Consuls, was described as clandestine, in the Claims Commission between Peru and Brazil. (*Vide* Judgment in the case of *Angulo and Brother*, Brazilian-Peruvian Arbitral Tribunal, p. 76.) *Ex parte* evidence being that received by one side in the absence of the other, is in every case absolutely deserving of mistrust. It is one-sided evidence to which the other party must take exception.

The undersigned wishes to refer briefly to the opinion expressed by the President of this Commission on the subject of the value of affidavits, in connection with the judgment in the *Santa Isabel* cases. The Commissioners had, at that time, agreed that the President should address a questionnaire to the two national Commissioners and that he should, after taking both their opinions into consideration, submit his own. The President called upon them to do so, officially and in writing. The said national Commissioners answered forthwith, also officially and in writing, and then the President communicated his own opinion, likewise officially and in writing. It was not, then a matter of mere memoranda privately prepared for holding a conference, as stated by the Commissioner of the United States. Furthermore, the questionnaire covered the issues put forward in the course of the discussion by the Agent of the United States and which the Mexican Agent had found himself compelled to examine. Now, the Presiding Commissioner, when giving his opinion in answer to the questionnaire, expressed himself as follows:

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"Value as evidence of *ex parte* depositions and witnesses.

"In the matter of evidence there is properly speaking no manifest difference in the opinions of the Honorable National Commissioners they both stating clearly that as the Commission should receive evidence of all kinds presented by the parties, as provided in article IV of the Convention, and therefore *affidavits* as well, it nevertheless belongs to it to weight such evidence and to assign to it such value as it may deserve in their opinion.

"As a matter of fact the Commission, being invested with the function of judging according to the principles of justice and equity, is composed of judges whose conviction, in the matter of the facts, must be established by the evidence which it is the task of the Parties to furnish. The rules in the matter of the evidence may not be other, then than those so clearly set forth by the Honorable National Commissioners. The Honorable Mexican Commissioner went into greater details, stating his views more particularly with regard to the value as evidence to be ascribed to *ex parte* testimony and witnesses, and to the specific proof of certain facts to which law in general attributes a special character as evidence, such as birth and other circumstances coming under civil registry. The principles maintained by the Honorable Mexican Commissioner are perfectly sound. Testimonial evidence being that which due to the frailty of human contingencies is most liable to arouse distrust, it must not be divested of all those conditions which the wisdom of all time has created in order that full credence may be given to it. It was certainly for this reason that the Commission in their Rules of Procedure provided for and regulated the hearing of witnesses before them (Rule IX), that does not imply that it is essential that testimony be given before the Commission. But what is indispensable in order that such testimony may constitute full proof, is that it be rendered with all those formalities with which law and usage have everywhere required that it be clothed in order that it may be accepted as full proof."

The Commissioner of the United States referred to a certain expression of opinion by the undersigned in regard to *ex parte* evidence submitted to the Court of Claims, and in regard to the measures taken by the Government of the United States to obviate the dangers of evidence furnished by one side only.

In order to prove what he said, the undersigned now copies the following paragraphs from his opinion in the *Santa Isabel* case, where the authority supporting his contention is to be found:

"The United States has itself had that experience in regard to that particular question. In 1873, in connection with Civil War Claims, numberless cases were presented to the Government of the United States, as appears from an official American publication, 'Claims against Governments". The President then became alarmed as a result of the innumerable proofs fabricated and supported by false testimony and stated the following in his message to Congress:

" 'There is a still more fruitful source of expenditure, which I will point out later in this message. I refer to the easy method of manufacturing claims for losses incurred in suppressing the late rebellion.

" 'Your careful attention is invited to the subject of claims against the Government, and to the facilities afforded by existing laws for their prosecution. Each of the Departments of State, Treasury and War have demands from many millions of dollars upon their files, and they are rapidly accumulating. To these may be added those now pending before Congress, the Court of Claims, and the Southern Claims Commission (Commissioners of Claims), making in the aggregate an immense sum. Most of these grow out of the rebellion, and are intended to indemnify persons on both sides for their losses during the war; and not a few of them are fabricated and supported by false testimony. Projects are on foot, it is believed, to induce Congress to provide for new classes of claims, and to revive old ones through the repeal or modification of the statute

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of limitations, by which they are now barred. I presume these schemes if proposed, will be received with little favour by Congress, and I recommend that persons having claims against the United States cognizable by any tribunal or department thereof, be required to present them at an early day, and that legislation be directed as far as practicable, to the defeat of unfounded and unjust demands upon the Government; and I would suggest, as a means of preventing fraud, that witnesses be called upon to appear in person to testify before those tribunals having said claims before them for adjudication. Probably the largest saving to the National Treasury can be secured by timely legislation on these subjects, of any of the economic measures that will be proposed.'

" 'This subject has been somewhat discussed elsewhere. (Congressional Record, Forty-third Congress, First Session, June 3, 1874, vol. 6, p. 4514; 20th vol. American Law Register, p. 189; note by Judge Redfield on decision of Court of Claims in Brown's Case.)'

"The Government of the United States ordered an investigation of the way in which claims were established and decided, to be made in almost every country in the world, and as appears from the book cited, even in the countries most backward in that respect, the taking of evidence with notice to the other side was required. For example, according to the report rendered by the Minister in Turkey to the Secretary of State, mentioned on page 71 of the above-mentioned publication, the Turkish Claims Commission had jurisdiction to call witnesses and to elicit evidence from both sides. On page 115 the statement appears that the Minister at Monrovia reported that in the Liberian Republic, courts taking cognizance of claims had powers to compel the appearance of witnesses and to collect all such evidence as might be required for the defense of the Government. In consequence of all this, the 'Court of Claims' of the United States was, as appears from the same publication, clothed with the necessary powers to take testimony and to have witnesses cross-examined." (*Opinion of the Mexican Commissioner, Santa Isabel* cases, pp. 47 and 48.)

