

# **REPORTS OF INTERNATIONAL ARBITRAL AWARDS**

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## **RECUEIL DES SENTENCES ARBITRALES**

**Heirs of Jules Brun Case**

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of a debt, recognized by a public instrument, for the extinguishment of which the party debtor had set aside certain receipts of the municipal revenues, thus constituting a pledge which in law establishes a legal right in favor of the creditor.

It is a notorious fact that the district of Vargas has since the year 1871 passed through a series of political and economic changes which have radically altered its organization and greatly decreased for various reasons the receipts of the municipal revenues.

The liability which might attach to the National Government to-day for a debt which was originally contracted by the municipal council of the district of Vargas, of the former province of Caracas, and which debt should be paid by these very municipal revenues which said corporation administered, can not be founded legally except in the ultimate territorial distribution sanctioned by the constitution of 1901 whereby the States obligated themselves to cede to the nation, among other cities, that of La Guaira.

Upon the date of this session the debt due the successors in interest of A. Lemoine had for a great many years remained without action, without their having been presented before this Commission any sufficient reason or motive to show that that situation was not owing to the neglect of the creditor and his legitimate successors in interest. The reason upon which all legislations base the right of the debtor to invoke prescription as a means of extinguishing an obligation is the abandonment in which the creditor has for a number of years left the exercise of his right, the legal presumption of payment arising therefrom. Prescription has not been invoked before this Commission in the present case by the Government of Venezuela, wherefore it can not of its own motion take it into consideration, in conformity with the principles which govern, but there is no right for the allowance of interest upon the amount of the debt; and taking moreover into consideration that the amount shown to be due by the liquidation of November 1, 1871, includes an item of \$7,500 for damages, and at the same time another amount for interest up to that date upon the capital at 6 per cent, which amounts to the sum of \$25,234.62; and that in all equity this double indemnity should not be allowed for interest and for damages, there should be deducted from the total amount of said liquidation the sum of \$7,500, and the balance in favor of the successors in interest of A. Lemoine should be allowed, say the sum of 228,714.64 bolivars, without interest.

(This opinion was concurred in by the French arbitrator.)

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#### HEIRS OF JULES BRUN CASE <sup>1</sup>

- A state of war, a battle, or a skirmish excuses only those casualties which are unavoidable.
- A city not in revolt, but temporarily occupied by insurgent forces, is entitled to receive from the Government the *utmost care and protection* not inconsistent with the retaking of the town from the insurgent forces, and is subject only to the *inevitable* contingencies attending such an undertaking.

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<sup>1</sup> EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 27, 1903.

Proceeded to examination of claim presented in the name of the heirs of Mr. Brun (Jules), late superintendent of the French Company of Venezuelan Railroads.

Doctor Paul observes that this claim is not presented by a representative of Mr. Brun and in his opinion this fact would suffice for its not being taken into

There is a presumption that the Government will do its duty in this regard; but it is met, if not overcome, by a presumption which arises from a refusal of the Government in such a case to permit the use of its judicial processes to settle the exact facts easily ascertainable.

If there is a claimant rightfully in the case, however informally present, it is sufficient to permit and to require a disposition of the case on its merits and all parties will be fully bound by the decision.

Where the claimant is the mother, a widow, and the claim is for the unlawful killing of her son, the measure of damages is the amount which will meet the pecuniary loss she has sustained where there is no ground for exemplary damages.

The protocol constituting this commission having provided that the award be paid in bonds of the diplomatic debt of 3 per cent of Venezuela, which are at present greatly reduced in market value, the umpire cannot because of this augment the actual damage or the actual debt in making his award. Such a course would be unjust to the respondent Government and to every holder of these debts. The umpire is not competent to do this under the protocol.

#### OPINION OF THE VENEZUELAN COMMISSIONER

This claim is wanting every document proceeding from the lawful heirs or successors to Jules Brun formulating a claim against the Government of Venezuela for the death of said gentleman, so that all such elements are lacking as are indispensable for taking into consideration either the lawfulness of the personality of the claimant or the sum to which the claim is made to amount.

Among the papers presented by the French arbitrator there only appears a telegram dated the 4th of June, 1898, addressed by Mr. Hanotaux to the French legation in Caracas running as follows:

Take steps necessary to protect eventual rights of the Brun family, assuring guarantee of the French personnel of the company.

There are also presented two rough copies of writing corresponding to two notes addressed to the minister of foreign affairs of Venezuela on the 4th and 12th of June, 1898, by Mr. Quiévreux, inviting him to ask the local authorities

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consideration by the commission. He adds, besides, that the death of Mr. Brun was caused by purely accidental means and that in no manner can it serve as a basis for a claim of indemnity against the Venezuelan Government.

Mr. de Peretti replies that in presenting this claim the French Government is substituted in place of the heirs whose interests it takes in hand, the mother of Mr. Brun being aged and infirm.

Moreover, the responsibility of the Venezuelan Government appearing to him well established he accords an indemnity of 500,000 bolivars.

It is therefore decided that this claim be reserved for the umpire to examine.

Doctor Paúl inquires of his colleague upon what basis he has estimated the amount of the indemnity which he thinks is due the heirs of Mr. Brun. Mr. de Peretti replies that in view of the rejection by his colleague of the present claim he does not feel obliged to disclose the reasons which have led him to fix the amount of 500,000 bolivars. However, he is willing to state that this amount, which is exactly estimated by the French Company of Venezuelan railroads as an equitable compensation for the injury done to the family of its superintendent, represents almost precisely in capital the annual salary that Mr. Brun earned by his labors.

of the State of Zulia to tender their assistance to the officials of the "Compagnie Française de Chemins de Fer Vénézuéliens," with the purpose of establishing the exact truth of the events that took place at Santa Bárbara on the day Mr. Brun was wounded.

In reply to one of these notes the minister of foreign affairs on the 11th of June of the same year expressed himself to be willing to take it into consideration, foreseeing that the fact of his not considering it might lend itself to interpretations alien from the views of the Government as to the death of a truly appreciated person, which had had its origin in a regrettable accident during the progress of battle.

The fact of the wound of Mr. Brun, with which the communications of the consul of France deal, occurred under circumstances of such a nature so precise, so evident, and so indisputably accidental that all investigation after the death of the wounded gentleman became unnecessary. The very employees of the company, personal witnesses of the fact, narrate with all its details the unfortunate accident of the wound of Mr. Brun, and the commissioner for the Government of Venezuela will take precisely those declarations into consideration to weigh the reason and justice of the alleged claim.

Mr. J. B. Peysselon, representative of the "Compagnie Française de Chemins de Fer Vénézuéliens," after the death of Mr. Brun, in a statement which he ratified before the consular agent of France at Maracaibo, relates the facts as follows:

From the 4th day of May the village of Santa Bárbara, the place of our residence, was occupied by a revolutionary troop. On Sunday, the 8th, the legal troops, transported by the steamer *Progreso*, arrived at midday at the village. Under these circumstances we must foresee a battle in the streets. This foresight ordered us to immediately close all the doors and blinds of our dwelling house. While I was closing a window overlooking the square Mr. Brun was closing that of his sleeping room, which overlooks Santo Domingo street. At the same moment the musket volleys began in this street; the window was already closed; but Mr. Brun had no time to remove his hand from the lock when the bullet of an arm of precision pierced the blind through, twisted the lock in an extraordinary way, pierced Mr. Brun's hand through and through and threw the chips on his breast. Mr. and Mrs. Crinière, who inhabit the house of the director, attended Mr. Brun on this sad circumstance. I immediately went out to the square to call a physician. I met with 20 armed men of the Government, and the only person known to me to whom I could apply was Gen. Eleazar Montiel, the head of the party. As the physician had not arrived, I went out for a second time and saw the same Montiel with Messrs. Bellais and Acosta, his lieutenants, and another troop of the Government. When the first panic was over, Drs. J. Rosales and J. Cohen could be called, and immediately came to attend our friend.

