FANNIE P. DUJAY, EXECUTRIX OF THE ESTATE OF GILBERT F. DUJAY (U.S.A.) *v.* UNITED MEXICAN STATES

(April 8, 1929. Pages 180-192.)

Commissioner Nielsen, for the Commission:

Claim in the amount of $15,000.00 with interest is made in this case by the United States of America in behalf of Fannie P. Dujay, Executrix of the estate of Gilbert F. Dujay, an American citizen who was wrongfully imprisoned in Tampico, Mexico, in 1884. The occurrences underlying this claim are set forth in the opinion of the Commission in the case of *Kate A. Hoff*, Docket No. 331. [1]

As was stated in that opinion, it appears that Dujay was kept in close confinement for a period of twenty-eight hours, subsequently released, and then re-arrested on February 23rd, and while awaiting the second trial was held under bond but without permission to leave Mexico until the 24th of April of that year.

In behalf of Mexico it was contended that there was probable cause for the arrest of Dujay. It was alleged that this was shown by the fact that the *Rebecca* anchored at Tampico with an irregular manifest, which did not cover certain commodities on board, by unverified statements made concerning the weather and the forced arrival of the ship, and by other matters disclosed by the record.

Even if it be considered that there was probable cause for the first arrest of Dujay, for reasons indicated in the *Hoff* case, the treatment accorded to Dujay was clearly unjustifiable. Counsel for Mexico explained that Dujay was detained pending his second trial under a process of Mexican law termed "arraigo." This appears to be a precautionary measure which may be taken incident to a civil action to secure redress against a person pending such action by detaining such person within the jurisdiction of the court and rendering him subject to penalties if he disobeys the order of detention, such penalties being those prescribed by the Penal Code with respect to the offense of disobedience to the legitimate order of the public authorities. See Book V, Title I, Chapter 11 of the Commercial Code of Mexico relating to mercantile tribunals.

The right of the United States to obtain compensation in behalf of Mrs. Dujay was denied by Mexico, it being contended that any wrongs

[1] See page 444.

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suffered by Dujay were of a personal nature. It is said in the Mexican brief that the claimant "has no legal personality to appear and to ask an award for personal injuries which were suffered by Captain Dujay," and that "the right to seek compensation for personal injuries such as the arrest suffered by the deceased, complained of in the Memorandum, and made the foundation of the claim in the Memorial, are personal."

With respect to this point it was contended by the United States that a claim on behalf of the executor or personal representative of a decedent to recover indemnity for personal injuries suffered by the latter during his lifetime is clearly recognized by international law. The issue raised is governed exclusively, it was argued, by that law. It was further contended that, if the question whether a claim such as that presented in the instant case survived to the executrix should be considered to be governed by a rule of domestic law, and specifically, the law of the domicile of the injured person, then the claim did survive under the law of the State of Texas which was the domicile of Dujay at the time of his death. However, the fundamental contention on which counsel relied is that the issue presented is governed by international law, and that under that law a claim can be maintained on behalf of the executrix. He argued that this contention was clearly supported by numerous precedents of international tribunals, and that a proper decision on the issue raised must be reached in the light of precedents of that character.

In searching for evidence of international law on the point at issue comparatively little information will be found outside of the pronouncements of international tribunals before which questions of the character under consideration have been raised. It therefore becomes pertinent carefully to examine the opinions of such tribunals.

In the Mexican brief reference is made to the maxim of the common law *actio personalis moritur cum persona*. And in connection with this reference citation is made of three English cases, namely, *Chamberlain v. Williamson*, 2 M. & S. 408; *Finlay v. Chirney*, 20 Q. B. D. 494; and *Quirk v. Thomas* (1916) 2 K. B. (A. C.) 515. While these cases of course support a general principle of the common law that certain actions of a personal character do not survive, they throw little or no light even by way of analogy on the precise issue under consideration.

Chamberlain v. Williamson, decided in 1814, involved an action for a breach of promise of marriage alleged to have been made by the defendant to a person who died intestate. *Finlay v. Chirney*, decided in 1888, was a case in which it was held that an action for breach of promise of marriage where no special damage was alleged did not survive against the personal representative of the promissor. *Quirk v. Thomas*, decided in 1916, was a proceeding somewhat similar to the two cases just mentioned.