The undersigned has never, of course, had the slightest intention of assuming the existence of anything in the way of malice on the part of the agency of the United States in producing that evidence. He would never venture to bring gratuitous and wholly unfounded charges.

What he does criticise is the system, which seems to him exceptionally defective and calculated to give rise to injustice. Aside from this, the American Agency does not even take such evidence. It is the claimants themselves that obtain it and turn it over to said Agency.

Webster's great dictionary (the foremost authority on the English language) in its definition of *ex parte* evidence, describes its character to perfection, in these words, which could not be more decisive:

"Made or done in the interest of, or with respect to, one side only; as, *ex parte* statements are usually partial." (P. 770.)

It has always been a universal principle that no one may, in a suit, be condemned unheard. To be given a hearing not only means that the defendant is to be heard in his own defense but that he is to be permitted to confront the witnesses testifying against him, so as to question them. A proceeding in which the defendant is not heard, nor permitted to control the evidence, is a proceeding foreign to justice, and one condemned by the laws of all civilized countries; but even supposing, however, that a contrary usage did exist somewhere, it should be abolished in accordance with the established maxim; *malus usus est abolendus*; the undersigned is certain that if an alien were tried on the basis of mere affidavits when controversial proceedings were required by law, it would not be long before a claim for denial of justice was presented to the Mexican Government. In the *Cutting* case, the right to cross-examine was alleged.

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The advance of civilization has made increasingly stronger the truth enclosed in the words of the ancient poet and moralist, which English judges take delight in quoting, thus rising above the materialism of court records to that serene region in which the human sentiments of great minds shine:

"*Quicunque aliquid statuerit, parte inaudita altera, Aequum licet statuerit, haud aequus fuerit.*"

NATIONALITY

The Commissioner of the United States has vigorously assailed the proposition of the undersigned in regard to the above matter. The undersigned will not, in this connection, enlarge upon this particular subject, because he does not wish to attack the proposition of the Presiding Commissioner, having during the discussion stated that he would not, in the event of dissenting from the said Presiding Commissioner, formulate a special opinion, but would confine himself to going by what had previously been stated in the judgment.

The Commissioner of the United States says that he is unable to understand the arguments of the undersigned. This is to be regretted, but the undersigned cannot, for the reasons just given, discuss this particular point. Were he free to do so, the undersigned considers himself sufficiently qualified (in spite of the skepticism with which the American Commissioner receives the undersigned's slightest statement) to show that the American Commissioner is begging the question where he says, in his dissenting opinion, that it is not a question of jurisdiction because there is no doubt that Russell and his family are American citizens; the undersigned takes the liberty of asserting that dual nationality can exist, when there is a conflict between two legislations, he further thinks that he would be able to show that the assertion of the American Commissioner with regard to the instant case, to the effect that international law is not applicable to matters of nationality, is not sustainable.

He merely takes the liberty of correcting the assertion of the Commissioner of the United States that the Mexican Commissioner, in the *Rau* case, before the Claims Commission, Mexico and Germany, rejected the proposition upheld by the undersigned. Had the Commissioner of the United States obtained more accurate information he would have become convinced of the contrary, as the illustrious Mexican Commissioner, Mr. Iglesias Calderón, upheld the very same proposition as the undersigned, as is apparent from the opinion expressed by the said Commissioner in the *Rau* case and which is, in so far as relevant, herein transcribed: in it he opposes the native authority cited by the American Commissioner:

"CONSIDERATIONS.—The following fundamental principles must, in order to decide this case, be taken into account:

"1. Every nation is free, in the exercise of its sovereignty, to impose terms and conditions for the granting of naturalization to aliens.

"2. Naturalization requires the mutual consent of him who grants it and of him who receives it; but such consent may be either express, tacit or presumed.

"3. The Constitution or Magna Charta—as it is often called—is the fundamental law of a nation and consequently prevails over every other law, as does always that which is principal over that which is secondary.

"The distinguished authority who presides over this Commission, has, in his 'Notions of International Law", presented with equal clearness and concision, cases of presumed naturalization, when he says: 'The alien who leaves

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his country without the intention of returning, *sine animo revertendi* or at least with only a very remote intention of doing so, does in fact and in a permanent manner become incorporated into the territory and people where he has settled.' (Paragraph 1397.)

"The philosophical reason for this principle is made manifest when he reproduces the following opinions of that eminent internationalist and attorney-general of the Supreme Court of Chile, Mr. Ambrosio Montt:

" 'The alien, heedless of his character as such, could found newspapers, stir up passions, set alight the furies of civil or international war; but he would, once hostilities had broken out or rioting had begun, emerge from his isolation as a *heimathlos*, and rush to register his name on the roll of his consulate; he would in the company of his accomplices or partners, deposit there an inventory of his property; he would affix plates or other visible signs of neutrality on his store, on his house, on his factory; he would beg the mercy or compliance of his minister; he would raise an outcry that would reach the ears of the government of his native land, and would thus, armed with those weapons of defense and of attack, make charges in respect of actual or imaginary losses, for actual profits and for profits he failed to realize; for attacks on his person and injury to his interests;'

"The philosophical principle to which I have just referred, could perfectly well be applied to the claimant, Rau, since it is evident that he left his country *sine animo revertendi*, or with such a remote intention of doing so, that thirty years—the length of his residence in Mexico, as stated by the German Agent—have not been sufficient to enable him to carry out his intention of returning.