Mr. A. Crinière, book-keeper of the company at Santa Bárbara, declares before the same consular agent:

We were anxious, because we heard and saw nothing. When at midday the report circulated that the steamer *Progreso* was at the entrance of Santa Bárbara, a great movement took place, and we saw a white flag at the station. This inspired us with some confidence, and we thought that the two parties would come to an understanding. Unfortunately it did not happen so, and at the same time a lively musket firing broke out in Santo Domingo street. It was the soldiers from Maracaibo that arrived at the bottom of the village and attacked the forces of Generals Figuera and Pozo in the rear. Immediately Messrs. Brun, Peysselon, and myself ran to close the doors and windows to protect ourselves from the bullets. I had already heard the noise of something like mortar falling behind me. It was a bullet that had pierced through the window of the hall overlooking the square which

had two flags. Almost at the same time I heard Mr. Brun cry, "I am wounded." We all ran to him to help and saw his right hand horribly mutilated by a bullet. All of this passed like a thunderbolt. We rendered the first attentions required by so serious a wound, and, the musket firing having ceased, Mr. Peysselon ran in search of a physician. I followed him and saw soldiers of the legal forces with the French flag over their heads guarding the entrance of the office in the street, which did not prevent them from preparing to fire at us; but fortunately Mr. Peysselon had sufficient presence of mind to cry: "French company," which produced the effect of changing their bad intention, and Mr. Peysselon was able to go out.

From the medical inspection made by Dr. J. Cohen and reported to the consular agent at Maracaibo, it appears that Mr. Brun, immediately after the incident, presented a wound in his right hand, with the following circumstances: On the palm side of the hand the wound presented an extent of from 7 to 8 centimeters and a strange appearance that showed that it had been produced not only by the bullet, but also by the violent pressure of a hard body, with half-cutting edges, which intersected the skin, the muscles, and the arterial arc. It also appears that the physician, in view of the dangerous nature of the wound, proceeded to render the patient, in company with Dr. Paminas Rosales, all such attention as medical science prescribed; that these cares continued during all the days 9, 10, 11, and 12, in which nothing particular occurred, the treatments being made regularly and with a great attention; that on the 12th, at 11 a.m., Mr. Brun was embarked on board the steamer *Progreso* for his transportation to Maracaibo without showing theretofore any alteration; that at 4 o'clock that day Doctor Cohen proceeded, on board the *Progreso*, to dress the wound, and found in the purulent focus formed at the side of the wound on the dorsal face of the hand a complete absence of gleet and three gangrenous points on the dorsal face of the thumb; that such symptoms inspired him with the fear of a great danger, for which reason he notified the acting representative of the rights of the company what he had seen and ordered a certain preventive method. The patient was well until 7, when in a violent manner the fever made its invasion with a strong delirium and all the consequences attending an infection; that everything was attempted, but in vain, for neither scientific cares nor those of friendship were enough to avoid the catastrophe that took place at 8.45, when the patient died of a purulent infection of violent invasion, which could not be overcome.

The corpse having been carried to Maracaibo on the same steamer *Progreso*, the government of the State of Zulia, upon learning the regrettable event, thought it to be its duty to join, as it did in effect, in the sorrow produced in the State by the death of Mr. Brun, and decided among other manifestations to assist at the act of the burial of the corpse of the esteemable gentleman, who lost his life on account of a lamentable accident.

Another proof given by the government of the sympathy with which it was inspired by the fate of Mr. Brun appears from a note addressed by Gen. J. M. Gomez, chief of the third military circumscription of the Republic to Mr. Julio d'Empaire, in charge of the consular agency of France in the city of Maracaibo.

In that note a copy is inclosed of that which in the name of Mr. Brun, while suffering in his bed the consequence of his wound, was addressed on the 12th of May, 1898, by Mr. J. B. Peysselon, inspector of the exploitation, to Gen. Mamerto D. Gonzalez, military agent of Gen. García Gomez in the Santa Bárbara district. Mr. Peysselon's note runs thus:

Compagnie Française de Chemins de Fer Vénézuéliens. Line from San Carlos to Mérida. Direction of the exploitation. L.R.No. 658. Santa Bárbara, 12th May, 1898. General Mamerto D. González. My dear sir: As the agent of the company, and Mr. Brun being unable to do so himself, I thank you for the restoration of

order and for having taken the proper measures for the bringing of the steamer *Santa Bárbara*. It would be highly agreeable to us to see you among us protecting our persons and our interests. I am with all consideration,

Your respectful servant,

J. B. PEYSSOLON,  
*Inspector of the Exploitation.*

This note, under the circumstances under which it was written, Mr. Brun being already wounded, order being restored in the place by the forces commanded by Gen. Mamerto González, and the steamer *Santa Bárbara*, that had been taken by the revolutionaries, being returned to the company, throws sufficient light to make one consider as ungrounded the attacks which Mr. Peysselon desired to adduce with the purpose, after the death of Mr. Brun, of giving the accident happening to the latter a character of aggression against the building of the company, that is not in any way proved.

For all the reasons above stated the claim presented by the Commissioner of France on account of the death of Mr. J. Brun is destitute of any ground that may render it acceptable for any amount, and the Commissioner for Venezuela, therefore, entirely rejects it.

CARACAS, May 27, 1903.

#### OPINION OF THE FRENCH COMMISSIONER

The 8th of May, 1898, M. Brun, superintendent of bridges and causeways on leave, director of the French company of Venezuelan railroads was grievously wounded by a discharge from Government troops which took place in the village of Santa Bárbara occupied by the insurgent forces. M. Brun, who was in his house, over which floated the French flag, had his hand shattered by a ball, at the moment when he was closing the shutters of the window of his room, and died four days later because of this wound. These facts have caused the lodgment by the French Government of the claim of 500,000 bolivars before the mixed commission appointed according to the protocol of the 19th of February, 1902. These facts are well established by the depositions of eyewitnesses and of the doctor who cared for M. Brun. The Venezuelan authorities have by their attitude confirmed their correctness, which the Venezuelan Government has never placed in doubt. At the sitting of the 27th of May, 1903, the mixed commission considered this claim.

Dr. Paúl rejected it, considering that it had not been presented by a representative of M. Brun and that this fact suffices for its not being taken into consideration at all by the commission; that the death of M. Brun had a cause purely accidental, and that it could not in any way serve as a basis for a demand of indemnity from the Venezuelan Government. I replied that the French Government had substituted itself for the presentation of this claim by the heirs whose interests it had taken in hand, the mother of M. Brun being aged and infirm, and that besides the responsibility of the Venezuelan Government seeming to me established I accorded a demand and indemnity in satisfaction of 500,000 bolivars.

It is said nowhere in the protocol that the claims must be presented by those having a right in themselves. It is at the same time conformable to international law and commanded by good sense and equity that the French Government present in its name the claims of those of its dependents who are not capable themselves of defending their rights, and nothing interferes with this. As for the responsibility of the Venezuelan Government, it is difficult to place it in doubt, even holding to the principles generally admitted by international European law, the existence of which are often disregarded in affairs between

the countries of Europe and certain South American republics, because of the social and political conditions of these countries.

Immediately after the decease of M. Brun, M. Hanotaux, minister of foreign affairs, telegraphed the 4th of June, 1898, to M. Quiévreux, chargé d'affaires of France at Caracas, to take the necessary steps to safeguard the eventual rights of the family. M. Quiévreux the same day wrote to the minister of foreign relations of Venezuela, rendering homage to the correctness of the attitude of the high authorities at Maracaibo, whose evidences of sympathy were an undeniable proof of the confidence which M. Brun had inspired and of the services which he had rendered to the country in directing a great enterprise of public utility. Quiévreux made known that the local officials had not conducted themselves so well. The successor of M. Brun in the direction of the company could not obtain from the judge of the district permission to proceed according to the legal forms to make the different proofs relating to this dreadful incident and to the circumstances accompanying it.