From the standpoint of international law, it was contended in the Mexican brief that a claim for wrongful imprisonment can not be maintained in behalf of the heir or legal representative of the person who suffered the injury. It was argued that although such a claim might be maintained in behalf of the injured person himself, it should be distinguished from one involving the wrongful killing of a person, which might result in a pecuniary loss to persons dependent on the victim. With respect to the applicable principle of international law, the following citations were made in the Mexican brief:

"Borchard, Dipl. Protec. p. 632; Underhill's case, Ralston's Rep. 45 *et seq*; wherein it is stated that 'Underhill's death puts an end to any claim

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that could arise from personal injuries, insults, or other offenses'; Metzger vs Venezuela, Ralston, 580; Plumer vs Mexico, Op. 182; see Reglas de Procedimiento, Art. 11, de la Comisión de Reclamaciones entre los Estados Unidos Mexicanos y la Gran Bretaña, México, 1928."

The case of *George F. Underhill*, a claim presented in 1903 by the United States against Venezuela, was decided by the Umpire Barge, the American Commissioner and the Venezuelan Commissioner having disagreed. Claim was made in behalf of Jennie Laura Underhill on account of "personal injuries, insults, abuses, and unjust imprisonment as well as for forced sacrifice of a property" suffered by George Freeman Underhill. The Umpire stated that "whatever may be the law or the opinion as to the transition of the right to claims that arise from personal injuries, insults or other offenses", no proof was found in the record that Jennie Laura Underhill was entitled to administer upon her late husband's estate. The Umpire declared that it did not appear whether Underhill left a will, and furthermore that there was uncertainty in the record with respect to rights that might have resulted from a previous marriage of Underhill. The claim was dismissed both as regards personal injuries and the so-called "forced sacrifice of a property". *Venezuelan Arbitrations of 1903*, Ralston's *Report*, p. 45. It will readily be seen that this opinion furnishes no authority with respect to the standing of a legal representative in relation to a claim growing out of personal injuries.

In the *Metzger* case claim was made in 1903 by Germany against Venezuela in behalf of the heirs of Metzger for an amount including indemnity for personal injuries inflicted on Metzger by Venezuelan military officers. Umpire Duffield, in an opinion by which a pecuniary award in the case was rendered, said:

"A right of action for damages for personal injuries is property. *A fortiori* is the claim in this case which had been presented and proved before the death of Metzger."

The Umpire asserted that, Metzger being domiciled at the time of his death in Venezuela, his heirs would take according to Venezuelan law. He stated that under the laws of Venezuela the right of action for personal injuries survived and passed to the heirs of the deceased in so far as damages for corporeal injuries were concerned, and for such injuries an award was made. No award could be made he declared for damages to the "feelings and reputation" of Metzger. *Op. cit.* p. 578.

There are two interesting points in this opinion: (1) that an action for damages for personal injuries is property, particularly a claim presented and proved before the death of an injured person, and (2) that Venezuelan law was controlling with respect to the survival of the claim. Irrespective of the question of the correctness of this latter conclusion, it is pertinent to note that the Umpire rejected solely the item of damages for the injury to "feelings and reputation" and rendered an award in favor of the heirs on account of corporeal injuries inflicted on Metzger. It will readily be seen that this case in which a claim was successfully maintained by heirs for personal injuries to the deceased is not authority in support of any rule that claims can not be maintained by heirs or legal representatives in a case of this nature.

The *Plumer* case was decided by a Board of three American Commissioners established under an act of March 3, 1849, (9 Stat. 393) for the settlement of claims provided for in Article XV of the treaty concluded between

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Mexico and the United States February 2, 1848. A claim was presented in behalf of Dorcas Ann Plumer, Administratrix of the estate of Robert Plumer. It arose out of a theft of personal property from Plumer in Mexico and personal injuries inflicted on him. The Board awarded damages for the loss of the personal property but rejected the item for personal injuries. The Board stated, evidently giving application to the principle of the old common law rule, that the "right of compensation in damage for personal injuries dies with the person and does not survive to the heir or administratrix". *Commissioners On Claims Against Mexico, Opinions,* Vol. I, p. 182.

