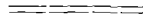


Annex 126

REPORTS OF INTERNATIONAL
ARBITRAL AWARDS



RECUEIL DES SENTENCES ARBITRALES

VOLUME VII

United Nations Publication

Sales No. : 1956. V. 5

Price : \$U.S. 4.50 ; 32/- stg. ; Sw. fr. 19.50
(or equivalent in other currencies)

REPORTS OF INTERNATIONAL
ARBITRAL AWARDS

RECUEIL DES SENTENCES
ARBITRALES

VOLUME VII

**Decisions of Mixed Claims Commission
UNITED STATES — GERMANY
Part One**

**Décisions de la Commission mixte de réclamations
ETATS-UNIS — ALLEMAGNE
Première partie**



UNITED NATIONS — NATIONS UNIES

FOREWORD

The present volume of Reports of International Arbitral Awards continues the systematic collection of decisions of international claims commissions started with volume IV. Volumes IV and V include the decisions of the so-called Mexican Claims Commissions. Volume VI is devoted to the Arbitral Tribunal United States—Great Britain, the Tripartite Claims Commission United States. Austria and Hungary, and the General Claims Commission United States—Panama. The volume now being added to the series comprises the first part of a broad selection of the decisions rendered by the Mixed Claims Commission United States—Germany, constituted under the Agreement of August 10, 1922. Awards which are mere applications of previous decisions of the Commission, or which for any other reason are devoid of lasting interest, were omitted. The second and last part of the selection will be published in volume VIII.

The mode of presentation followed in this volume is the same as that used in volumes IV—VI. Each award is captioned under the name of the individual claimant, together with identification of the espousing and the respondent governments. Notation is made of the date of the award, any certificates of disagreement or separate opinions by the commissioners, and the original report from which the decision was drawn. A headnote or digest is offered in each case to facilitate its use in research by practitioners and students of international law. The index found at the end of this volume is based upon such headnotes, and is conceived in the manner set forth in the Foreword to volume VI.

An historical note relating to the establishment and work of the Commission and a general bibliography concerning the latter are included. With regard to each particular case, mention has been made under a heading "Cross-reference(s)" to any source or sources other than that from which the instant publication is made, while any specific discussions of the case have been listed under a heading "Bibliography", based on the general bibliography.

Since the appreciation of the decisions depends not only upon their contents, but also upon the terms of the Treaty of Berlin of August 25, 1921 and the Agreement of August 10, 1922, the texts of these two instruments are reprinted here.

This volume, like volumes IV, V and VI, was prepared by the Office of Legal Affairs of the Secretariat of the United Nations.

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

VOLUME VII

(United Nations publication, Sales No. : 1956.V.5)

C O R R I G E N D U M

Page 389, after the headnote in the Turner C. Gillenwater case : the title and the docket number as appearing in the original report have erroneously been reprinted.

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A.J.I.L.	<i>The American Journal of International Law</i>
Annual Digest	<i>Annual Digest and Reports of Public International Law Cases</i>
Kiesselbach, <i>Probleme</i>	Kiesselbach, Dr. Wilhelm, <i>Probleme und Entscheidungen der Deutsch-Amerikanischen Schadens-Commission</i> (Mannheim, 1927)
Witenberg, Vols. I—III	Witenberg, J. C., <i>Commission Mixte de Réclamations Germano-Américaine</i> (Mixed Claims Commission United States and Germany), Vols. I—III (Paris, 1926, 1927 and 1940). Vol. III with Jacques Desrioux

MIXED CLAIMS COMMISSION
UNITED STATES-GERMANY
CONSTITUTED UNDER THE AGREEMENT OF
AUGUST 10, 1922
EXTENDED BY
AGREEMENT OF DECEMBER 31, 1928

PARTIES: United States of America, Germany.

SPECIAL AGREEMENT: August 10, 1922, extended December 31, 1928.

COMMISSIONERS:

Umpire: William R. Day (1922-1923), Edwin B. Parker (1923-1929), Roland W. Boyden (1930-1931), Owen J. Roberts (1932-1939), all of the United States of America.

American Commissioner: Edwin B. Parker (1922-1923), Chandler P. Anderson (1923-1936), Christopher B. Garnett (1936-1939).

German Commissioner: Dr. Wilhelm Kiesselbach (1922-1934), Dr. Victor L. F. H. Huecking (1934-1939).

REPORT: Mixed Claims Commission, United States and Germany: Administrative Decisions and Opinions of a General Nature and Opinions in Individual *Lusitania* Claims and Other Cases to June 30, 1925. (Washington, Government Printing Office, 1925.)

Administrative Decisions and Opinions of a General Nature and Opinions in Individual *Lusitania* Claims and Other Cases from July 1, 1925 to October 1, 1926. (Washington, Government Printing Office, 1926.)

Administrative Decisions and Opinions of a General Nature and Opinions and Decisions in Certain Individual Claims from October 1, 1926 to December 31, 1932, with Orders of March 25 and May 7, 1925 and Appendices. (Washington, Government Printing Office, 1933.)

Opinions and Decisions from January 1, 1933 to October 30, 1939 (Excepting Decisions in the Sabotage Claims of June 15 and October 30, 1939) and Appendix 1933-1939. (Washington, Government Printing Office, *s.d.*)

Opinions and Decisions in the Sabotage Claims Handed Down June 15, 1939 and October 30, 1939 and Appendix. (Washington, Government Printing Office, *s.d.*)

HISTORICAL NOTE

The non-ratification by the United States of America of the Peace Treaty of Versailles concluded between the Allied Powers and Germany on June 28, 1919, led to the Treaty signed at Berlin on August 25, 1921, restoring friendly relations between the United States and Germany. A number of provisions of the Treaty of Versailles were incorporated by reference in the Treaty of Berlin. The Treaty was ratified by the United States on October 21, 1921, and by Germany on November 2, 1921. Ratifications were exchanged at Berlin on November 11, 1921. Under its Article III, the Treaty took thereby immediate effect.