The house of M. Brun, property of the company, was connected with the shops and storehouse for material and the central office. But the doors of the principal shop of the office of bookkeeping and the telegraph office were broken down after one of the discharges fired upon the property of the company had wounded M. Brun.

In conclusion M. Quiévreux asked relief from the Federal Government and that they kindly invite the local officers to lend their indispensable assistance to an investigation of this nature by the agents of the French company.

In his reply the minister for foreign affairs tried to establish theoretically that the judicial authorities were not obliged to proceed to any investigation. He added that the death of M. Brun and the breaking of the doors were simply accidents of war. The death of M. Brun could no more require compensation than that of a Venezuelan who, crossing a street in Paris in 1871, during the struggles of the Commune, was killed by a stray ball.

The representative of France in his reply called attention to such strange theory, as it seemed to him. He suggestively remarked that the terms of the letter of the minister had only strengthened his purpose to have an examination of the unfortunate incidents which had marked the taking of Santa Bárbara by the troops of the Government. It was inadmissible, he added, that the department of foreign relations should try, under cover of the authorities of international law, to liken the breaking of the doors of the buildings of the French company to the destruction of the hostile intrenchments, which would lead one to suppose that the aforesaid buildings over which floated the French flag were occupied by revolutionary forces, but this hypothesis was so contrary to the real fact that the Venezuelan Government itself has not thought to claim it. M. Quiévreux said at the end of his letter—

I regret that it does not seem possible to your excellency that the judicial authorities of the district in which Santa Bárbara is situated should lend to the officials of the French company of Venezuelan railroads their aid in view of establishing the exact truth about the events which the national Government deploras with me. I see myself obliged, therefore, to make all my reserves for the case where the interested party having to formulate a precise claim upon the subject of this affair it would not be possible for them to base it upon the statements made according to the usual and legal forms. This will not be in accordance with their will or mine.

In spite of this courteous admonition the Venezuelan Government persists in its resolutions. This attitude proves clearly that it feared the consequences of a legal investigation and that it was ready to intrench behind technicalities more or less contestable upon explanations, upon international law and upon comparisons not well justified. We are convinced besides that this eagerness to

defend itself by the aid of citations of authorities of international law even before having been attacked, to reject a claim which was not yet presented, shows clearly that the Venezuelan Government itself confessed that a compensation for damages might be demanded of it under a just title. If it had been assured that an investigation conducted conformably to Venezuelan laws by the Venezuelan officials would have simply permitted to conclude upon the irresponsibility of the Government for the accident of the war no doubt but that it would have proceeded immediately to the aforementioned investigation. That would have established the responsibilities. That is what the Venezuelan Government wished to avoid. It has not recoiled before a denial of justice and it has thus condemned itself.

In the several trips I have made to Santa Bárbara for the purpose of forming personal opinions upon the French claims I have been able, although five years have passed since the events, to make some observations which have terminated by convincing me that the wounding of M. Brun could not be regarded as a simple accident of war. Accompanied by the commander of the French cruiser *Jouffroy*, by a representative of the French company, by the civil head of Santa Bárbara, and by some prominent men of the place, I visited the house where M. Brun was wounded. The window of the room situated on the first floor where this accident took place is pierced by several balls, the traces of which one sees clearly on the shutters of smooth wood and on the walls back of the chamber. Stray balls do not converge thus on a precise point. It is certainly a question of a volley fired intentionally upon a window which had just been closed and above which floated the French flag. According to the declarations which have been made to me by the civil chief and by the notables who were at Santa Bárbara when the village was taken, the troops which fired came by a street perpendicular to the side of the house where the window of M. Brun was located. There were neither in the street nor in the house any insurgents, the presence of whom could have explained the shots, and the armed band was commanded by an officer, Mr. Montiel, and composed of soldiers who knew the house of M. Brun and M. Brun himself very well. The tone with which these declarations were made lead me to believe that the aggressors knew what they were doing and were led by a chief who profited from an occasion offered to satisfy a former grudge. The investigation asked for and refused under the conditions, which I have explained, would at least have permitted the Government of Venezuela to punish those who thus fixed its responsibility. These necessary explanations tend to transform the simple accident of war which the Venezuelan Government would like to content itself with deploring into a murder committed knowingly, perhaps premeditated, and in any case accompanied by acts of violence upon foreign property without any provocation or any resistance being able to excuse or even explain them. Can one equitably establish a parallel between a like instance and the fortuitous death of a Venezuelan who, in 1871, was hit by a stray ball while crossing a street during a combat going on between the insurgents and the army of Versailles? M. Brun, director of a public service, who was obliged to remain at his post, has been wounded in his house surmounted by a French flag by a volley intentionally aimed at his window by a party of regular soldiers who knew him without one's being able to find in it any excuse or provocation. The same soldiers then broke down the doors of the buildings which they invaded and can not give as an excuse for this violation of foreign property the necessity of driving insurgents from it and of making them cease their resistance.

The nature of the acts, the conduct of the local authorities, the attitude of the Venezuelan Government, and the result of a personal investigation have led me to judge that an indemnity was due the family of the victim. I have



placed it at 500,000 bolivars, judging as an arbitrator who acts according to his conscience without allowing himself to be influenced by the quality of the parties which he has no mission either to attack or defend. I have estimated, and still estimate, after having heard my honorable colleague express his opinion, that this indemnity is an equitable reparation for the material damage suffered by the family of M. Brun. This sum represents in capital the annual salary of the director of the French company, who earned in pursuit of his duties from 20,000 to 25,000 bolivars. We should reach a much greater sum if we calculated the indemnity at the normal rate of interest in Venezuela, which is practically 12 per cent. We ought to consider besides that, according to the terms of the protocol, this indemnity has to be paid in bonds of the diplomatic debts and not in gold. Thanks to this concession kindly granted by the French Government to the Venezuelan Government to permit it to pay its debts with greater facility, the figure of the indemnity finds itself singularly reduced in reality. The bonds issued by the Venezuelan Government have an actual variable value in fact which always rests far from their nominal value. In May, 1903, they underwent a depreciation of 30 per cent. To-day the Venezuelan Government, having proceeded to new issues to pay the indemnities accorded by the mixed commission, the depreciation reaches 70 per cent. The latter can only increase still more by future issues. It would be then, if the umpire should partake of the sentiment of the French arbitrator, scarcely the sum of 150,000 bolivars in gold which the heirs of M. Brun would receive from the Venezuelan Government.

*December 15, 1903.*

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EXHIBIT ATTACHED TO THE OPINION OF THE FRENCH COMMISSIONER

Under date of June 17 last, the mother of M. Brun, having learned that the Venezuelan arbitrator had raised a question of fact because the Brun claim was not directly presented by the interested parties, sent me the attached letter.

Mme. Brun, aged and infirm, has counted upon the French Government to sustain her claim against the Venezuelan Government. She declares that she approves what the ministry of foreign affairs has done in her interest and requests it to continue its proceeding in the same manner.

*JUNE 28, 1904.*

M. DE PERETTI DE LA ROCCA,

*French Arbitrator in Venezuelan Claims,  
Ministry of Foreign Affairs, Paris, France.*

LODÈVE (HÉRAULT),  
*June 17, 1904.*

SIR: I have learned that the Venezuelan arbitrator at Caracas has raised some difficulties with regard to the claim which I have for the death of my son, José Brun, director of the Company of French-Venezuelan Railways, assassinated at Santa Bárbara, Venezuela, because I have not acted myself, but I count upon what has been done by the French Government in maintaining my claim to follow its course.