Irrespective of the question as to the weight that should be given to this decision of a local tribunal when considered in connection with numerous other decisions of international tribunals, it is interesting to note that, shortly after the date of its rendition, on January 24, 1850, another award was rendered by the Board, on February 18, 1850, in which an indemnity of $20,000.00 was made in favor of the Administratrix of George Hughes in satisfaction of a claim for damages for injuries inflicted on Hughes by troops under the command of General Santa Anna in Mexico. In the opinion in that case it is recited that Hughes was severely beaten and wounded and kept a prisoner for several weeks on a Mexican vessel, and that he was plundered of personal property. Moore, *International Arbitrations,* Vol. II, p. 1285; Vol. III, p. 2972. It would seem to be reasonably clear from the opinion that the common law rule that personal actions do not survive was not applied in this case the decision in which apparently was therefore at variance with that in the earlier case of *Plumer.*

The existence or non-existence of a rule of law is established by a process of inductive reasoning, so to speak; by marshalling the various forms of evidence of international law to determine whether or not such evidence reveals the general assent that is the foundation of the law of nations. It will be seen from an examination of the cases cited in the Mexican brief that, with the possible exception of the *Plumer* case, they furnish no authority in support of the contention that under international law claims can not be maintained in behalf of either representatives or heirs in cases growing out of personal injuries.

The rule in the Mexican-British arbitration to which reference is made in the Mexican brief reads as follows:

"Claims presented solely for the death of a British subject shall be filed on behalf of those British subjects considering themselves personally entitled to present them. Any claim presented for damage to a British subject already deceased at the time of filing said claim, if for damage to property, shall be filed on behalf of the estate and through his legal representative, who shall duly establish his legal capacity therefor." (Translation.)

Without discussion of the bearing of this rule on the question at issue, it may be observed that it does not seem necessarily to preclude the presentation of claims for personal injuries even though no specific reference is made to them.

Rule IV, paragraph 2, sub-section (i), prescribed by this Commission pursuant to Article III of the Convention of September 8, 1923, provides that a "claim arising from loss or damage alleged to have been suffered by a national who is dead may be filed on behalf of an heir or legal representative of the deceased". This rule appears to be in harmony with procedure sanctioned by international tribunals, numerous decisions of which are cited in the counter-brief of the United States. That this is so

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can be shown by references to a few illustrative cases in which claims have been filed in behalf of heirs or legal representatives. Among the numerous cases cited are cases concerned with injuries that have resulted in death; cases in which it appears that injuries inflicted were of such a nature as to have contributed to death; cases involving both loss or destruction of property and physical injuries; and cases arising solely out of personal injuries. Reference may be made to a few of the last mentioned class of cases as most apposite to the instant case.

In the claim presented in behalf of V. Garcia, Administrator of the estate of Theodore Webster, Thornton, Umpire under the Convention of July 4, 1868, between the United States and Mexico, held that the Administrator had "a right to lay a claim before the Commission for injuries suffered by Webster." These injuries which severely impaired Webster's health resulted from a gunshot wound inflicted by a Mexican soldier. An award of $10,000.00 was made in this case. The act of wounding Webster was, said the Umpire, a wanton outrage countenanced by an officer so that his Government became liable for it. Moore, *International Arbitrations,* Vol. III, p. 3004.

In the case of *De Luna*, which was decided under the Agreement of February 11-12, 1871, between the United States and Spain, the Umpire, Count Lewenhaupt, awarded $3,000.00 in favor of the brother of the deceased as Administrator. In this case claim was made in behalf of the Administrator on account of the arrest of his brother in Cuba in 1880. *Op. cit.*, vol. IV, p. 3276.