Subsequent to the Treaty of Berlin, the United States and Germany signed an Agreement, dated August 10, 1922, providing for the establishment of a Mixed Commission whose task would be the determination of Germany's financial obligations under the Treaty of Berlin. The Agreement came into force on the day of its signature. By an exchange of notes of the same date, it was agreed that the Commission should consider only such claims as were brought before it within six months after its first meeting. The Commission's jurisdiction was by an Agreement, dated December 31, 1928, extended to claims notice of which was filed prior to July 1, 1928, and presented to the Commission within six calendar months from February 1, 1929.

The Mixed Claims Commission United States and Germany was established in 1922 and functioned until 1939. In this period, it held meetings in Washington, D.C., Boston, The Hague and Hamburg and disposed of 20,433 claims, in 7,025 of which awards were entered, totalling \$181,351,008.45, not including interest. Payments were made under the Settlement of War Claims Act of 1928.¹

¹ United States Statutes at Large, Vol. 45, p. 254; Supplement to *The American Journal of International Law*, Vol. 22 (1928), Official Documents, pp. 40-68.

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Special Agreement

Agreement of August 10, 1922: United States, Treaty Series, No. 665; Reichsgesetzblatt, Jahrgang 1923, Teil II, pp. 113-115; de Martens, *Nouveau Recueil Général de Traités*, 3rd Series, Vol. XI, pp. 924-927; The American Journal of International Law, Supplement, Vol. 16 (1922), pp. 171-172. Agreement of December 31, 1928: United States, Treaty Series, No. 766; de Martens, *Nouveau Recueil Général de Traités*, 3rd Series, Vol. XX, pp. 460-463; The American Journal of International Law, Supplement, Vol. 23 (1929), pp. 58-60.

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¹ See also the Report mentioned on p. 3. Besides official reports, numerous printed documents (memoranda, briefs, oral arguments) pertaining to individual cases are to be found in different libraries. These documents were not included in the present bibliography.

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² Part II contains German translations of the Commission's principal decisions. Part I was published in an English translation: Problems of the German-American Claims Commission (Washington, 1930).

³ French translations of the Commission's principal decisions.

Treaty of Peace
BETWEEN THE UNITED STATES AND GERMANY

Signed at Berlin, August 25, 1921

THE UNITED STATES OF AMERICA AND GERMANY:

Considering that the United States, acting in conjunction with its co-belligerents, entered into an Armistice with Germany on November 11, 1918, in order that a Treaty of Peace might be concluded;

Considering that the Treaty of Versailles was signed on June 28, 1919, and came into force according to the terms of its Article 440, but has not been ratified by the United States;

Considering that the Congress of the United States passed a Joint Resolution, approved by the President July 2, 1921, which reads in part as follows:

“RESOLVED by the Senate and House of Representatives of the United States of America in Congress assembled. That the state of war declared to exist between the Imperial German Government and the United States of America by the Joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

“Sec. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress, or otherwise.

“Sec. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-

Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operation of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government, and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America.''

Being desirous of restoring the friendly relations existing between the two Nations prior to the outbreak of war:

Have for that purpose appointed their plenipotentiaries:

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

Ellis Loring Dresel, Commissioner of the United States of America, to Germany;

and

THE PRESIDENT OF THE GERMAN EMPIRE:

Dr. Friederich Rosen, Minister for Foreign Affairs;

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

Article I

Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

Article II

With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and

enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions.

(2) That the United States shall not be bound by the provisions of Part I of that Treaty, nor by any provisions of that Treaty including those mentioned in Paragraph (1) of this Article, which relate to the Covenant of the League of Nations, nor shall the United States be bound by any action taken by the League of Nations, or by the Council or by the Assembly thereof, unless the United States shall expressly give its assent to such action.

(3) That the United States assumes no obligations under or with respect to the provisions of Part II, Part III, Sections 2 to 8 inclusive of Part IV, and Part XIII of that Treaty.

(4) That while the United States is privileged to participate in the Reparation Commission, according to the terms of Part VIII of that Treaty, and in any other Commission established under the Treaty or under any agreement supplemental thereto, the United States is not bound to participate in any such commission unless it shall elect to do so.

(5) That the periods of time to which reference is made in Article 440 of the Treaty of Versailles shall run, with respect to any act or election on the part of the United States, from the date of the coming into force of the present Treaty.

Article III

The present Treaty shall be ratified in accordance with the constitutional forms of the High Contracting Parties and shall take effect immediately on the exchange of ratifications which shall take place as soon as possible at Berlin.

In witness whereof, the respective plenipotentiaries have signed this Treaty and have hereunto affixed their seals.

Done in duplicate in Berlin this twenty-fifth day of August, 1921.

[SEAL] Ellis Loring DRESEL

[SEAL] ROSEN

Special Agreement

AGREEMENT BETWEEN THE UNITED STATES AND GERMANY PROVIDING FOR THE DETERMINATION OF THE AMOUNT OF THE CLAIMS AGAINST GERMANY

Signed at Berlin, August 10, 1922

The United States of America and Germany, being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded by the two governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

The President of the United States of America, Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany, and

The President of the German Empire, Dr. Wirth, Chancellor of the German Empire,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

Article I

The commission shall pass upon the following categories of claims which are more particularly defined in the treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

Article II

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners

die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

Article III

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They may fix the time and the place of their subsequent meetings according to convenience.

Article IV

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two governments.

Article V

Each government shall pay its own expenses, including compensation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both governments, including the honorarium of the umpire, shall be borne by the two governments in equal moieties.

Article VI

The two governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two governments.

Article VII

The present agreement shall come into force on the date of its signature.

In faith whereof, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August, 1922.

[SEAL] ALANSON B. HOUGHTON

[SEAL] WIRTH

EXCHANGE OF NOTES

(The German Chancellor to the American Ambassador at Berlin)

[Translation]

Foreign Office.

No. III A 2451.

Berlin, August 10, 1922

Mr. Ambassador,

In reply to your kind note of June 23, 1922, I have the honor to state to your Excellency as follows:

The German Government is in agreement with the draft of an agreement communicated to it in the note mentioned. Now that some changes in the text have been agreed upon with your Excellency. I have the honor to transmit herewith the draft modified accordingly.