"But there is something more than that, in the *Rau* case—which is that of the alien who has acquired real property under the rule of the Constitution of 1857—it is not a matter of presumed naturalization, but of tacit though unmistakeable naturalization, which is that provided for by the last part of Article 30 of the Constitution of 1857, quoted above.

"This tacit naturalization is so obvious, that the illustrious internationalist who presides over the Commission, after mentioning the fact that, according to the laws of the various countries, the conditions and qualifications required by them for naturalization of aliens are exceedingly diverse and varied, adds a little further on: 'In Mexico it is, among other ways, acquired through the purchase of real property situated in that country, unless the desire to retain a former nationality be declared *at the time of making such purchase*'.

"The Constitution of 1857 did not, as a matter of necessity, impose the obligation of becoming naturalized upon the alien acquiring real property, since it left him free to choose between his nationality of origin and Mexican nationality. The only thing that it did impose so as to avoid those ambiguous situations favored by tacit naturalization and which have on occasion given rise to so many abuses—was a formal declaration, by the purchaser, to be entered in the deed of purchase of the real property, a declaration, I repeat, to the effect that he desired to retain his nationality. As will be seen, the condition imposed by the Constitution of 1857 was both very simple and very easy to fulfil, and if the alien did not comply with it, an unmistakeable proof of his tacit naturalization thus remained on record.

"Article 30 of the Constitution of 1857 is so clear, so precise and conclusive in its wording, that it does not lend itself to distinctions or to perversions. According to it, all aliens acquiring real property in our country and who failed to put on record, in the necessary deed of purchase, an express declaration to the effect that they wished to retain their nationality, have as from that moment, and by a mere omission revealing their assent, become Mexican citizens by tacit naturalization.

"The Law on Alienage, which should only have regulated the said article, has, under the pretext that no law existed specifying the date from which the omission in question produced its effects, attempted to convert the tacit naturalization prescribed by the said article into express naturalization; but—

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in accordance with the hypocritical procedure so characteristic of the dictatorial régime of General Díaz when desirous of systematically violating the Constitution—the framer of the said Law on Alienage, while pretending not to amend article 30 aforesaid, but only to regulate same, did in fact amend it to such an extent that the provisions of the Constitution and those of the Law on Alienage proved to be contradictory, as has been admitted by both parties.

"It is not the duty of the Commission to enter upon a critical and comparative judgment of the said contradictory provisions, but only to decide which one of them is to prevail, that contained in the Constitution, or the one appearing in the Law on Alienage.

"The issue having thus been propounded with entire precision and clearness, is decided by the mere fact of being so propounded; as a constitutional provision, so long as not abolished or modified by means of an amendment to the Constitution, carried out with all the necessary formalities—which has not been done in the case under examination—preserves its full force and vigor and prevails over any legal or administrative provision contrary thereto.

"And as regards the contention of the German Agent that Mr. Rau has, even supposing him to be a Mexican citizen, forfeited that nationality through having served a foreign Government without permission from the Congress of the Union, it should be taken into account that in such a case it is not nationality, but citizenship, that is forfeited; as the Constitution of 1857 expressly lays down that the '*status of citizenship* is lost, among other reasons, for serving a foreign Government without permission from Congress'.

"Although in this Interrogatory, the question of the greater or lesser excellence of the constitutional provision contained in article 30 may not properly be gone into, it will not, however, be superfluous to point out that it was due to the patriotic intention of protecting the Nation against those abuses which great Powers have, by way of protection of their respective subjects, committed in the past and still commit through diplomatic imposition; as at that time the difficulties arising out of the Spanish Convention were still very recent, as also the memory of the grossly exaggerated claim, estimated at eighty thousand pesos, presented by a French pastrycook and supported by the guns of the fleet of Louis Philippe. It is not superfluous, either, to call to mind that article 30—which is the one applicable to the instant case—did not give rise to any debate in the Congress that adopted the Constitution, and that it was approved unanimously by 81 votes, these being those of the deputies that formed a quorum at that meeting; as also the fact that among them was the same jurist, Ignacio Vallarta, who was later, in the statement of motives of the Law on Alienage, to contrive several ways of construing that article in an entirely absurd manner.

"And seeing that the Commission must render their decisions, not only in accordance with justice, but also by taking equity into account, the case of this claimant should be examined from that aspect also.

"The assumption of the German Agent that if Mr. Rau, when he acquired real property in 1911 and 1913, did not place on record his wish to preserve his German nationality, it was due to a mere oversight on the part of the Notary who drew up the deed of purchase; that assumption, which could, in equity, be admitted in the case of a very ignorant alien, is entirely inadmissible in that of Mr. Rau, an educated man, who was at one time Counsellor of the German Legation in Mexico and who had, furthermore, already made a similar declaration on acquiring the Las Palmas Hacienda, in the year 1909.

"It would be not complimentary to Mr. Rau to suppose that he had intentionally, when purchasing the Simbac and Chaspac Haciendas, omitted to comply with the requirement imposed upon him by our fundamental Law in the event that he desired to retain his German nationality, and that he had thus attempted to create an ambiguous situation, which would allow him to appear either as a Mexican citizen or as a German, as might best suit his interests; but even be that so he had failed to comply with an express and very simple provision of our Supreme Law, which all aliens are obliged to obey. And

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it would, in that event, be iniquitous, to the full extent of the meaning of that word, that disobedience by an alien of the laws of the country, where he resides, should redound to the prejudice, not of the disobedient alien, but of the nation thus disobeyed.