I inform you then by the present that I give full approbation to what the ministry of foreign affairs has done, asking it to be pleased to maintain my claim in the manner in which it has supported it itself.

WIDOW BRUN (NÉE CARRED).

BOULEVARD DE L'HÔPITAL,  
*Maison Laurès, Lodève, Hérault.*

## ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

As commissioner for Venezuela, I have held, as shown by the abstract of the oral proceedings had on May 27, 1903, that the commission should abstain from considering the merits of the documents produced, as at first glance it appeared that a claim for indemnification had not been properly entered against the Venezuelan Government by a citizen or a party in interest of French nationality, showing his capacity as universal heir to M. Jules Brun, nor his legal title to receive any sum by way of indemnification. I also held that, from the examination of the documents then before me, no cause was shown to substantiate the alleged liability of the Venezuelan Government for the death of M. Brun, as the testimony of the eyewitnesses clearly proved that the death of the party was produced accidentally, was due to a casualty, at the time an armed conflict was taking place near his residence.

In support of the first point held in my opinion, I beg to call the attention of the honorable umpire to the precise language of article 1 of the protocol made in Paris on the 17th of February, 1902, to which the existence of the present commission is due, and supplemented by article 2, relating to claims submitted to the investigation and decision of said commission.

Both articles refer to *claims for indemnification presented by French citizens only*, and this commission can not, because more or less plausible reasons of similarity or inference are put forth, extend its limited powers to deal with other matters, except such as are *brought before it by French citizens* in the shape of a *claim demanding a stated indemnification*. Individual action is one of the requisites necessary to the possibility or faculty of the commission to deal with cases involving private interests of French citizens who claim as against the Venezuelan Government to have sustained damages or to be aggrieved parties.

Other questions exclusively affecting the Governments of both countries do not come within the scope of this commission, in the same manner that the diplomatic action of the Government taking in hand the representation and defense of the rights of its citizens does not extend so far as to create such rights nor to enforce them when the party concerned has not made use of such right nor yet to supersede the party when the party has not shown signs of existence. It is not amiss to quote, in this connection, the opinion of the learned commissioner, Mr. Little, in the claims of Narcissa de Hammer and Amelia de Brissot, before the commission created by the convention of December, 1885, between Venezuela and the United States:

This of course, is not saying that the United States has no cause for reclamation on the account of the killing of her citizens—Captain Hammer and Mr. Brissot. It is only holding that under the terms of the convention the question is not submitted to us. It would be to go beyond the limits of just interpretation and to enter the forbidden domain of judicial legislation to say that *claims on the part of citizens* means or includes *claims growing out of the injuries to citizens*. (Moore, 2459--2460.)

All questions relating to the nationality of the claimant and to the legal status or judicial capacity of the person to receive an award grow out of the presentation of such person as a claimant, whether it is a real living person or a judicial person, which by law has a supposed existence. On the other hand, the claim must state the amount claimed as a fair indemnification, such data as are furnished by the claimant being of great importance in the estimation of damages.

None of the requisites is found in the documents submitted to the commission, as such evidence only consisted of a collection of notes and depositions made by employees of the company and consular officers in regard to the death of M. Jules Brun. From the contents of said notes in regard to the consular action

it appears that such action was reduced to soliciting immediately after the death of M. Brun the cooperation of the Venezuelan authorities for the *further investigation* of a fact then made sufficiently clear by the testimony of the only eyewitnesses to the accidental wounding, the employees of the company. Such extreme investigation was asked for the sole purpose of—

securing the possibility that the parties concerned may have to enter a *precise claim* on the subject, being thus enabled to base it upon proofs established according to legal proceedings.

The telegram of M. Hanotaux, minister of foreign affairs of France, to the French legation at Caracas reads as follows:

Prenez dispositions nécessaires pour sauvegarder droits éventuelles famille Brun.

[Translation]

Take necessary steps to safeguard eventual rights of Brun family.

What is the meaning of the note of M. Quiévreux and of this telegram? That it might be possible for the interested parties to enter a *precise claim* on this subject and that the consular agent should endeavour to safeguard any eventual rights of the Brun family. Neither has the claim been made *precise*, nor is there anything to show that such rights of the Brun family have passed from their eventual condition to that of positive and distinct rights; nor has the French Government duly entered any such claim against the Venezuelan Government in behalf of the Brun family, nor yet has it deemed that the case has arrived when, by virtue of its sovereignty and in view of the testimony furnished by the employees of the company, witnesses to the wounding of M. Brun, said Government should demand a certain sum of money from the Venezuelan Government as an amend for a wrong done to the nation or as a penalty and under no circumstances by way of a humanitarian compensation or a charitable gift made to the Brun family. These courts can not measure in money the wrong done to a nation, as a nation, in case such wrong exists, nor have they been created to make grants in order to remedy the needs of a widow and orphans by reason of the accidental death of a beloved husband and father.

The honorable commissioner for France has lately produced as an annex to his opinion a letter from M. Brun's relict, dated on the 17th of June of last year — that is, one year after having presented and examined the documents in the case which I had before me in Caracas when I gave my opinion on the case. Such letter lacks weight, as it only ratifies the proceedings adopted in this matter by the minister of foreign affairs of France, and it has been shown that such proceedings do not constitute a claim for an indemnification for a given sum in behalf of a given person. That which has had no existence can not be the subject of approval or ratification. That which lacks legal force because of the omission of an indispensable requisite to make the act or contract valid may be ratified or approved in order to make it valid. To do this, however, it is also indispensable that such act or contract should exist even in a weak condition. That which has never existed can not be ratified or revalidated, and the claim of Mme. Brun against the Venezuelan Government for indemnification did not exist either prior to or at the time of the signature of the protocol of February 17, 1902, nor yet during the six months provided by article 2, as an extension of the time granted for the presentation and the examination in the first place by the French and Venezuelan commissioners of *all claims for indemnification* growing out of events prior to May 23, 1899.

In consequence I maintain the first point of my opinion that, as no claim whatever for indemnification was presented in due time by or in behalf of a specified French citizen, this commission is not under obligation to examine the

documents bearing on the case in point, as the commission has no authority in the premises, and that the claim must therefore be rejected.

In case the honorable umpire should deem it proper to examine the documents in reference on their merits and to weigh the proof of the facts in order to ascertain whether the conclusions arrived at by the honorable commissioner for France and the assertions contained in his memorandum in regard to the death of M. Jules Brun are justified, I have no need to go into a deep analysis of the testimony introduced to convince the honorable umpire of the slight connection there is between the opinion of my learned colleague and the conclusive proof shown by the testimony of the eyewitnesses, MM. A. Crinière, bookkeeper of the company and J. B. Peysselon, representative of the company after the death of M. Brun.

Mr. Crinière's *verbatim* testimony is as follows:

Dans la matinée du dimanche 8 mai, craignant un engagement sérieux des deux parties, nous arborions vers les dix heures du matin à la maison de la Direction des drapeaux nos couleurs françaises, dont deux à la fenêtre du salon donnant sur la place, par M. Brun lui-même et aidé de Miguel Labarca, deux par moi dont un très grand sur la rue Santo Domingo; *c'est par cette rue que les soldats de la force légale ont entouré le village et où donnait la chambre dans laquelle M. Brun a trouvé la mort en fermant une fenêtre.* \* \* \* Une vive fusillade éclate au même moment dans la rue Santo Domingo; c'était les soldats envoyés de Maracaibo qui arrivaient par le fond du village, et prenant par derrière les forces des généraux Figuera et Pozo, immédiatement Messieurs Brun, Peysselon et moi, nous précipitons pour fermer portes et fenêtres pour nous préserver des projectiles. Déjà j'avais entendu comme un bruit de plâtre tomber derrière moi; c'était une balle qui avait traversé la fenêtre du salon donnant sur la place et munie des deux drapeaux (a window different from the one where a few moments later M. Brun was wounded) et presque aussitôt j'entendais Monsieur Brun s'écrier: Ah, je suis blessé, nous tous nous précipitons vers lui pour lui porter secours et lui voyons la main droite horriblement mutilée d'une balle. Tout ceci a duré l'espace d'un éclair. \* \* \* J'ai été témoin de tous ces faits et je suis en possession du verrou de la fenêtre de la chambre de Monsieur Brun, et aussi d'une balle que j'ai ramassée au milieu du salon (not M. Brun's room); je les tiens à votre disposition et ils prouveront surabondamment la véracité de ces faits regrettables.