From the numerous conferences which have taken place with your Excellency, the German Government believes itself justified in assuming that it is not the intention of the American Government to insist in the proceedings of the Commission upon all the claims contemplated in the Versailles Treaty without exception, that it in particular does not intend to raise claims such as those included in Paragraphs 5 to 7 of Annex 1 of Article 244 of the Versailles Treaty (claims for reimbursement of military pensions paid by the American Government, and of allowances paid to American prisoners of war or their families and to the families of persons mobilised) or indeed claims going beyond the Treaty of August 25, 1921.

The German Government would be grateful if your Excellency would confirm the correctness of this assumption.

In the view of the German Government it would furthermore be in the interest of both Governments concerned that the work of the Commission be carried out as quickly as possible. In order to insure this it might be expedient to fix a period for the reporting of the claims to be considered by the Commission. The German Government, therefore, proposes that the Commission should consider only such claims as are brought before it within at least six months after its first meeting as provided in Article III of the above-named agreement.

I should be obliged to your Excellency for a statement as to whether the American Government is in agreement herewith.

At the same time I take advantage of this occasion to renew to you, Mr. Ambassador, the assurance of my most distinguished consideration.

WIRTH

(The American Ambassador at Berlin to the German Chancellor)

No. 128.

American Embassy
Berlin, August 10, 1922

Mr. Chancellor:

I have the honor to acknowledge the receipt of your note of today's date transmitting the draft of the agreement enclosed to you in my note of June 23, as modified as a result of the negotiations that have been carried on between us.

In accordance with the instructions that I have received from my Government, I am authorized by the President to state that he has no intention of pressing against Germany or of presenting to the Commission established

under the claims agreement any claims not covered by the Treaty of August 25, 1921, or any claims falling within Paragraphs 5 to 7, inclusive, of the annex following Article 244 of the Treaty of Versailles.

With regard to your suggestion that the Commission shall only consider such claims as are presented to it within six months after its first meeting, as provided for in Article III, I have the honor to inform you that I am now in receipt of instructions from my Government to the effect that it agrees that notices of all claims to be presented to the Commission must be filed within the period of six months as above stated.

I avail myself once more of the opportunity to renew to you, Mr. Chancellor, the assurances of my most distinguished consideration.

A. B. HOUGHTON

Dr. Wirth,

Chancellor of the German Empire,
Berlin.

AGREEMENT OF DECEMBER 31, 1928

AGREEMENT EFFECTED BY EXCHANGE OF NOTES BETWEEN THE UNITED STATES
AND GERMANY

EXTENSION OF THE JURISDICTION OF THE MIXED CLAIMS COMMISSION
UNITED STATES AND GERMANY

(Signed December 31, 1928.)

(The Secretary of State to the German Ambassador)

Department of State
Washington, December 31, 1928

Excellency:

I have the honor to refer to your note of November 26, 1928, regarding the concluding of an agreement between the United States and Germany for the extension of the jurisdiction of the Mixed Claims Commission, United States and Germany, to include claims of the same character as those of which the Commission now has jurisdiction under the agreement between the two Governments signed August 10, 1922, which were not filed in time to be submitted to the Commission under the terms of the notes exchanged at the time of signing that agreement but which were filed with the Department of State prior to July 1, 1928.

You state that your Government is prepared to do its share to bring about a settlement of these so-called late claims, but that it considers that the preparation and adjudication of the claims should be governed by the same legal principles as have so far been applied in the proceedings of the Mixed Claims Commission, and that means should be found by which a prompt and speedy preparation and adjudication of the claims involved may be fully guaranteed. Your Government suggests that as an appropriate means to this end, fixed and final terms should be agreed upon for the filing of claims and defense material, including the necessary evidence, and that a requirement should be made that all claims to be adjudicated by the Commission should be presented for judgment within a fixed period of time. You add that, owing to the fact that the adjudication of the late claims will necessitate the con-

tinuance of the expensive machinery of the Mixed Claims Commission for some months, which would not otherwise be necessary or which would not have been necessary to the same extent if the claims had been presented within the time prescribed by the agreement of August 10, 1922, your Government considers that the claimants for whom a remedy will thus be afforded should participate to an appropriate extent in the expenses which will result from the prolongation of the life of the Commission. This, you suggest, might be accomplished by the collection of a fee for the final filing of each claim, thus eliminating to the greatest possible extent claims which are unfounded or which are presented in unjustified amounts, and an additional fee for preparing and adjudicating the claim.

I desire to express my appreciation of the willingness of your Government to cooperate with my Government in an effort to complete the adjudication of the claims defined above. My Government, equally with your Government, is anxious that the work of the Mixed Claims Commission should be completed at the earliest date practicable and will use its best endeavors to that end. With respect to your suggestion that the claimants who will be benefited by an extension of time for the presentation of so-called late claims should share to an appropriate extent the additional expense incident to the prolongation of the labors of the Mixed Claims Commission, my Government considers that it would not be feasible to require the deposit of a fee as a condition precedent to the adjudication of the claims. In an effort, however, to meet the views of your Government that it should be relieved of this additional expense, the President would be willing to recommend to the Congress that the one-half of one per cent. which the Secretary of the Treasury is authorized by the "Settlement of War Claims Act of 1928" to deduct from awards made by the Mixed Claims Commission before payment thereof to the claimants as reimbursement for the expenses of the United States incident to the adjudication of the claims, shall, in so far as regards the late claims, be made available to your Government for defraying such expenses as may be incurred by your Government in connection with the adjudication of such late claims. I, therefore, suggest the following as the terms of the agreement between the two Governments:

(1) That all the late claims of American nationals against Germany, notice of which was filed with the Department of State prior to July 1, 1928, of the character of which the Mixed Claims Commission, United States and Germany, now has jurisdiction under the claims agreement concluded between the United States and Germany on August 10, 1922, shall be presented to the Commission with the supporting evidence within six calendar months from the first day of February, 1929;

(2) That the answer of the German Government to each claim presented shall, together with supporting evidence, be filed with the Commission within six calendar months from the date on which the claim is presented to the Commission, as provided for in paragraph 1;

(3) That the subsequent progress of the claims before the Commission, including the submission of additional evidence and the filing of briefs, shall be governed by rules prescribed by the Commission, it being understood that both Governments are equally desirous of expediting the completion of the work of the Commission;

(4) That the preparation and adjudication of the claims shall be governed by the same legal principles as have so far been applied in the proceedings before the Mixed Claims Commission;

(5) That the President will recommend to the Congress that the one-half of one per cent. which the Secretary of the Treasury is authorized by the

“Settlement of War Claims Act of 1928” to deduct from awards made by the Mixed Claims Commission before payment thereof to the claimants for application to the expenses of the United States incident to the adjudication of the claims, shall, in so far as regards the late claims, be made available to the German Government for defraying such expenses as may be incurred by that Government in connection with the adjudication of such late claims.