"DECISIONS.—In virtue of the whole of the foregoing, the Mexican Commissioner holds that the Commission should render decision as follows:

"THREE.—The Demurrer to the Jurisdiction based on the fact that the claimant, Rau, had Mexican nationality as from the dates when he purchased the aforesaid Simbac and Chaspac estates, is hereby allowed. as the fact mentioned has legally been proven.

"Does it [the constitutional provision] order that our nationality be imposed, if not as a penalty, at least as a compulsory compensation for the right to own real estate?

"There is no doubt that it orders no such thing; as we have already seen that no imposition can exist where freedom of choice is left; but even if there were, that alleged imposition would not be in the nature of compensation for the right of owning real property, but a precaution for national protection, so that such property might not become the reason or the pretext for diplomatic intervention by foreign powers—an intervention so favorable to the abuse of force on a large scale—in the event, either fictitious or true, of such properties suffering damage or injury.

"Is it sufficient that the alien who is unworthy of naturalization, who is even an enemy of the Republic, should own a piece of land, for him to be numbered among its citizens, even though the country of his origin should repute him as its own subject and not recognize his Mexican character? Is the acquisition of real property sufficient to insure that allegiance which every adopted *citizen* owes to his Country?

"As we have already seen, ownership of a piece of land is not sufficient to enable an alien to be considered as a Mexican, but it is further necessary that he should have evinced his consent thereto, even though tacitly. Even with that consent, it is obvious that the mere purchase of real estate, whether the purchaser be worthy or unworthy, whether he be a friend or an enemy of our Republic, is not sufficient *to enable him to be numbered among the citizens* thereof, nor is it sufficient to insure that allegiance which *every* adopted *citizen* owes to his country; but as said acquisition, with its compulsory complement, mentioned above. only confers nationality and not *citizenship*, i. e., as in this case no citizen whatsoever is involved, everything said in that regard by Mr. Vallarta and anything that could be added even by him, in order to impress upon the minds of his readers all the imaginable evils and dangers attendant upon the granting of *Mexican citizenship* in exchange for the acquisition of real property is altogether useless, proves to be entirely superfluous.

"This is where the sophistical confusion—to which I referred from the beginning—contrived by the author of the 'Exposición de Motivos' and which consists in placing nationality and citizenship on the same footing, so as to make the suppression of a constitutional provision appear to be merely the regulation thereof makes its appearance."

It does not seem out of place here to state that the decision in the Rau case, mentioned by the American Commissioner, referred to the acquisition of real property (which may, at times, bring about the acquisition of nationality, according to the Commission of 1868.—*Vide Smith and Bowen* v. *Mexico*), and not to the fact of his having had children in Mexico.

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INTERPRETATION OF THE CONVENTION

The undersigned does not wish to reopen the question of the interpretation of the Convention, because he considers it unnecessary to repeat arguments already advanced. He will, therefore, confine himself to those very brief observations that seem to him indispensable.

The undersigned permitted himself to assert that the United States had recognized the Government of Mr. Carranza as a Government *de facto*, and that the Governments of Messrs. de la Barra and De la Huerta had been considered as Governments *de facto* by American writers, and that he, to avoid discussions upon that point, referred to the distinction so drawn by Americans. The Commissioner of the United States said that no documents had been produced in support of those recollections and that no American writer had been cited.

In point of fact, the undersigned is not in position to invoke, as regards his own recollection, any official document, but he can prove the grounds of his assertion that the distinction originated in the opinions of Americans.

He of course considers it unnecessary to invoke any authority whatsoever to prove the existence of the Government of Mr. Carranza, and that he was recognized as a Government *de facto* by the United States.

As regards the de la Barra Government, the undersigned here transcribes the following quotation from Desvernine, written on this very subject of claims against Mexico.

"Porfirio Díaz was elected in 1910 to this eighth term as President of the Republic of Mexico. Shortly before his election an insurrectory movement started in northern Mexico which increased in momentum, and finally led to the resignation of Díaz on March 18, 1911, and the designation of Francisco de la Barra as President *ad interim*. De la Barra's short administration was that of a *de facto* government." (*Claims against Mexico*.—Desvernine, p. 22.)

It is, in the dissenting opinion of the Commissioner of the United States in the *Santa Isabel* cases, asserted that: "Don Francisco de la Barra was the successor of Diaz as *de facto* chief of the Government".

As regards the Government of de la Huerta, the authority quoted above, Desvernine, when considering that the Government of General Obregón had to recognize certain liabilities in respect of the revolutionary acts that raised him to power, connects the de la Huerta Government with them and compares the juridical situation then existing with that of the Carranza régime which assumed responsibility for certain acts of revolutionaries. It would not be possible to allude more clearly to the de la Huerta Government as a Government *de facto*. It would, on the other hand, be impossible to look upon the de la Barra Government as a Government *de facto* and not to consider the de la Huerta Government as one also. Here follow certain statements taken from the work of the aforesaid authority:

"In the liabilities of the Carranza régime would be included liability for the acts of the revolutionists who joined or aided in the overthrow of General Huerta. Similarly in the liabilities to which the Obregón Government would succeed from the de la Huerta Government would be included the liability arising from the acts of those revolutionists who aided or joined in the overthrow of General Carranza." (*Op. cit.* pp. 24-25.)

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As will be seen, then the statements challenged by the Commissioner of the United States do not belong to the realm of pure imagination.