In several interesting cases which came before the American-British Commission under the treaty of 1871, claims growing out of personal injuries were presented in favor of legal representatives. Demurrers filed by the American Agent in such cases setting forth that claims of this kind did not survive after death were overruled by a majority of the Commission who sustained the argument of British counsel that injuries to the person, whether resulting in death or not, were, in the diplomatic intercourse of civilized nations treated as a proper subject of international reclamation in behalf of the personal representatives of the person injured after his death. The same position was taken even when all connection between the injury alleged and the death of the intestate was disclaimed in the Memorial. See the claim of *Edward McHugh*, Administrator of the estate of James McHugh, arising out of imprisonment by American authorities; claim of *Elizabeth Sherman*, widow and Administratrix of Thomas Franklin Sherman, on account of injuries resulting from the forcible abduction of the latter by American authorities from Canada into the United States, and his imprisonment in Detroit; claim of *Elizabeth Brain*, widow of John Brain, for injuries sustained by the latter in connection with his imprisonment by American authorities in Washington. *British and American Claims Commission, Report of British Agent*, pp. 69-70; *Papers Relating to the Treaty of Washington*, Vol. VI, pp. 61-62; Ralston, *The Law and Procedure of International Tribunals*, p. 147.

In a reply filed by counsel for Great Britain to the demurrer of the United States, are found the following passages which are interesting, even though one may not agree with all details of the reasoning therein employed:

"This ground asserts a doctrine of the common law of England, which it is believed, is wholly unknown as a rule of international law, and is repugnant to those principles of equity and justice which underlie it. Even in the common

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law this doctrine has been materially modified by statute both in England and this country, so that some actions which formerly died with the person, now survive to the widow or orphans.

"But it is not according to the common law that this Commission is to decide the questions brought before it, but according to the principles of equity and justice. This fourth ground of the demurrer is purely technical, and what is more, thoroughly repugnant to the public law, under which this claim arises, and by the principles of which it is to be decided....

"The widow and administratrix of the deceased claimant who, as she avers, left her nothing but this claim, presents it for satisfaction under the Treaty of Washington. The United States, who, under the rules of international law, had released the prisoner, and promised a consideration of his claim, which it never accorded, entered into a Treaty with Her Majesty's Government, which Treaty gave power to this International Tribunal to decide, according to the principles of equity and justice, '*all claims on the part of*' British subjects and American citizens 'arising out of acts committed against their persons and property' between certain dates. The learned Agent and Counsel for the United States now seeks to turn away a claim manifestly within the Treaty by means of a maxim of the common law, which, if admitted to apply to such cases as this, limits and restricts the broad words of the Treaty so as to change their power and scope. But, apart from the fact that this maxim is opposed to the spirit of the public law, the reason which gives the maxim force in the common law does not exist in international proceedings.

"The injuries to the subjects or citizens of one State by the Government of another, out of which arises an international claim, demand a national satisfaction to be accorded to the injured nation by the wrongdoer. Thus the claim is not a personal action, but an international proceeding, in which one Government demands satisfaction of the other, by presenting the claim of its subject or citizen. Nor is this satisfaction accorded until an award be made, or a thorough investigation proves the claim to be invalid. Surely it cannot be maintained that the death of the claimant satisfies his Government for the outrage committed on its territory and its subject, or that the Government which had done these acts, in violation of international law, can, before an international tribunal, deny that satisfaction which it was bound to afford before the Treaty was made, and which, by the terms of the Treaty, it is pledged to afford here, on the ground that this claim, being a personal action, died with the claimant.

"Let us consider this point in another light. There are two divisions in this claim: 1st. Two thousand dollars' damage for the abduction of the claimant, 'the deprivation of his liberty, pain of imprisonment in itself, and the material immediate and continuing injury to his health, from which he never recuperated.' 2nd. Five hundred and eighty-five dollars for damages to his personal estate, the items being two hundred and twenty-five dollars actually paid out for prison expenses, and three hundred and sixty dollars for loss of earnings. The first of these divisions is a claim arising out of acts committed against the person of a subject of her Britannic Majesty; the second, a claim arising out of acts committed against his property.

"The claimant is dead; his claim is presented by his widow and administratrix. Now, by the decisions and practice of this Commission, as administratrix, the memorialist may claim indemnification for the injuries to the property of the deceased; but the United States now maintain that the claim for personal injuries, which would have been valid for presentation under the provisions of the Treaty, which provisions are the same for both classes of injuries, died with the claimant.

"Now, it is submitted that a claim growing out of a personal injury is as much, if not more, an international claim than one growing out of an injury to the property of the claimant. The Treaty makes no distinction between these two classes of claims. According to the letter and spirit of the Treaty they are to be dealt with in the same manner." *Report of British Agent*, pp. 557-559.