Upon the receipt from you of a note expressing the concurrence of your Government in the conditions outlined in paragraphs 1 to 5 inclusive, the agreement contemplated by paragraph (j) of Section 2 of the “Settlement of War Claims Act of 1928” will be regarded as consummated.

Accept, Excellency, the renewed assurances of my highest consideration.

Frank B. KELLOGG

His Excellency,

Herr Friedrich Wilhelm von Prittwitz und Gaffron,
Ambassador of Germany.

(The German Ambassador to the Secretary of State)

Deutsche Botschaft

Washington D.C., den 31. Dezember 1928

Herr Staatssekretär:

Ich beehre mich den Empfang der Note Eurer Exzellenz vom 31. Dezember 1928 bezüglich der Regelung der Late Claims vor der Deutsch-Amerikanischen Gemischten Kommission ergebenst zu bestätigen.

In Erwiderung darauf beehre ich mich die Zustimmung meiner Regierung zu der Regelung der Angelegenheit auszusprechen, wie sie in den Paragraphen 1 bis 5 der Note Eurer Exzellenz vorgeschlagen ist und Ihnen mitzuteilen, dasz meine Regierung das im Paragraphen J des Abschnittes 2 der “Settlement of War Claims Act of 1928” in Aussicht genommene Abkommen als in diesem Sinne getroffen ansieht.

Genehmigen Sie, Herr Staatssekretär, die erneute Versicherung meiner ausgezeichneten Hochachtung.

F. W. v. PRITTWITZ

Seiner Exzellenz
dem Staatssekretär
der Vereinigten Staaten,
Herr Frank B. Kellogg,
Washington D.C.

(The German Ambassador to the Secretary of State)

[Translation]

German Embassy

Washington, D.C., December 31, 1928

Mr. Secretary of State:

I have the honor to acknowledge receipt of Your Excellency's note of December 31, 1928, with reference to the adjudication of the late claims before the Mixed Claims Commission, United States and Germany.

In reply thereto I beg to express to Your Excellency the concurrence of my Government in the proposals for adjusting this matter, as outlined in paragraphs 1 to 5 inclusive of Your Excellency's note, and to inform you that my Government considers the agreement contemplated by subsection (j) of Section 2 of the "Settlement of War Claims Act of 1928" as thus consummated.

Accept, Excellency, the renewed assurance of my highest consideration.

F. W. v. PRITTWITZ

His Excellency,
The Secretary of State
of the United States,
Mr. Frank B. Kellogg,
Washington, D.C.

Decisions, Part One

ADMINISTRATIVE DECISION No. I

(November 1, 1923, pp. 1-3¹)

TERMINOLOGY USED IN DECISION. — FINANCIAL OBLIGATIONS OF GERMANY UNDER TREATY OF BERLIN. Definition of terms used in decision, and of financial obligations of Germany to United States arising under Treaty of Berlin.

Cross-references: A.J.I.L., Vol. 18 (1924), pp. 175-176; Kiesselbach, *Probleme*; pp. 174-176 (German text); Witenberg, Vol. I, pp. 7-9 (French text).

*Bibliography*²: Borchard, pp. 135-136; Isay, p. 606; Kersting, p. 1843, Kiesselbach, *Probleme*, pp. 10, 31; Partsch, pp. 131-132; Prossinagg, pp. 10-11.

PARKER, *Umpire*, rendered the decision of the Commission, the American Commissioner and the German Commissioner being unable to agree:

As used herein the following terms shall be taken to have the meaning indicated below:

United States: the United States of America, and/or the Government of the United States of America;

Germany: the German Empire, and/or the Government of Germany;

Germany or her allies: the German Empire or the Austro-Hungarian Empire, Bulgaria, and/or Turkey;

War period: the period between August 1, 1914, and July 2, 1921, both inclusive, the latter date being that on which the joint resolution passed by the Congress of the United States declaring the war at an end became effective;

Period of neutrality: the period between August 1, 1914, and April 5, 1917, both inclusive;

Period of belligerency: the period between April 6, 1917, and July 2, 1921, both inclusive, the former date being that on which the joint resolution declaring a state of war to exist between Germany and the United States became effective;

American national: a person wheresoever domiciled owing permanent allegiance to the United States of America;

Treaty of Berlin: the treaty between the United States and Germany signed at Berlin August 25, 1921, restoring the friendly relations existing between the two nations prior to the outbreak of war;

Agreement: the agreement between the United States and Germany signed at Berlin August 10, 1922, entered into in pursuance of the Treaty of Berlin, providing for the creation of this Mixed Commission.

¹ References to page numbers are to the original Report mentioned on p. 3 *supra*.

² References in this section are to publications referred to on pp. 5-6 *supra* and to the Annual Digest. References to comments by Dr. Kiesselbach are limited to his *Probleme*.

There are expressly excepted from this decision (1) claims of the United States as such against Germany, (2) claims based on debts owing to American nationals by Germany or by German nationals, and (3) claims arising out of the application of either exceptional war measures or measures of transfer as defined in paragraph 3 of the Annex to Section IV of Part X of the Treaty of Versailles. These three excepted classes of claims (hereinafter referred to as "excepted claims") have not been referred to the Umpire for decision by the National Commissioners.