The Commissioner of the United States contends that the assertion made by the undersigned to the effect that the Government of Mr. Madero was not a Government established as a consequence of a revolution, is entirely unwarranted. He says that it cannot seriously be contended that the period of agitation that existed in the country from the time when Mr. Madero rose in arms, to the fall of President Díaz, had nothing to do with the establishment of Mr. Madero's Government. The proposition of the undersigned can very easily be maintained, although it is, in the opinion of the American Commissioner, based on a strange method of reasoning. If it were held that the Government of Mr. Madero was, by reason of the fact that a revolution had taken place that overthrew General Díaz, a government established by that revolution, even though another Government had existed in between the revolution and the Government of Mr. Madero, it could be asserted that the Third French Republic is at the present time a revolutionary Government, because that régime was established after the agitation that followed upon the fall of Napoleon the Third, and it could, by going a little farther, be said that the Government of Queen Victoria of England was a government that arose out of a revolution because the historical antecedent existed of the fall of James the Second. If it be argued that Mr. Madero took to arms in 1910 and that because of this the government subsequently established by him was revolutionary, it could then be said that the Governments of Washington, Adams, Jefferson, Madison and Monroe, in the United States, were revolutionary Governments because those rulers took an active part in the revolution for independence The undersigned would, in that event, be compelled to quote an elementary principle of law:—*In jure non remota causa sed proxima spectatur.*

The Commissioner of the United States challenges the assertion made by the undersigned, that the antecedents in connection with the 1923 Conference between personal representatives of the Presidents of Mexico and the United States should not be introduced, because they were not submitted as evidence (nor would such a thing be allowable) and declares that it is not proper that the undersigned should quote the opinion of "a court" (no less a one than the International Court of Justice) as to its not being necessary to construe when the text is clear.

The undersigned maintains his proposition throughout, as he cannot, on any account, admit the pretension that if the antecedents relating to negotiations of any kind whatsoever (even supposing same had been formal) be introduced as evidence, the character of a treaty not ratified by the Legislative Power can be ascribed to such negotiations. The authorities cited to show that the contrary proposition is not allowable, are entirely unrefuted.

Aside from this, the undersigned held that the text of the Convention was not doubtful, but clear, more especially taking into account the Spanish expressions. When he referred to construction in case of doubt, he did so, on the momentary assumption only, that application of the theory that a study of the negotiations could be undertaken, was allowable.

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As regards the character of the Delegates to the Bucareli Conference, it is odd that attempt should be made to ascribe to them a plenipotentiary character, when the Government of the United States itself refused to recognize the representatives of the Mexican Government as having any official capacity, during the whole of the period that elapsed from the end of the Government of Mr. Carranza to the resumption of relations between both countries. The doctrine now upheld by the Commissioner cannot be reconciled with that previously maintained.

The Commissioner of the United States refers to a so-called citation of a case made in the course of oral argument, by the Mexican Agent. The Commissioner in a somewhat obscure manner makes a charge of lack of impartiality, because the documents in the case were not delivered complete to the Agent of the United States, as requested by him at the hearings. It is true that the undersigned Commissioner privately made efforts to have those documents made available to the Agent of the United States for inspection, but he must point out that he did not succeed in doing this within the very short time left for the termination of the case, due to the fact that they were in the files of another Commission.

It is the duty of the undersigned to call attention to the fact that it is incorrect that the Mexican Agent invoked that case. What he did invoke were certain quotations by the Mexican arbitrator, which quotations may be found in the works of the respective authors. After mentioning the said quotations the Agent in question mentioned a comment which, aside from this, is to be found in the opinion on the *Santa Isabel* case, printed copies of which were handed to the Agent and Commissioner of the United States. So that it may be seen how justifiably the undersigned asserted the facts, he takes the liberty of transcribing the following, taken from the shorthand version of the oral argument of the Mexican Agent, although before going any further he declares that, as already stated, shorthand versions do not commit the Agents. Furthermore, he states that the comment to which the Mexican Agent referred is to be found on page 76 of the opinion of the Mexican Commissioner in the *Santa Isabel* cases.

"I shall likewise review the definitions given by authorities on the subject. I shall take these definitions from certain pages of the opinion of Licenciado González Roa, in the *Pinson* case in the French Commission, as follows:

"The famous dictionary of Arthur English (Dictionary of Words and Phrases used in Ancient and Modern Law) defines a revolution as follows: 'REVOLUTION (p. 699)—A successful rebellion'.

"The celebrated internationalist Carlos Calvo, in his dictionary of International Law, a classic, defines a revolution thus:

" 'REVOLUTION: *Se dit de tout changement considérable, qui survient dans les choses du monde, dans les mœurs, dans les opinions, et plus particulièrement d'un changement brusque et violent, souvent fondamental, dans la politique, et le gouvernement d'un Etat*'.

"It must be noted that he speaks of a sudden and violent change, a fundamental change, in the politics and in the government of a state, or a change which supervenes.

" 'Moreover', says Mr. González Roa, 'International Law has defined what "insurrection", "civil war", and "rebellion" are, through no less a person than the eminent Umpire of the Mexican-American Commission of 1868, Dr. Lieber, who in his famous instructions to the American armies in time of war gave utterance to the following articles:

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" '149. *Insurrección es el levantamiento del pueblo armado contra el gobierno establecido o contra una parte de este gobierno, o contra alguna o varias de sus leyes, o contra alguno o varios de sus funcionarios. La insurrección puede limitarse solamente a una resistencia armada, o encaminarse a fines más trancendentales.*

" '150. *Guerra civil es la que sostienen, en el seno del Estado, dos o más partidos que luchan por enseñorearse del poder supremo, y de los que cada uno se atribuye a sí solo el derecho de gobernar el país. También se da algunas veces el nombre de guerra civil a una rebelión armada que se efectúa en provincias o distritos contiguos a los que son el asiento o residencia del gobierno.*'

"This article would seem to have been written on purpose for this case, He calls it armed rebellion even though it is also called civil war, and says: 'it is an armed rebellion effected in provinces or districts contiguous to those which are the seat or residence of the government'.