[Translation]

On the morning of Sunday, May 8, fearing a serious fight between the two parties, we hoisted our French colors at about 10 a.m. over the company's house. Two of said flags were placed in the window of the parlor overlooking the square by M. Brun himself, assisted by Miguel Labarca, and two by me, the very large one in the window facing the street of Santo Domingo. It was by this street that the legal troops surrounded the village and which the window overlooked where M. Brun met his death in closing this window. A lively fusillade rang out at that moment on Santo Domingo street; it came from the soldiers sent from Maracaibo, who were arriving at the rear of the village, taking the forces of Generals Figuera and Pozo at their back. Messrs. Brun, Peysselon, and I at once proceeded to close doors and windows to protect ourselves from the missiles. I had already heard a noise behind me as of falling plaster; it was from a ball that had come through the parlor window that overlooked the square and from which hung the two flags; almost at the same instant I heard M. Brun cry out, "I am wounded." We all rushed to his aid and found his right hand horribly mangled by a ball. All this had happened in a flash. I have been a witness to these events and have in my possession the window bolt of M. Brun's room and also the ball which I picked up in the middle of the salon; they are entirely at your disposal and afford abundant proof of these lamentable facts.

Mr. Peysselon states:

Le dimanche 8, les troupes légales amenées par le vapeur *Progreso* arrivaient à midi et demi dans le "pueblo". Nous devions dans cette circonstance *prévoir*

*une bataille dans les rues. Cette prévoyance nous commandait de fermer immédiatement toutes les portes et volets de notre maison d'habitation; pendant que je fermais une fenêtre donnant sur la place, M. Brun fermant celle de sa chambre donnant sur la rue Santo Domingo; au même instant la fusillade commençait dans cette rue, la fenêtre était déjà fermée, mais Monsieur Brun n'avait encore pas eu le temps de quitter la main dessus le verrou, quand une balle d'arme de précision est venue traverser le volet, tordre le verrou d'une façon extraordinaire, percer de part à part la main de Mons. Brun, et lui projeter des éclats en pleine poitrine. \* \* \* Mons. Brun est resté à Santa Bárbara jusqu'à la première occasion pour descendre à Maracaibo et il a été embarqué le jeudi matin vers les dix heures avec plus grands soins. Son état ne nous permettait pas de prévoir une issue aussi fatale et si prompte. Il est mort pendant la traversée, le même jour à 8 heures 45 minutes du soir. Tel est l'exposé sincère des faits dont j'ai été témoin oculaire jusqu'à l'embarquement de M. Brun.*

[Translation]

On Sunday, the 8th, the legal troops brought on the steamer *Progreso* arrived in the "pueblo" at half-past twelve, noon. Under such circumstances we anticipated a fight in the streets. This led us to immediately close all the doors and shutters of our dwelling house. While I was closing a window overlooking the square M. Brun was closing that of his room facing Santo Domingo street; at the same moment firing began in this street; the window had been already closed, but M. Brun had not had time yet to withdraw his hand from the bolt when a bullet from a rifle (*arme de précision*) came and perforated the shutter, twisted the bolt in an extraordinary manner and pierced through the hand of M. Brun, sending splints all over his chest. M. Brun remained in Santa Bárbara until the first opportunity to go down to Maracaibo. He was embarked Thursday morning at about 10 o'clock with the greatest care. His state did not warrant our foreseeing such a fatal and sudden issue. He died during the trip on the same day at 8.45 in the evening. This is a sincere statement of the facts of which I was an eyewitness until M. Brun was put aboard.

After reading such sincere and truthful accounts given by two responsible parties, employees of the company and fellow-countrymen of M. Brun, how can it be explained that the learned commissioner should in his opinion endeavor to construe a mere accident of war which the Venezuelan authorities were the first to deplore, as shown by the record of the case, into a murder committed knowingly and perhaps with premeditation, averring at the same time that the wound received by M. Brun was due to a shot from a volley designedly aimed at the window by regular soldiers who knew him? Where is the proof of so grave an accusation? Inferences like these, which originate in the mind preoccupied with the idea of finding guilt where there is only a regrettable incident, as indicated by the testimony of M. Crinière, can not fail to bring to the mind of an impartial and upright judge the conviction that such an assertion lacks all reasonable foundation.

So grave a charge against the Government of any country should be maintained by the most unquestionable proof. It should be alleged as a distinct fact and ground of reclamation and proved by evidence of the clearest character. Case of *Johnson v. Mexico*, before the Mexican Claims Commission, 1849. (Moore, p. 3032.)

As a proof of the correctness of his assertions M. de Peretti de la Rocca introduces in his memorandum a statement of the inspection he himself made of the house wherein M. Brun was wounded, when he went to Santa Bárbara on board of the French cruiser *Jouffroy*, in the course of a trip to Venezuela, five years after the incident. M. de Peretti states that according to the declarations made to him by the civil authority (*jefe civil*) and prominent persons who were in Santa Bárbara at the time the town was captured —

The troops that fired came through a street running at right angles to the side of the house where M. Brun's window lies, and that there were neither in the house nor in the street any revolutionists whose presence might explain the firing and that

the armed troop was under the command of an officer by the name of Montiel and consisted of soldiers well acquainted with M. Brun's house and M. Brun himself.

This supplementary proof which, for lack of a better one, the honorable commissioner for France endeavours to introduce, a proof resting upon his personal investigation, lacks all force in the present instance as we, the commissioners, must give our several decisions in strict accordance with the proofs submitted *ex parte*, and we can not find other elements to form our opinion unless they are from the documentary evidence submitted to us. To act otherwise would be tantamount to changing the mission of arbitrator and become an earnest defender of one of the parties. In order to show how easy it is to err when the field of sober thought is left where the judge must preside to enter into the arena where the eager defense is made it suffices to compare the text of the depositions of the eyewitnesses Crinière and Peysselon with the report of the French commissioner.

The witnesses state:

It was by *Santo Domingo street* that the soldiers of the legal troops surrounded the town, and M. Brun's room, where he was wounded when shutting a window, overlooks the street. \* \* \* A lively fusillade rang out at that moment in *Santo Domingo street*. It came from the soldiers sent from Maracaibo, who *were arriving at the rear of the town* and taking the revolutionary forces at their back; immediately (we) proceeded to close doors and windows *to protect ourselves from the missiles*. Under such circumstances we anticipated a fight in the streets. This led us to immediately close all the doors and shutters of our dwelling house.

While I was closing a window (Peysselon states) overlooking the square, M. Brun was closing that of his room facing *Santo Domingo street*, and at the same moment the firing began in this street. The window had been already closed, but M. Brun had not yet had time to withdraw his hand from the bolt when a bullet from a rifle perforated the shutter, twisted the bolt in an extraordinary manner, and pierced the hand of M. Brun.

Now, do not these two depositions clearly show the imminent risk which all the persons living in the house were running that the missiles might come in through doors and windows, and for this reason they hastened to close them? And was it not precisely in obedience to the instinct of self-preservation that M. Brun went to the window in his room, which faced *Santo Domingo street*, when a lively fusillade rang out in this street, and while being precisely there with his hand still on the bolt, the window being closed, a bullet wounded his hand?