The financial obligations of Germany to the United States arising under the Treaty of Berlin on claims other than excepted claims, put forward by the United States on behalf of its nationals, embrace:

(A) All losses, damages, or injuries to them, including losses, damages, or injuries to their property wherever situated, suffered directly or indirectly during the war period, caused by acts of Germany or her agents in the prosecution of the war, provided, however, that during the period of belligerency damages with respect to injuries to and death of persons, other than prisoners of war, shall be limited to injuries to and death of civilians; and also

(B) All damages suffered by American nationals during the period of belligerency caused by:

(1) GERMANY through any kind of maltreatment of prisoners of war;

(2) GERMANY OR HER ALLIES and falling within the following categories:

(a) Damage wherever arising to civilian victims of acts of cruelty, violence, or maltreatment (including injuries to life or health as a consequence of imprisonment, deportation, internment, or evacuation, of exposure at sea, or of being forced to labor), and to the surviving dependents of such victims;

(b) Damage, in territory of Germany or her allies or in occupied or invaded territory, to civilian victims of all acts injurious to health or capacity to work, or to honor, and to the surviving dependents of such victims;

(c) Damage to civilians by being forced to labor without just remuneration;

(d) Damage in the form of levies, fines, and other similar exactions imposed upon the civilian population;

(e) Damage in respect of all property (with the exception of naval and military works or materials) wherever situated, which has been carried off, seized, injured, or destroyed, on land, on sea, or from the air;

(3) ANY BELLIGERENT and falling within the following categories:

(a) Damage directly in consequence of hostilities or of any operations of war in respect of all property (with the exception of naval and military works or materials) wherever situated;

(b) Damage wherever arising to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war, including bombardments or other attacks on land, on sea, or from the air, and all the direct consequences thereof, and of all operations of war.

The American Agent and the German Agent and their respective counsel will be governed by this decision in the preparation and presentation of all cases.

Done at Washington November 1, 1923.

Edwin B. PARKER
Umpire

Concurring:
Chandler P. ANDERSON
American Commissioner

ADMINISTRATIVE DECISION No. II

(November 1, 1923, pp. 5-15.)

FUNCTIONS AND JURISDICTION OF COMMISSION: DETERMINATION, PAYMENT OF OBLIGATIONS. RAISING ex officio OF QUESTION OF JURISDICTION. *Held* that Commission, whose jurisdiction is limited to determination of Germany's financial obligations under Treaty of Berlin (reference made to Administrative Decision No. I, see p. 21 *supra*), and is not concerned with payment by Germany of such obligations, as preliminary question in each case must determine its jurisdiction.

APPLICABLE LAW: PRIMARY, SECONDARY SOURCES, TREATY OF BERLIN, CONVENTIONS, CUSTOM, MUNICIPAL LAW, GENERAL PRINCIPLES OF LAW, JUDICIAL DECISIONS, TEACHINGS OF PUBLICISTS.—JUSTICE, EQUITY, GOOD FAITH. Commission will be controlled by Treaty of Berlin. *Held* that, where no Treaty provision applicable, Commission *may* apply conventions binding upon United States and Germany, international custom, common rules of municipal law, general principles of law, and, as subsidiary means for determination of law, judicial decisions and teachings of most highly qualified publicists; provided that Commission will not be *bound* by any particular code or rule of law, but shall be guided by justice, equity and good faith.

REAL PARTIES TO INTERNATIONAL ARBITRATIONS, ACTUAL CLAIMANT IN CASE OF ESPOUSAL OF CLAIM. *Held* that governments are real parties to international arbitrations; all claims, therefore, to be asserted and controlled by United States as claimant, either on own behalf or on behalf of national.

JURISDICTION AND NATIONALITY OF CLAIMS.—NATURALIZATION: EFFECT ON STATE OBLIGATIONS. *Held* that in other than government claims Commission has jurisdiction only when loss suffered by person who at time of injury was American citizen, and that claim for such loss must since have continued in American ownership. Naturalization does not carry with it existing state obligations.

SEVERAL CLAIMANTS IN ONE CASE: APPORTIONMENT OF AWARDS, DISTRIBUTION OF AMOUNTS PAID.—JURISDICTION OF COMMISSION, MUNICIPAL COURTS. *Held* that, though Germany not interested in distribution by United States of amounts paid, Commission must determine how much each claimant is entitled to recover when two or more claimants present several rather than joint claims, whereupon aggregate amount of award can be fixed. Example: according to law of nations and governing principles *supra*, injuries resulting in death give rise to claims on behalf of those who suffered direct loss, the rules for measuring their damage to be separately applied to circumstances and conditions of deceased and of each claimant. *Held* also that Commission, like all international arbitral tribunals, has exclusive and final power to determine, according to applicable international law, in whom cause of action originally vests, as well as to determine all other questions involving its validity and the amount recoverable, but that all questions involving transfer of interest from and through original owner must be decided by municipal tribunals according to local jurisprudence.

DAMAGE: DIRECT AND INDIRECT, RULE OF PROXIMATE CAUSE.—INTERPRETATION OF TREATIES: INTENTION OF PARTIES, TERMS, RELATED PROVISIONS. *Held* that, under Treaty of Berlin, Germany not responsible, during entire war period, for all damage or loss in consequence of war: leaving out of

consideration claims falling within categories enumerated under (B) of Administrative Decision No. I (see p. 22 *supra*), Germany liable only for losses "caused by acts of Germany or her agents", whether acts operated directly or indirectly (application of rule of proximate cause which clearly parties to Treaty had no intention of abrogating). Analysis of terms of section 5, Resolution of Congress, July 2, 1921, carried into Treaty of Berlin. Related treaty provisions should be interpreted in connexion with each other.

MORAL, FINANCIAL RESPONSIBILITY FOR CONSEQUENCES OF WAR. *Held* that Article 231 Treaty of Versailles also carried into Treaty of Berlin at most amounts to acceptance by Germany of its moral, not financial responsibility for loss and damage suffered as consequence of war.

Cross-references: A.J.I.L., Vol. 18 (1924), pp. 177-186; Annual Digest, 1923-24, pp. 180, 184-185, 199-202, 367-368; Kiesselbach, *Probleme*, pp. 177-185 (German text); Witenberg, Vol. I, pp. 10-21 (French text).

Bibliography: Borchard, pp. 136-137; Isay, p. 607; Kersting, p. 1843; Kiesselbach, *Probleme*, pp. 10, 14-21, 100-102; Partsch, pp. 132-135; Prossinagg, pp. 11-12.

PARKER, *Umpire*, delivered the opinion of the Commission, the American Commissioner and the German Commissioner concurring in the conclusions:

For the guidance of the American Agent and the German Agent and their respective counsel there are here set down some of the basic principles which will, so far as applicable, control the preparation, presentation, and decision of all cases submitted to the Commission. Reference is made to Administrative Decision No. I for the definition of terms used herein.