" '151. *El nombre de rebellión se da a la insurrección que estalla en una gran parte del pais, y que se convierte comúnmente en una guerra declarada contra el gobierno legítimo por varias porciones o provincias del país, con el objeto de sustraerse a su autoridad y darse un gobierno propio.*'

"What I am now going to read is a comment:

" 'So that according to that illustrious internationalist an insurrection is a rising against the institutions or against the government, while a rebellion is nothing more than a widely extended insurrection, and civil war is a form of rebellion.

" 'Insurrection includes revolution just as the genus does the species, because the latter must, in order to be one, achieve success.

" 'The undersigned excuses himself, in view of the criticism of the Hon. President of the use of dictionaries, for proceeding forthwith to quote the most favorably known of those in the French language, and states that when words are well defined (which they are in the present case) by authorities on law, it is necessary to resort to authorities on language, as questions of grammar have to be decided by them and by no one else. The quotation which the undersigned is now going to make, he does so simply on the inadmissible assumption that the words used in the Convention,—revolutionaries and insurrectionists,—are not defined by the great authorities on International Law and Legislation.'

"Larousse's dictionary, large size edition, defines revolution as follows:

" 'REVOLUTION.—*Changement considérable dans le gouvernement d'un Etat, transformation de ses institutions.*'

"Webster's dictionary says, defining the word revolution:

" '(Politics.)—A fundamental change in political organization or in a government or constitution; the overthrow or renunciation of one government, and the substitution of another, by the governed.'

"The dictionary of the Spanish Academy says the following defining the word revolution:

" 'A violent change in the political institutions of a nation. A transformation or new form in the state or a new form in the state or government of things.'

"Decenciere-Ferrandiere, on his side, in his work on 'International Responsibility of States', quoting American publicists, says:—'The revolution has from the beginning shown a change in the popular will, a change which has in some way crystallized in its ulimate success.' (p. 137.)

"According to Webster's dictionary an insurrection is:

" 'A rising against civil or political authority, or the established government.'

"The dictionary of the Spanish Academy says:

" 'Insurrection: a rising, mutiny or rebellion of a people, etc.'

" 'Insurrectionist: one who has risen or mutinied against the public authority.'

"On his side, Lieber held that an insurrection is a rising against the established government or against a part of that government, or against one or more of its laws, or against one or more of its agents. (Article 150 of the instructions to Armies in Time of War.) And a rebellion is nothing more than a widely extended insurrection.

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"A revolt is, according to Webster's dictionary:

" 'REVOLT.—The act of revolting; an uprising against legitimate authority; specially a renunciation of allegiance and subjection to a government; rebellion, as the revolt of a province of the Roman Empire.'

" 'Syn. Insurrection; sedition; rebellion; mutiny.'

"Licenciado González Roa goes on to comment upon the facts referred to by him in his opinion and said:

" 'Then Mr. Carranza, under the authority of the decree of Coahuila, began the revolutions in accordance with the "Plan de Guadalupe" which, after having been supplemented at Veracruz, contained certain proposed political and social reforms that are well known.

" 'The *revolution*, which has sprung up under Venustiano Carranza of Coahuila', says Priestley, 'was the revolution known as the Constitutionalist revolution, which like that of Mr. Madero, had a plan based on principles and established a government. None of those who rose against Mr. Carranza established a government, nor are they called revolutionaries by historians.' "

Aside from the above, the case in question was not taken into account in the judgment on the instant case nor was it a case of a new fact surreptitiously introduced by the Mexican Agency, but merely of alleging quotations that were at everybody's disposal in the originals. What, then is left of the charge (if any) which the undersigned ventures to describe as absurd, made by the Commissioner of the United States?—*Vox et præterea nihil.*

The undersigned in his opinion referred to the attitude of the Mexican Government in connection with the negotiations undertaken in 1912 by the American Consul with the rebel, Pascual Orozco. The Commissioner of the United States cannot understand the relation between the words of the undersigned and the legal questions raised in this case. The undersigned wishes to explain that if he referred to the point, it was due to the fact that it had been discussed by the Agent and mentioned by the Commissioner of the United States with certain expressions of opinion contrary to the proposition of the Mexican Agent. The undersigned would have preferred not to refer to this particular point, but he has done so in order to prevent silence on his part from being construed as an admission of anything not refuted, as he has seen the system followed of inferring a positive from a negative fact, by drawing non-existent admissions from silence: this is only explicable in the legal situation in which a person is placed who appears in court, not as a judge, but as a defendant.

The quotation from Bouvier, whose existence and appropriateness was doubted by the American Commissioner, did not refer to English courts of equity, but to the sense in which this word is used in conventions like the present one. That quotation was so made use of by Plumley, Umpire (an eminent jurist) in the *Aroa Mines* case. (Vide Ralston *Report*, p. 386.)

The American Commissioner refers to the interpretation of subdivision (2) of article III of the Convention, in order to contend that it has been construed by the President and by the undersigned by means of additions and unallowable interpolations, which are the result of imagination, and that the confused manner in which said subdivision (2) is construed, is increased on examination of subdivision (5) of said article III.

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It would be very strange indeed if the members of the German Commission, those of the British Commission (who examined texts in English and Spanish) and lastly, the former President of this Special Commission, Dr. Octavio, had fallen into a kind of similar delirium of interpretation. When a number of persons of different nationalities and conditions, not known to one another, and who only have in common their uprightness and knowledge of law, arrive at the same conclusions, there is some reason for it, and nothing to be surprised at.

Aside from this, the undersigned will confine himself to a single authority when referring to the method of interpretation of the Commissioner of the United States by which he endeavors to extend the responsibility of the Mexican Government.