Neither the conclusions arrived at by the learned commissioner from France in the narrative of his ocular inspection nor his theory of the perpendicular line in the subject of the direction of projectiles in a fight, which grew to the proportions of a battle, can alter in the slightest degree the deep conviction produced by the depositions of Peysselon and Crinière that the wound received by M. Brun, which some days later brought about his lamented death, was an accident, and by no means the outcome of a malicious plan.

I beg to call the attention of the honorable umpire to the contents of the official communications addressed by the president of the State of Zulia, and by the commander of the Third military zone, where the town of Santa Bárbara belongs, to M. Jules d'Empaire, in charge of the French consular agency in Maracaibo, wherein such officers express their earnest regret on account of the death of M. Jules Brun, a French subject, produced by a wound received under sad and fortuitous circumstances.

With the last-named communication, the military commander of the zone also sends a true copy of a letter M. Peysselon, inspector of the company, addressed in behalf of M. Brun to the military commander of the district, the letter in question being *verbatim*, as follows:

Como agente de la compañía y por impedimento del Sr. J. Brun (this is four days after being wounded), doy a Vd. las gracias por el restablecimiento del orden y por haber tomado las disposiciones eficaces para la tráfida del vapor *Santa Bárbara*. Nos complacemos altamente verlo a Vd. entre nosotros para proteger nuestras personas y nuestros intereses.

[Translation]

As the agent of the company and by reason of disability on the part of M. J. Brun, I beg to thank you for the restoration of order and for having taken effective steps for the coming of the steamer *Santa Bárbara*. We are highly pleased to see you among us to protect our lives and property.

Could it be possible that M. Brun would instruct M. Peysselon to thank the military commander of the district having under command the troops which made the attack on the town of Santa Bárbara, and to whose body the group of soldiers under the officer Montiel belonged, if M. Brun had not been satisfied that the wound he received and for which he was then suffering had not been entirely accidental?

I come to a close, confirming in all its particulars my former opinion, which I send with the present opinion, in which opinion I differ from my learned colleague, rejecting in full the claim that the Venezuelan Government must indemnify with any amount whatever the mother or family of M. Brun by reason of his death, which was entirely fortuitous and does not create any liability whatsoever on the part of said Government.

NORTHFIELD, VT., *February 1, 1905.*

#### ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

After having heard the additional opinion drawn up by my honorable colleague I ought to declare that his arguments have not in any wise weakened my convictions. In the first place, I maintain that one could not refuse the French Government the faculty of the right to interfere for Mme. Brun, aged and infirm, and consequently incapable of acting by herself. This would be contrary to humanity, to good sense, and to the protocol of 1902. It is superfluous to indicate in fact that the French Government would have failed in its duty in not presenting this claim, but it is important to remark here that it has not in doing this acted contrary to the obligations which the protocol places upon it. Article 2, which concerns the claims which we are considering, is formulated thus:

The demand of the indemnities other than those which are covered by article 1, but founded on acts anterior to the 23d of May, 1899, shall be examined in concert, etc.

It is not said that these demands will have to be presented by the claimants themselves, who are at liberty to have them presented to the arbitrators by advocates or by their natural representative which is the government of their country. In the mixed commissions established at Caracas by the protocols signed in 1903 at Washington did not each government have an agent charged with presenting the claims in its name? It is necessary to remark besides that in the particular case the French Government by a scruple which can only honor it has not made itself the advocate of Mme. Brun. Nothing, however, forbade this, but it is content to serve as impartial intermediary. On the contrary, in denying the French Government the faculty of presenting this claim one goes against the spirit of the protocol, which has for its end the settlement of all the claims of French citizens, for one would oblige the French Government to reply to this claim by the diplomatic way now that the protocol has been signed, precisely in view of removing these difficulties from the ordinary

course, to submit them to arbitration. In the second place, in my opinion, the responsibility of the Venezuelan Government rests plainly established by the incident which has led to the death of M. Brun. I remain persuaded that M. Brun has not been the victim of a simple accident of war. The results of my personal investigation are not at all proofs, without doubt. I present them merely as the basis which has permitted me to form a conviction. I persist, moreover, in considering the refusal of the Venezuelan Government to proceed after the incident to an investigation upon the spot by its own officers as a valuable indication of the fear which the result of such an investigation would inspire in it.

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#### OPINION OF THE UMPIRE

The honorable commissioner for France asserts a claim of 500,000 francs, while the honorable commissioner for Venezuela rejects the claim in its entirety. Hence it comes to the umpire for his decision.

The unquestioned facts are that in the State of Zulia in the United States of Venezuela on May 8, 1898, there was a railroad extending from San Carlos to Mérida and in San Carlos was the village of Santa Bárbara about the harbor of the same name. That this railroad was operated by a certain French company, whose superintendent or director was Mr. Jules Brun. His residence and the shops and offices of the company were in said village of Santa Bárbara.

That for some time preceding the date mentioned there had been a revolt in the State of Zulia against the government of that State and of the Republic, and that these insurgents had taken possession of the country in the vicinity of San Carlos and since May 4 had been in possession of the said village of Santa Bárbara. That the government was taking measures through military operations to dislodge the insurgents from this village and to defeat and disperse them; and for that purpose on Sunday, May 8, the Government troops arrived in the harbor of Santa Bárbara on the steamer *Progreso*, a little before noon of the day. That about 10 o'clock in the morning Superintendent Brun, his associates, and those who were occupants of the house with him, fearing an engagement between the two forces, placed conspicuously five French flags over their residence to attest its neutrality and mark it for protection. Not far from 12, noon, a battle seemed imminent between the two forces and the inmates of this residence, including the superintendent, made haste to close the shutters of the house. While Superintendent Brun was engaged in closing the shutters of the window overlooking the public square he was wounded by a rifle ball coming from the gun of a Government soldier, which penetrated the shutter, struck the bolt and drove it into his right hand, the ball passing through. It proved to be a most serious injury, crushing the hand and bones and lacerating the arteries, so that he lost seriously in blood and had a very jagged wound. Four other rifle bullets penetrated the house, coming through the window practically at the same time with this one which wounded Mr. Brun. Almost immediately following the wound two of the inmates went to the door to call a physician and found standing very near the residence about twenty soldiers, certain minor officers, and General Montiel in charge. At substantially the same moment of the firing into the house as aforesaid the doors of the principal shop and the office of the bookkeeper and the telegraph office belonging to this company were broken down by the Government soldiers by the order of General Montiel.

There were summoned as soon as possible to the aid of Mr. Brun competent physicians and surgeons who gave him thereafter so long as he survived skillful care and attention. However, despite the best of care, gangrene super-



vened and Mr. Brun died from the effects of the wound on May 12, four days after the wounding.

May 14, two days after the death of Mr. Brun, the gentleman then in charge of the French company's Venezuelan railroad made application in writing to the citizen judge of that district, praying that judicial proceedings be had to ascertain the facts connected with the injury and death of Mr. Brun and the damage to the railroad property occurring at the same time. There was no reply to his request, but General Montiel evidenced a violent hostility to this request. Following this application there came letters from the *chargé d'affaires* of France at Caracas to the minister of foreign affairs of Venezuela, the first being written on June 4 and the second on June 12, asking the minister to request the local authorities of the State of Zulia to take the proper judicial steps to ascertain the exact truth of the events of May 8, resulting in the fatal wounding of Mr. Brun and the damage to the railroad property. The first communication was not answered, but to the second letter a reply was made, courteous and sympathetic, but claiming that the injury arose under such circumstances as to free the Government of Venezuela of all liability for the death of Mr. Brun and the damages to the railroad property and declining to accede to the request of the *chargé d'affaires* that the facts be ascertained by proper judicial inquiry.