Functions of Commission. This Commission was established and exists in pursuance of the terms of the Agreement between the United States and Germany dated August 10, 1922. Here are found the source of, and limitations upon, the Commission's powers and jurisdiction in the discharge of its task of determining the amount to be paid by Germany in satisfaction of her financial obligations to the United States and to American nationals under the Treaty of Berlin. Article I of the Agreement provides that:

"The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

"(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

"(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

"(3) Debts owing to American citizens by the German Government or by German nationals."

The financial obligations of Germany which this Commission is empowered to determine arise out of claims presented by the United States falling within the several categories specified in the Agreement and more particularly defined or described in the Treaty of Berlin. For this more particular definition as applied to claims (other than excepted claims) against Germany asserted by the United States on behalf of its nationals reference is made to the decision of the Umpire as embraced in the Commission's Administrative Decision No. I.

The Commission is not concerned with the Treaty of Versailles as such, but only with those of its provisions which have been incorporated by reference into the Treaty of Berlin. While for convenient designation reference will be made herein to the Treaty of Versailles, it will be understood (unless the context plainly indicates the contrary) that such reference is to such of the provisions of the Treaty of Versailles as constitute a part of the Treaty of Berlin.

The machinery provided by the Treaty of Versailles and the rules and methods of procedure thereunder governing the disposition of claims may be applied by but are not binding on this Commission.

It does not, of course, follow that every "claim" presented to the Commission constitutes a "financial obligation" of Germany. The American Agent pursues the policy of giving American nationals the benefit of every doubt and presents all claims that are not frivolous. Therefore at the threshold of the consideration of each claim is presented the question of jurisdiction, which obviously the Commission must determine preliminarily to fixing the amount of Germany's financial obligations, if any, in each case.¹

When the allegations in a petition or memorial presented by the United States bring a claim within the terms of the Treaty, the jurisdiction of the Commission attaches. If these allegations are controverted in whole or in part by Germany, the issue thus made must be decided by the Commission. Should the Commission so decide such issue that the claim does not fall within the terms of the Treaty, it will be dismissed for lack of jurisdiction. But if such issue be so decided that the claim does fall within the terms of the Treaty, then the Commission will prescribe the measure of damages, apply such measure to the facts in the particular case as the Commission may find them, and fix the financial obligation of Germany therein. The Commission's task is to apply the terms of the Treaty of Berlin to each case presented, decide those which it holds are within its jurisdiction, and dismiss all others.

The Commission is not concerned with the *payment* by Germany of its financial obligations arising under the Treaty. Its task is confined solely to fixing the amount of such financial obligations.

Principles governing Commission. In its adjudications the Commission will be controlled by the terms of the Treaty of Berlin. Where no applicable provision is found in that instrument, in determining the measure of damages the Commission may apply:²

¹ "History and Digest of the International Arbitrations to which the United States Has Been a Party," by John Bassett Moore, 1898 (hereinafter cited as "Moore's Arbitrations"): Volume I, pages 324-327, Volume III, Chapter LII, pages 2277-2312, and page 2599; "International Law Chiefly as Interpreted and Applied by the United States," by Charles Cheney Hyde, 1922 (hereinafter cited as "Hyde") section 577 (Volume II, page 153) and authorities cited in notes; "Papers Relating to the Foreign Relations of the United States," 1895, Part I, pages 83-84, letter from Mr. Olney, Secretary of State, to Mr. Gana, Minister of Chile, June 28, 1895; discussion of the right of a commission to pass upon its own jurisdiction in "International Arbitral Law and Procedure" by Jackson H. Ralston, 1910 (hereinafter cited as "Ralston"), sections 26-30, inclusive; *Comegys and Pettit v. Vasse*, 1828, 1 Peters (26 U.S.) 193, 212-213; "The Diplomatic Protection of Citizens Abroad or The Law of International Claims," by Edwin M. Borchard, 1915 (1922) (hereinafter cited as "Borchard"), section 191; "A Digest of International Law" by John Bassett Moore, 1906 (hereinafter cited as "Moore's Digest"), Volume VII, section 1073.

² Article 38 of the Statute for the Permanent Court of International Justice, 1920, Proceedings of the American Society of International Law, 1920, page 65; "International Law" by L. Oppenheim, 3rd edition, 1920 (hereinafter cited as "Oppenheim"), Volume II, section 15, page 19; "The Rights of War and Peace" by Hugo

- (a) International conventions, whether general or particular, establishing rules expressly recognized by the United States and Germany;
- (b) International custom, as evidence of a general practice accepted as law;
- (c) Rules of law common to the United States and Germany established by either statutes or judicial decisions;
- (d) The general principles of law recognized by civilized nations;
- (e) Judicial decisions and the teachings of the most highly qualified publicists of all nations, as subsidiary means for the determination of rules of law; but
- (f) The Commission will not be bound by any particular code or rules of law but shall be guided by justice, equity, and good faith.

The United States is claimant. Though conducted in behalf of their respective citizens, governments are the real parties to international arbitrations.³ All claims, therefore, presented to this Commission shall be asserted and controlled by the United States as claimant, either on its own behalf or on behalf of one or more of its nationals. If in the decisions, opinions, and proceedings of the Commission American nationals are referred to as claimants it will be understood that this is for the purpose of convenient designation and that the Government of the United States is the actual claimant.

Original and continuous ownership of claim. In order to bring a claim (other than a Government claim) within the jurisdiction of this Commission, the loss must have been suffered by an American national, and the claim for such loss must have since continued in American ownership.⁴

The enquiry is: Was the United States, which is the claimant, injured through injury to its national? It was not so injured where the injured person was at the time of suffering the injury a citizen of another state. While naturalization transfers allegiance, it does not carry with it existing state obligations. Any other rule would convert a nation into a claim agent in behalf of those availing of its naturalization laws to become its citizens after suffering injury.⁵

(Footnote continued from page 25.)