When the *Chamizal* case was tried, under the Convention of June 24, 1910, the Commissioner of the United States went farther than the Mexican Agent on the Special Claims Commission, in contending that particular terms prevail over general terms, as he even went so far as to assert that even merely explanatory expressions abrogate the general part of a treaty, a proposition which the American Commissioner now criticizes. These are the words used by Arbitrator Mills in his Separate Opinion, and he held that the Commissioners who did not share his opinion were dominated by "*un espíritu de transacción no por inconsciente menos indebida, que el que corresponde a una decision judicial.*"

"*Es una regla de interpretación que la Suprema Corte de los Estados Unidos asegura ser 'de aplicación universal' ('Los Estados Unidos contra Arredondo,' 6, Pet. 691), que.*

" '*Cuando en un mismo estatuto están comprendidos términos generales y términos explicativos de análoga naturaleza, ya sea que los primeros preceden o sigan a los últimos, los términos generales derivan su significación de los explicativos y se presume que abarcan sólo a las personas o cosas por étos designadas.—(Fontenot contra el Estado' 112, La., 628; 36, So. Rep., 630.')*

"*Son innumerables los precedentes que pueden citarse en apoyo de esta proposición; pero solamente se hará referencia a algunos de ellos:*

" '*Los Estados Unidos contra Bevans,*' 3, Wheat 390.

" '*Moore contra Compañía Americana de Transportes,*' 24, Howard, 1 a 41.

" '*Los E. U. contra Irwin,*' *Casos Federales, No. 14,* 445.

" '*La Supr. Corte de Kentucky,*' *en* '*La Ciudad de Covington contra Herederos de McNicholds,*' 57, Ky. 262.

" '*Rogers contra Boiller,*' 3, Mart., O. S., 665.

" '*La Ciudad de S. Luis contra Laughlin,*' 49, Mo. 559.

" '*Brandon contra Davis,*' 2, Leg. Rec., 142.

" '*Felt contra Felt,*' 19, Wis., 183.

" '*También El Estado contra Gootz,*' 22 Wis., 363.

" '*Gaither contra Green,*' 40, La. Ann , 362 ; 4, So. Rep., 210.

" '*Phillips contra Cía. Christian,*' 87, Ill., App. 481.

" 'In re : *Rouse, Hazzard y Cía.*, 91, Fed. Rep. 96.

" '*Barbour contra Ciudad de Louisville,*' 83, Kp., 95.

" '*Cía. de Gas y Eléctrica de Townsend contra Hill,*' 64, Pac. Rep., 778 ; 24, Wash. 469.

" '*El Estado contra Hobe,*' 82, N. W. Rep., 336; 106, Wis., 411.

" *En* '*Regina contra France,*' 7 Quebec, Q. B., 83 *se dice que*

" '*No tiene importancia, según se ha resuelto, ue el término genérico preceda o siga a los términos explicativos que se empleen. En uno u otro caso, el genérico debe derivar su propio significado y presumirse que abarca sólo aquellas personas de la clase designada en las palabras explicativas.*'—*(Cita tomada de la* '*Am &* Eng. Enc. of Law,' vol. 26, p. 610, *título:* 'Statutes.'*) (Juicio de Arbitraje del Chamizal,* tomo I, págs. 1081-1082.)"

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According to the well-known maxim, *optima est enim legis interpres consuetudo*, to construe the Convention by means of a rule which the Supreme Court of the United States deems of universal application and in accordance with the opinions of many eminent jurists, would not seem to be an act of mental incoherence. It is, then, not only a matter of a *pronoun* (although this would in itself be sufficient) but of something more than that.

To conclude the undersigned states that he would most willingly have abstained from writing this document and that he only does so by reason of the respect which the Commission inspires in him, and of that courtesy which he is obliged to observe with regard to the Commissioner of the United States, in virtue of the latter's high office[1].

COMMENTS OF AMERICAN COMMISSIONER ON "SUPPLEMENTARY OBSERVATIONS BY THE MEXICAN COMMISSIONER, FERNANDO GONZÁLEZ ROA, IN REGARD TO THE DECISION IN THE RUSSELL CASE", FILED BY COMMISSIONER GONZÁLEZ ROA, AUGUST 14, 1931.

There has come to my notice some kind of an opinion filed by the Mexican Commissioner, Dr. González Roa, in relation to the *Russell* case. The opinion is a combination of strange statements made by himself and by the Mexican Agent, Dr. Elorduy. It appears to be a reply to my dissenting opinion written in that case.

Owing to delays of the proceedings in Mexico at the last session of the Commission, delays for which I was not responsible, my dissent was prepared in Washington with the expressed concurrence of Dr. González Roa and the Presiding Commissioner. And, as shown by the record, the latter announced at the final session of the Commission on April 24, 1931, in Mexico City that I would file a dissent. No one then suggested any objection to such necessary and reasonable action. I am unable to perceive that any provision of the Convention of September 10, 1923, or any rule of the Commission authorizes the filing of this peculiar opinion by the Mexican Commissioner. Since obviously there is no such provision or rule, it is particularly strange that the Mexican Commissioner should question, as he does in the second paragraph of his opinion, the propriety of my preparing a dissent in Washington as a matter of necessity. The applicable rule, which the Mexican Commissioner helped to make authorizes dissenting opinions.