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In an arbitration conducted between the two Governments many years later under an Agreement concluded August 18, 1910, the Government of Great Britain also proceeded on the theory that claims for personal injuries could be presented in behalf of a legal representative or an heir. See claim on behalf of *Glenna Thomas*, heir of Edward Bedford Thomas, based on complaints of illegal imprisonment and mistreatment of the latter during such imprisonment; claim on behalf of the *Representatives of L. J. Levy*, based on the same grounds. American Agent's *Report*, pp. 154, 157. No contention was made by the United States in this arbitration that a claim could not be filed in behalf of an heir or a legal representative in cases concerned with personal injuries.

In the case of *Lucile T. Bourgeois*, Administratrix, before the French and American Claims Commission of 1880, under the Convention of January 15, 1880, a claim was made for $20,000.00 on account of an arrest and imprisonment effected by Colonel Reith of the United States Army. The Commission entered an award in favor of the Administratrix in the sum of $1,025.00. *Boutwell's Report*, p. 60.

Citation was made by counsel for the United States of numerous cases decided by the Commission under the Agreement of August 10, 1922, between the United States and Germany. In these cases substantial awards were made in behalf of the estates of deceased persons who suffered physical injuries at the hands of German authorities. Among these cases were claims growing out of injuries suffered by American citizens who were on board the steamer *Lusitania* when it sank in 1915. See among others the *Knox* case, *Consolidated Edition of Decisions and Opinions, 1925, Mixed Claims Commission, United States and Germany*, p. 495; the *Foss* case, *ibid.*, p. 512.

Responsibility in the cases coming before the American-German Commission was determined not in accordance with rules and principles of international law but under treaty stipulations. However, these cases are interesting in that it is clearly shown, since awards have been made in favor of estates, that claims growing out of personal injuries were regarded by the Commission as having the character of property rights. As has been pointed out, Umpire Duffield stated in the *Metzger* case, *supra*, that a right of action for damages for personal injuries is property. The same principle with regard to the character of international claims has been enunciated by the Supreme Court of the United States, although it may be noted that the cases in which this principle was asserted related to claims growing out of injuries to property. *Comegys* v. *Vasse*, 1 Peters 193; *Phelps* v. *McDonald*, 99 U. S. 298.

It is observed by Mr. Ralston, *International Arbitral Law and Procedure*, p. 180, that in the *De Luna* case, *supra*, an administrator was allowed to recover for wrongful imprisonment of his intestate in harmony with the rule often followed in the civil law as to the right of survivorship for personal damages rather than the rule of the common law. In the *Metzger* case, Umpire Duffield awarded damages for personal injuries on the ground that under Venezuelan law such a claim passed to the heirs of a deceased person. The impropriety of giving application to any rule or principle of domestic law in relation to a subject of this kind is readily perceived. An international tribunal is concerned with the question whether there has been a failure on the part of a nation to fulfill the requirements of a rule of international law, or whether authorities have committed acts for which a nation is directly responsible under that law. The law of nations is of course the same for all members of the family of nations, and redress for

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acts in derogation of that law is obviously not dependent upon provisions of domestic enactments. Domestic law can prescribe whether or not certain kinds of actions arising out of domestic law may be maintained by aliens or nationals under that law, but it is by its nature incompetent to prescribe what actions may be maintained before an international tribunal. If domestic law should be considered to be controlling on this point we should have the *reductio ad absurdum* that redress for personal injuries conformably to international law might be obtained in a country like Venezuela in which the principles of the civil law with respect to the survival of actions may obtain, and no redress for the same violation of international law could be obtained in another country where the principles of the common law obtained.