It appears that in conversation the military authorities of Zulia explained the attack of the Government troops upon the property of the French company, on the ground that the company had revolutionists concealed in its office. This allegation is wholly denied by the representatives of the company.

Mr. Jules Brun was 38 years old at the time of his death, was unmarried, was a French citizen, and was superintendent of a railroad at a salary of 25,000 francs a year, and he left surviving him as next of kin his mother, a widow and a resident citizen of France, who still survives. It is in her interest that this claim is presented by the French Government.

It is not claimed by the honorable commissioner for Venezuela, nor has it been claimed in any of the correspondence between the company and the Government of Venezuela that either the French company or Mr. Brun had failed to observe proper neutrality; and no claim is made by the Venezuelan Government that anything done on May 8th by the military authorities was because of any aid given to the insurgent forces by the company or by anyone directly or indirectly in its behalf, so that the umpire takes no account of the claim of the military authorities of Zulia, stated above.

There are certain other matters of fact which will be especially adverted to in the progress of the opinion.

Reference may be had to the very able opinions of the honorable commissioners to learn their respective positions upon the facts as developed; and the umpire takes this opportunity to express his appreciation of their great value to him in considering and determining this claim and, as well, his obligation to the honorable commissioners for their valued answers to the interrogatories submitted by him to them.

The honorable commissioner for Venezuela contends that the occurrence was of such a nature, its circumstances so precise, so evident, that all investigation after the death of Mr. Brun concerning the manner of his death became unnecessary. That this evidence disclosed indisputably that the wound was an accident due to a casualty and at the time an armed conflict was taking place near his residence. In fact, that it was an ordinary hazard of war.

Out of the same facts the honorable commissioner for France finds that there are shown to have been no insurgents in the street near the house, the presence of whom would explain the shots fired, and that the troops who did the firing

were at the time under command of a general of the national army, and that the bullets which struck the house and the bullet which wounded to his death Mr. Brun were the result of an unprovoked, unnecessary, and murderous attack on a well-known neutral who personally was held in high regard by the citizens and officials. He considers the damage to the buildings of the company at the same time to be corroborative of this view.

The umpire does not see in the injury of Mr. Brun and of the property of the French company any certain indication of a deliberately hostile act to him or to the property. Indeed, the sorrow of the president of the State, of the chief of the national forces, and of the inhabitants generally was so marked and so sincere that to find such a fact as is alleged by the honorable commissioner of France would require very strong and positive proof — proof to a degree of which this case is wholly destitute.

The umpire is convinced, however, that there were no insurgent forces in the immediate vicinity of the house of Mr. Brun at the time of his being wounded. The umpire arrives at this conclusion by an analysis of all the facts which have come to his knowledge in this case. (a) When the firing had ceased, Mr. Peysselon ran from the house to call a doctor and Mr. Crinière followed to get water. Mr. Crinière saw some of the national troops near the entrance to the house, but he mentions no insurgents. (b) Mr. Peysselon said that their egress from the house was *immediately* after Mr. Brun was wounded and that he found himself "face to face with about twenty armed men of the Government \* \* \*, General Montiel in command." As the doctor did not come, he went out a second time and saw General Montiel and two of his lieutenants, whom he names. But neither then nor before does he make mention of the insurgent forces, nor does he mention seeing any insurgent forces while going after the doctor or returning therefrom on either occasion. (c) The umpire fails to find any statement by anyone in any part of the papers of the claim suggesting the immediate presence of the insurgents at these premises at any time before, during, or after the battle. (d) It is accepted apparently by all parties, individual and governmental, that the shots in question were fired by Government troops. If there had been also present and engaged in an armed conflict insurgent troops and there had been at this point at the time in question a battle or even a skirmish in progress in which both were participating, there would have been always a serious question whether these shots were in fact from national or insurgent guns. (e) The fact that immediately following the injury there were twenty armed soldiers and a general in command at repose, apparently, near this building; that the general and his lieutenants, at least, remained there until such delay had occurred that a second attempt was made to call the doctor, are attitudes and facts which remove the probability that the shots which hit the house and wounded Mr. Brun were fired in the midst of battle against a contending or even a fleeing force. (f) When Peysselon or Crinière went out from the house there was no insurgent force in retreat, there was no national force pursuing. (g) There is an entire absence of all indicia common to such an occasion, if there had been at this point a battle or even a skirmish. The umpire is satisfied, therefore, to a moral certainty that no battle took place around or near this house at the time in question, and that the firing which did occur and from which the fatal wound resulted was unnecessary, and was in the presence of a high officer in command of the military forces. From all of the facts in the case the umpire finds that the bullet wound thus inflicted was the proximate cause of the death of Jules Brun, that the injury came under circumstances engaging the responsibility of the respondent Government, and that it must be held in damages for such sum as in equity should be assessed therefor.

The umpire might hesitate to adopt these findings if it were not true, and

had not been always true, that the respondent Government could ascertain and produce before this mixed commission the exact facts regarding the positions and movements of its own soldiers, and the position and movements of the insurgent forces at the time in question. Especial force attaches to this when it is known that the respondent Government was asked and urged by the representatives of the French company and by the representatives of the claimant Government to permit the use of its judicial processes and functions, in order that the truth might be established, but the privilege was denied them.

Hence against the very proper presumption that the Government of Venezuela will always do its duty by its own nationals and by its neutral friends resident within its domain may very properly be placed the presumption which arises when one is in possession of important truths essential to a judicial inquiry and elects not to produce them.

It must be remembered also that the village of Santa Bárbara was not in revolt. It was a loyal community temporarily under the control of an enemy — the insurgent forces. Within this loyal community were the shops and offices of a neutral company and the residence of the superintendent, also a neutral, whose conduct in Venezuela had been such as to gain and hold universal esteem. This property was then distinguished by a display of its national colors. Both the community and the company were the friends, not the enemies, of the Government and were both entitled to receive from the Government the utmost care and protection not inconsistent with the retaking of the town from the hands of the revolutionary forces and were subject only to the inevitable contingencies attending such an undertaking.

The umpire considers that in fixing responsibility upon the respondent Government he walks in the path of conscience, prompted by the spirit of justice and sustained by principle, by publicists, and by precedent. He invites the courteous attention of the honorable commissioners to the authorities and precedents which follow.

In the case of Terry and Angus between the United States of America and Mexico, Moore's Arb., 2995, the commissioners found that —

So far as the evidence discloses he had done nothing which could be construed into a violation of the neutrality which his position required. The destruction of the property was neither incidental nor a consequence of the military operations which the Mexican forces adopted to recover the possession of the city. That part of the city in which the property was located was wholly in the possession of the Mexican troops, and it does not appear that its destruction could in any manner facilitate their efforts to dispossess Colonel Childs of the part which was occupied by him.

This property was in Puebla in Mexico, which city had been taken possession of by the United States Army; and that portion of the United States Army left in command had been forced by the Mexican army, seeking to repossess itself of the city, into a remote part of the city from the property in question, and the property in question was wholly within the zone of the occupancy of the Mexican authorities. In view of these facts the commissioners also held that —

The destruction of the property of the claimants, under these circumstances, in the opinion of the board, constituted a valid claim for indemnity against the Mexican Republic. Moore's Arb., 2995.

See the case of Jaennaud v. United States, Moore's Arb., 3000, where it was held that the damage was not done "in battle or as a necessary and lawful military act." The cotton gin in which the cotton was stored which was burned "had not furnished a shelter from which the Confederates had fired or might thereafter fire upon the United States forces."

The evidence shows that the burning was a wanton act of the soldiers in the excitement of the moment, as they were marching back to their camp from a successful battle with the Confederates. It was without any justifiable excuse, in violation of order and discipline, and committed when marching back to camp under the command and in the presence of their officers, who by the usual and ordinary enforcement of military discipline might and could and should have prevented it, but who do not appear to have used any means whatever to prevent it.