Grotius, Whewell translation, 1853 (hereinafter cited as "Grotius"), Book III, Chapter XX, sections 46-48; Hyde, section 559; II Moore's Arbitrations, page 1226; "Venezuelan Arbitrations of 1903," report by Jackson H. Ralston, 1904 (hereinafter cited as "Venezuelan Arbitrations 1903"), opinion of Umpire Plumley in Aroa Mines (Limited) Case before British-Venezuelan Mixed Claims Commission, pages 386-387; Eldredge's Case before American-Peruvian Mixed Commission of 1863, IV Moore's Arbitrations, page 3462; Cadiz Case before United States and Venezuelan Commission, 1885, IV Moore's Arbitrations, page 4203.

³ *La Abra Silver Mining Company v. Frellinghuysen*, 1884, 110 U.S. 63, 71-72; Hyde, section 273; Ralston, section 201; Borchard, sections 139, 140, 145, 146, 147, and 152; VI Moore's Digest, sections 973-978.

⁴ III Moore's Arbitrations: *Morrison v. Mexico*, 1850, page 2325; *Young's case*, 1851, page 2752; *Wiltz v. United States*, 1882, page 2254; *Abbiatti v. Venezuela*, 1885; pages 2347-2348. Borchard, sections 306-310; Ralston, sections 220-226; VI Moore's Digest, sections 979 and 981; *Burthe v. Denis*, 1890, 133 U.S. 514; *Venezuelan Arbitrations 1903*; *British-Venezuelan Mixed Claims Commission*, Plumley, Umpire, *Stevenson*, Case pages 438, 442-455; *Italian-Venezuelan Mixed Claims Commission*, Ralston, Umpire, *Brignone Case*, pages 710, 720, *Miliani Case*, pages 754, 759-762; *Corvaia Case*, pages 782, 809, *Poggioli Case*, pages 847, 866.

The language of the Treaty of Berlin does not bring a claim which America is presenting on behalf of its nationals within the exception to the general rule announced by *Barge*. Umpire, in the *Orinoco Steamship Company Case*, *Venezuelan Arbitrations 1903*, at pages 84-85.

⁵ The rule here laid down will not preclude the presentation by the American Agent and the consideration by this Commission of the claims, if any, of citizens of the Virgin Islands and others similarly situated, who, after suffering damages through the act of Germany or her agents, became American nationals through the acquisition of territory by the United States and not on their own initiative.

Apportionment of awards amongst claimants. As above stated, it is the province of this Commission to adjudicate claims presented by the United States, on its own behalf and on behalf of its nationals, against Germany falling within the several categories defined or described in the Treaty of Berlin.

The primary purpose of such adjudication is to determine the amount of Germany's financial obligations to the United States under the Treaty.⁶ Obviously, Germany is concerned only with the amount of her obligations and not with any distribution which may be made by the United States of such amount when paid. But both Governments are directly interested in, and this Commission in passing upon its jurisdiction must determine, the ownership of each claim at and since its inception.

In that class of claims where two or more are joined as claimants in one case because their respective causes of action are based upon a single occurrence, and where their demands are several rather than joint, this Commission must, after disposing of all jurisdictional questions, determine how much *each* claimant is entitled to recover before the aggregate amount of the award in that case can be fixed.

To illustrate: Claims growing out of injuries resulting in death are not asserted on behalf of the *estate* of the deceased, the award to be distributed according to the provisions of a will or any other fixed or arbitrary basis. The right to recover rests on the direct personal loss, if any, suffered by each of the claimants. All issues with respect to parties entitled to recover, as well as issues involving the measure of damages, are determined, not by the law of the domicile of the deceased, but in private or municipal jurisprudence by the law of the place where the tort was committed⁷—*here* by the law of nations and the application of the governing principles above announced. The *rules* for measuring the damages suffered by each claimant are the same. But those rules must be separately applied to the circumstances and conditions, not only of the deceased but of each claimant as well, to arrive at the *quantum* of damages suffered by each claimant. This process necessarily involves a determination of the amount to be awarded each claimant rather than the aggregate amount of Germany's liability for the loss of a life. The problem in such cases is, not to distribute a given amount assessed against Germany amongst several persons, but to assess separately the damages suffered by each of such persons who jointly present independent claims. This the Commission will do.

In so doing we are mindful of expressions used in the opinions of the Supreme Court of the United States to the effect that one claiming an award made by an international tribunal in favor of another is bound by the decision of such tribunal as to the validity of the claim and the amount of the award *but not as to the ownership thereof*.⁸

⁶ See Preamble to Agreement; *Frelinghuysen v. United States*, 1884, 110 U. S. 63.

⁷ *Spokane and Inland Empire Railroad Company v. Whitley*, 1915, 237 U. S. 487, 495, opinion by Mr. Justice Hughes; *Northern Pacific Railroad Company v. Babcock*, 1894, 154 U. S. 190, 197-199, opinion by Mr. Justice White; *American Banana Company v. United Fruit Company*, 1909, 213 U. S. 347, 356, opinion by Mr. Justice Holmes; *Story on Conflict of Laws*, 7th edition, 1872, section 307; *Wharton on Conflict of Laws*, 3rd edition, 1905, section 478.

⁸ See *Comegys and Pettit v. Vasse*, 1828, 1 Peters (26 U. S.) 193, 212; *Frevall v. Bache*, 1840, 14 Peters (39 U. S.) 95, 97; *Judson v. Corcoran*, 1855, 17 Howard (58 U. S.) 612, 614; *Phelps v. McDonald*, 1879, 99 U. S. (9 Otto) 298, 307; *Frelinghuysen v. Key*, 1884, 110 U. S. 63, 71; *Leonard v. Nye*, 1878, 125 Massachusetts 455, 466; *Brooks v. Ahrens*, 1888, 68 Maryland 212, 221; *Heard v. Sturgis*, 1888, 146 Massachusetts 545, 547, and (*Williams v. Heard*, 1891) 140

The suggestion that under the rule announced by these authorities this Commission is without jurisdiction to apportion its awards amongst several joined as claimants in one case is due to a misapprehension of the exact point decided. These authorities deal not with the *original* claimants' *primary right to recover* but with conflicts over asserted rights to *receive payment* arising (1) between the original claimants and those claiming under them or (2) between two or more whose rights are derivative, not original, claiming through assignments or transfers, voluntary or involuntary, from the original claimants. All of the authorities cited in effect recognize the exclusive and final power of international arbitral tribunals to determine *in whom* a cause of action originally vests, as well as to determine all other questions involving its validity and the amount recoverable. They hold that these are issues to be decided by the international tribunal according to the law of nations, *but* that all questions involving the transfer of interest from and through the original owner must be decided by municipal tribunals according to local jurisprudence.