An examination of domestic law may often be useful in reaching a conclusion with regard to the existence or non-existence of a rule of international law with respect to a given subject. But analogous reasoning or comparisons of rules of law can also be misleading or entirely out of place when we are concerned with rules or principles relating entirely or primarily to the relations of States towards each other. International law recognizes the right of a nation to intervene to protect its nationals in foreign countries through diplomatic channels and through instrumentalities such as are afforded by international tribunals. The purpose of a proceeding before an international tribunal is to determine rights according to international law; to settle finally in accordance with that law controversies which diplomacy has failed to solve. That is the purpose of arbitration agreements such as that under which this Commission is functioning. It would be a strange and unfortunate decision which would have the effect of precluding an international tribunal from making a final pronouncement upon the merits of any such controversy, because some rule of a particular system of local jurisprudence puts certain limitations on rights of action under domestic law. Arbitration as the substitute for further diplomatic exchanges or force would fail in its purpose. The unfortunate delays incident to the redress of wrongs by international arbitration are notorious. Injured persons often die before any redress is vouchsafed to them. A decision of this kind would seem to put a premium on such delays which would be conducive to the nullification of just claims.

It is unnecessary for the Commission in holding, as it does, that it may properly pass upon the merits of the instant claim presented by the Administratrix who is also the widow of Gilbert F. Dujay, to enter upon the entire, broad field of discussion covered by the briefs and oral arguments of counsel for each Government. This claim, that arose and was presented to Mexico many years ago, may well be regarded as a "property right". Had it been settled when presented, Dujay or his estate would have had the benefit of it. It is competent for this Commission to pass upon the merits of the claim in the light of the terms of submission stated in the Convention of September 8, 1923. It is a claim within the jurisdictional article of the Convention which provides among other things for the adjudication of claims for losses or damages suffered by persons or their properties, and in the language of the Convention, of "claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice, and which claims may have been presented to either Government for its interposition with the other since the signing of the Claims Convention concluded between the two countries July 4, 1868, and which have remained unsettled".

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In the case of *Jennie L. Underhill*, in which claim was made by the United States against Venezuela in 1903, "for personal injuries, insults, abuse, and false imprisonment", Umpire Barge dismissed the claim as regards unlawful arrest and imprisonment, but with respect to the detention of the claimant for a month and a half in Venezuela, the Umpire awarded an indemnity of $3,000.00, saying with regard to this item:

"But as, furthermore, claimant claims award for damages on the charge of detention of her person;

"And whereas, without any arrest and imprisonment, detention takes place when a person is prevented from leaving a certain place, be it a house, town, province, country, or whatever else determined upon; and

"Whereas it is shown in the evidence that claimant wished to leave the country which she could not do without a passport being delivered to her by the Venezuelan authorities; and that from August 14 till September 27 such a passport was refused to her by General Hernandez, then chief of the Government of Ciudad Bolívar, the fact that claimant was detained by the Venezuelan authorities seems proved; and

"Whereas, whatever reason may or might have been proved to exist for refusing a passport to claimant's husband, no reason was proved to exist to withhold this passport from claimant; and

"Whereas the alleged reason that it would not be safe for the Underhills to leave on one of Mr. Mathison's steamers can not be said to be a legal reason, for if it be true that there existed any danger at that time, a warning from the Government would have been praiseworthy and sufficient. But this danger could not give the Government a right to prevent Mrs. Underhill from freely moving out of the country if she wished to risk the danger; whilst on the other hand it might have been said that the steamer being a public means of transfer, it would have been the duty of the Government to protect the passengers from such danger on the steamers when existing.

"Whereas, therefore, it is shown that Mrs. Underhill was unjustly prevented by Venezuelan authorities from leaving the country during about a month and a half, the claim for unlawful detention has to be recognized.

"And whereas for this detention the sum of $2,000 a month—making $3,000 for a month and a half—seems a fair award, this sum is hereby granted." (*Venezuelan Arbitrations of 1903*, *Ralston's Report*, pp. 49, 51.)

An indemnity of $2,200.00 was paid by the United States to the Government of Norway on account of the detention of three seamen at Jersey City, New Jersey, for a few days in excess of a month in the year 1911. The men were detained as witnesses in connection with legal proceedings growing out of an explosion in the harbor which caused damage to a Norwegian vessel called *Ingrid.* In connection with the payment of this indemnity it was stated that it was made "without reference to the question of liability therefor" (42 Stat. 610).

In the instant case the claim of $15,000.00 with interest must be rejected, but an award may properly be made in the sum of $500.00.

Decision

The United Mexican States shall pay to the United States of America on behalf of Fannie P. Dujay $500.00 (five hundred dollars) without interest.

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