The necessity for preparing a dissent in Washington was due to the delay of the proceedings in Mexico. When the hearings at the last session of the Commission were scheduled to begin, the American Commissioner, the Presiding Commissioner, and counsel were informed, after they had arrived at the place of the hearings, that the Mexican Commissioner was unable to perform his duties, and no one else was named to take his place. While greatly regretting the delay, I courteously informed the Mexican Commissioner at his home that I was prepared to let all proceedings be suspended until I was notified by him that he desired to proceed. Notification by him with respect to his readiness to participate in the proceedings was received more than a month after the date fixed for the opening of the session. On March 24, 1931, the Mexican Agent called attention to a Mexican official

[1] The above document, dated July 11, 1931, was not presented to the Joint Secretariat of the Commission for filing until August 14, 1931.

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decree giving employees of the Mexican Government a ten days' vacation period. On that occasion I courteously stated that I would be guided by his opinion or by the opinion of the Mexican Commissioner as to the propriety of an adjournment, and an adjournment was taken. For some reason, the Presiding Commissioner was unwilling to express any view with respect to the merits of the case until a few hours before his departure for Washington to attend a session of the so-called General Claims Commission, which I also attended. Therefore, delays which I was not responsible for, which I regretted, but which I courteously submitted to, made it a necessity to prepare a dissenting opinion in Washington. Now the Mexican Commissioner, who, better than I, can account for the delays in Mexico, expresses a view to the effect that my action was strange. The Mexican Agent appears to regard it as improper.

It may be noted that my action is not without precedents. As a matter of convenience, the Mexican Commissioner on the General Claims Commission prepared in Mexico City, dissenting opinions in the cases of *Chattin*, *Haley*, *Parrish*, and *Englehart*, *Opinions of the Commissioners*, *Washington*, 1927, pp. 450 *et seq.*, after opinions in these cases had been written in Washington by the other Commissioners. I made no criticism or innuendoes or misrepresentations in my opinions in those cases with respect to the Mexican Commissioner's action.

Dr. González Roa may have desired to take all possible action (without, in my opinion, being very sucessful) to improve or to justify his opinion in the Russell case in the light of comments made in my dissenting opinion. I have no particular objection to such a motive, although, of course, there is no warrant in the Convention or in the rules for his last opinion. But assuredly the preparation of such an opinion should not be justified by a combined effort on the part of himself and the Agent of Mexico, whom Dr. González Roa quotes, either to purport to point out in my dissenting opinion errors, which a casual examination of the records would show do not exist, or to question the propriety of a dissenting opinion, authorized by the rules of the arbitration. I shall not comment regarding the motives for such action. There is no similarity between holding proceedings of a Commission at an unauthorized place and the preparation of an opinion dissenting from a decision of a Commission rendered at a proper place. The Mexican Commissioner presumably refers to objections to the former made in the past by the Government of the United States.

My observations with respect to the determination of the case by the interchange of views among all three Commissioners were, I think, pertinent. I may observe, however, that in making these observations I nowhere used the word "irregular," which appears in the Mexican Commissioner's opinion.

In the statement referred to by Dr. González Roa, the Mexican Agent, Dr. Elorduy, says:

"The Mexican Agency considers that it is unnecessary and useless to enter into discussions as to whether or not the document subscribed by Mr. Nielsen is in reality a dissenting opinion in accordance with the usage or jurisprudence of Courts of Arbitration and the Rules governing the procedure of this Honorable Commission.

"The Mexican Agency also considers it unnecessary and useless to refute, as regards its substance, the propositions upheld by Mr. Nielsen in his so-called Dissenting Opinion, as the case docketed under No. 44 has been finally decided, without subsequent appeal, in favor of Mexico."

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If it is useless, as it assuredly is, to discuss the question whether my dissenting opinion is a dissenting opinion, then I do not perceive why the point is raised by the Mexican Agent. Furthermore, I do not understand that it is a function of the Mexican Agent to undertake to refute, in some form of a dissenting opinion, opinions written by Commissioners. The Mexican Agent seems to indicate that, if the case had not been decided in favor of Mexico, he would have some right to attempt to refute propositions. Since the case was decided in favor of Mexico, I do not perceive why the Mexican Agent raises any point as to the necessity of his undertaking to refute propositions in an opinion of a Commissioner.

I am unable to understand the view expressed by the Mexican Commissioner that the rules did not justify me in commenting on certain points in his opinion. Neither the Convention nor any rule prescribes a precise method of preparing opinions. The Convention is silent on the subject. When the Commissioners express separately their views as to the "grounds", in the language of the rules, on which an award is based, I consider it to be proper for a Commissioner to comment in his dissenting opinion on grounds stated by either Commissioner. Again I may cite a precedent from the proceedings under the Convention of September 8, 1923, between the United States and Mexico. In the *Chattin* case, the Mexican Commissioner commented at length on certain paragraphs in the opinion written by the Presiding Commissioner, in which paragraphs I did not concur, as I expressly stated in my opinion written in that case.

I am unable to understand the passage in Dr. González Roa's latest opinion in which he states that he had made known that he would not formulate a dissenting opininon, in case he should have occasion to dissent from the Presiding Commissioner. It would seem to be certain that, if in any case decided against Mexico the Mexican Commissioner should consider the decision to be improper, he would dissent. He did so with respect to the first decision rendered by the Commission at its last session, Decision No. 2. It would be a strange procedure for a Commissioner to bind himself, in advance of knowledge of views of another Commissioner, not to dissent. I, being uninformed as to how the case would be decided up to a few hours before the session of the Commission closed, and being in disagreement with the decision, filed a dissent conformably to the rules.

I see no purpose in commenting on the Mexican Commissioner's lengthy discussion of legal questions which were discussed at such great length in opinions already written in the case.

The Mexican Commissioner, while equivocally referring to some charge made by me, characterizes such charge as absurd. There is no charge made in my opinion, which deals solely with law and facts.

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