In such a case we think that an allowance should be made. Moore's Int. Arb., 3000-1.

In the case of Alfred Jeannotat *v.* Mexico under the convention of July 4, 1868, Sir Edward Thornton, umpire, it was held by him that since—

the mischief is unnecessary and wanton, the responsibility must be accepted.

\* \* \* It does not appear that without the arrival of the military force which *ought to have protected the peaceable inhabitants of the town*, there would have been any inclination to commit such acts of violence. The umpire is therefore of opinion that compensation is due to the claimant from the Mexican Government. Moore's Int. Arb., 3673.

See also the case of Edward C. Du Bois against the Government of Chile, Moore's Arb., 3712-14.

See Turner's case, Moore's Arb., 3684-5.

See Hollenbeck's case, Moore's Arb., 3716-17.

In the case of George Pen Johnston *v.* Mexico, Moore's Arb., 3673, Sir Edward Thornton, umpire, held:

With regard to the damage alleged to have been done to the crops of cotton, barley, and oats by General Corona's forces in the spring of 1866, the umpire is of opinion that some damage was done, but not to the extent of the claim made, \* \* \*: that as the defendants have not proved that the requirements of war rendered that damage necessary, it must therefore be considered to have been unnecessary; and that therefore the claimants are, on account of that damage, entitled to compensation.

Distinctions, however, should always be made in regard to the character of the people in the district of country which is militarily occupied or passed over. The people of the country in which you are likely to operate may be divided into three classes: First, the truly loyal, who neither aid nor assist the rebels except on compulsion, but who favor or assist the Union forces. Where it can possibly be avoided this class of persons should not be subjected to military requisitions but should receive *the protection of our arms*.

The preceding paragraph is taken from instructions by the commander in chief of the armies of the United States (Gen. Henry W. Halleck) to the commanding officer in Tennessee under date of March 5, 1863. Halleck's Int. Law, vol. 2, page 56.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen.

Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war as much as the common misfortune of all war admits.

Instructions for the government of armies of the United States in the field, April 24, 1863. Halleck's Int. Law, 55.

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

Military necessity admits of all direct destruction of life or limb of *armed enemies*,

and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war. *Ib.*, 41, par. 14-15.

Even in bombardments it is now deemed necessary to avoid as far as possible injuries to churches, museums, and hospitals, and not to direct the artillery upon the quarter inhabited by civilians, unless it is impossible to avoid them while firing at the fortifications and military buildings.

But had the guns of the besiegers been deliberately turned upon the dwelling houses of the bombarded town, or had an open or undefended village been fired into, the persons responsible for such proceedings would have been justly accused of barbarity, forbidden by modern usage. Lawrence, p. 344.

In further support of the finding of the umpire herein he cites Ralston, umpire in the Biajo Cesarino case, Venezuelan Arb. of 1903, 771. He also cites the De Lemos case, *ib.*, 303.

The honorable commissioner for Venezuela contends that this case lacks the essential prerequisite of a claimant, who, being a French citizen, by his individual action brings his claim before the commission, demanding a stated indemnification; and the honorable commissioner supports his contention by quoting from the learned opinion of Commissioner Little in the claims of Narcissa de Hammer and Amelia de Brissot before the United States and Venezuelan Commission, found in Moore's *Int. Arb.*, 2459-2460.

In the case cited the two claimants were widows, respectively, of Captain Hammer and Mr. Brissot, deceased, and upon the manner of whose killing the claims arose. The widow de Hammer and the widow de Brissot were each Venezuelan born and of Venezuelan nationality until married, when by the laws of both countries they became American citizens and remained such until the death of their respective husbands, when they reverted to their original Venezuelan nationality and were Venezuelans when they appeared before the American-Venezuelan commission claiming compensation of Venezuela for the killing of their respective husbands. It was under these conditions that Commissioner Little gave his opinion as to the scope of the protocol constituting that commission, and, as the umpire understands it, these two claimants, widows as aforesaid and Venezuelans, were denied place before that commission, because they were Venezuelans and not Americans.

The difference between the case cited and the case before the umpire is easily seen. The *case* for this claim exists in the claim of Jules Brun, which occurred before May 23, 1899, and at the time of his death, and always since, the claimant, Mme. Brun, mother of the deceased, has been a French citizen, resident of France and entitled to invoke the aid of France, and under the protocol of February 17, 1902, to appear before the tribunal there constituted to present her claim. That she has now actually done this, although in an informal way, can not be fairly questioned. She will be estopped from any future right or claim against the respondent Government on account of the death of her son as fully and as completely as though she had appeared earlier in the case, and the respondent Government will be protected and the claimant Government barred as effectually in every particular as though matters had proceeded more precisely and more formally.

In a case like the present, where the judgment of the umpire is the sole arbiter of amounts, the facts upon which his judgment is to be predicated are essential, but the stated indemnification of the claimant is not especially important. It is a matter of regret that the umpire knows so little concerning important matters which would have greatly aided him in arriving at the sum to be assessed as damages, and he may easily err because of such ignorance.

He is of the opinion that he has jurisdiction of the parties and of the subject-matter and must make a decision upon the merits.

There remains to be determined the sum to be assessed against the respondent Government because of this unfortunate incident, and here occurs a wide divergence of views between the honorable commissioners. In the opinion of the umpire it is such an amount as will meet the pecuniary loss which the widowed mother has sustained through the death of her son. This is not the sum which put at interest would earn an amount equal to his annual wage. It is only her fair expectancy in his wage and from his accumulations, which, had he lived, would reach her from year to year. In the absence of all proof that he had accumulated aught, or that he had contributed anything to her comfort and support, there is for the umpire no rule of action but to assume the ordinary conditions as to accumulations and the ordinary willingness of a dutiful son to contribute generously to the comfort and happiness of his widowed mother in her declining years, where as in this case the deceased had no dependent family. Her age is not stated, but to be the mother of one born forty-five years since, she is a woman near " threescore years and ten " and her expectation of life is relatively short.

The honorable commissioner for France insists with much learning and ability that the sum which would otherwise be assessed by the umpire in this case must be augmented by the difference which now exists in the market value in gold of the Venezuelan diplomatic debt of 3 per cent which is the method of payment provided in the protocol. This proposition is seriously opposed and with marked ability by the honorable commissioner for Venezuela. If the umpire were to take the advice of the honorable commissioner for France in assessing this sum he must hold to the same rule where the amounts due are capable of exact ascertainment and in his award augment these fixed sums by the same ratio of increase. If he did not do this, he might cause serious inequity, by inequality, between the individual claimants now before him; and if he did do this, he would preserve equity by equality, among the claimants directly before him, but he would work injustice and inequity, by inequality, to every other holder of this diplomatic debt. He would reduce still lower the market value of such diplomatic debt to the manifest loss of all, and it would not be impossible to deprive the diplomatic debt of all value if each lowering rate per cent in this diplomatic debt of 3 per cent was followed by a proportionately increased assessment. Aside from the apparent unwisdom and inequity of such a holding, the umpire is satisfied that he is not competent under the protocol to do other than to ascertain as nearly as he can the actual sum due from the respondent Government in each particular case and to award that particular sum. Under the protocol it is not for him to determine the means or the methods of payment; this is wholly with the treaty-making power of the two Governments, and it has been settled by the protocol in accordance with their high judgment.

It follows, therefore, that the sum to be assessed and awarded in this case and in all others before this umpire must be based on the damages actually sustained, and must be stated without reference to the way or market value of the means of provided payment.

In his best judgment the sum due from the respondent Government to the claimant Government for the benefit of Madame Brun is 100,000 francs, and the award will be prepared and signed for that sum.

NORTHFIELD, *July 31, 1905.*

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