To this rule we unqualifiedly subscribe.⁹ But it does not relieve us of the duty of deciding the amount which shall be awarded to each of two or more who join in asserting in any one case their claims, not joint but several in their nature, and whose rights to recover and the amount recoverable depend on the terms of the Treaty and the rules of applicable international law.

Losses suffered directly or indirectly. Numerous counsel pressing claims of American nationals presented by the American Agent urge in substance that under section 5 of the resolution of Congress and also under Article 231 of the Treaty of Versailles, both carried into and made a part of the Treaty of Berlin, Germany is, during the entire war period, (in the language of one of the American counsel) "responsible for all damage or loss in consequence of the war, no matter what act or whose act was the immediate cause of the injury". This contention is rejected.

From the decision of the Umpire set forth in Administrative Decision No. I, handed down this day, it is apparent that during the period of belligerency Germany is liable for damages suffered by American nationals caused by Germany's allies or by any belligerent when the damages fall within defined categories enumerated under division (B) of that decision. But leaving out of consideration claims falling within these defined categories, Germany's liability for losses sustained by American nationals falling within the provisions of division (A) of Administrative Decision No. I is limited to losses "caused by acts of Germany or her agents". The applicable provisions of Administrative Decision No. I are for convenience reproduced as follows:

"The financial obligations of Germany to the United States arising under the Treaty of Berlin on claims other than excepted claims, put forward by the United States on behalf of its nationals, embrace:

(Footnote continued from page 27.)

U. S. 529, 539-540; *Kingsbury v. Mattocks*, 1889, 81 Maine 310, 315; *Taft v. Marsily*, 1890, 120 New York 474, 477.

It is worthy of note that in the first three of these cases the court was construing the powers not of mixed arbitral tribunals, but of American commissions created under acts of Congress to distribute a lump sum paid to or held by the United States under treaties between the United States on the one part and Spain, France, and Mexico, respectively, on the other. It is also worthy of note that in none of these cases was there any question of the commission's jurisdiction involved, and in each of them the Supreme Court held that the particular claimant to whom the commission's award was made was entitled to receive payment. The question, therefore, as to the commission's jurisdiction to make the award did not affect the result in any one of these cases.

⁹ Grotius, Book III, Chapter XX, Section 48.

“(A) All losses, damages, or injuries to them, including losses, damages, or injuries to their property wherever situated, suffered directly or indirectly during the war period, caused by acts of Germany or her agents in the prosecution of the war, provided, however, that during the period of belligerency damages with respect to injuries to and death of persons, other than prisoners of war, shall be limited to injuries to and death of civilians.”

The contentions and arguments pressed by American counsel which are here rejected will be examined in the light of the provisions of the decision above quoted and also in the light of the provisions of section 5 of the joint resolution of Congress and Article 231 of the Treaty of Versailles.

Much stress is laid by American counsel upon the provisions of section 5 of the resolution of Congress and particularly upon the language italicized in the succeeding sentence. That section, among other things, provides in substance that the United States shall retain (unless otherwise theretofore or thereafter expressly provided by law) all property of Germany or its nationals or the proceeds thereof held by the United States or any of its officers, agents, or employees from any source or by any agency whatsoever, until such time as Germany shall have made “suitable provision for the satisfaction of all claims against” Germany of American nationals who have since July 31, 1914, “suffered, through the acts of the Imperial German Government, or its agents, * * * loss, damage, or injury to their persons or property, *directly or indirectly*, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, *or in consequence of hostilities or of any operations of war, or otherwise*”. Examining this language to ascertain what claims are embraced within its terms, it appears that such nationals must have suffered:

- A. (Cause?) through the acts of Germany or its agents;
- B. (When?) between August 1, 1914, and July 2, 1921, both inclusive;
- C. (What?) loss, damage, or injury to their persons or property
 - (1) Directly *or*
 - (2) Indirectly, whether
 - (a) Through the ownership of shares of stock in any domestic or foreign corporation;
 - (b) In consequence of hostilities or
 - (c) Of any operations of war, or
 - (d) Otherwise.

The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of that act must have been the loss, damage, or injury suffered. The *capacity* in which the American national suffered—whether the act *operated* directly on him, or indirectly as a stockholder *or otherwise*, whether the subjective nature of the loss was direct or indirect—is immaterial, but the *cause* of his suffering must have been the act of Germany or its agents. This is but an application of the familiar rule of proximate cause—a rule of general application both in private and public law—which clearly the parties to the Treaty had no intention of abrogating. It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany’s act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany’s act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely

traced, link by link, to Germany's act. But the law can not consider, the Congress of the United States in adopting its resolution did not consider, the parties in negotiating the Treaty of Berlin did not consider or expect this tribunal to consider, the "causes of causes and their impulsion one on another."¹⁰ Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed. The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?

It follows from the analysis of section 5 of the resolution of Congress that the contention of American counsel, based on the provisions of that section, must be rejected. The argument, pressed to its logical conclusion, would fix liability on Germany for all increased living costs, increased income and profits taxes, increased railroad fares and freights, increased ocean freights, losses suffered through the Russian revolution—in a word, for *all* costs or consequences of the war, direct or remote, to the extent that such costs were paid or losses suffered by American nationals. Going one step further, if there be applied to the word "otherwise" found in section 5 of the resolution as a part of the phrase "or in consequence of hostilities or of any operations of war, or otherwise" the same rules of construction as American counsel applies to the balance of that phrase, then it would follow that Germany is liable for all losses of every nature, no matter if the cause was entirely foreign to the war, wheresoever and howsoever suffered by American nationals since July 31, 1914. The mere statement of the extreme lengths to which the interpretation we are asked to adopt carries us demonstrates its unsoundness.

Neither can the argument of American counsel find support by a resort to the provisions of Article 231 of the Versailles Treaty, the first article of the reparation clauses of that treaty. That article provides that:

"The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies."

But Article 232 provides that:

"The Allied and Associated Governments recognize that the resources of Germany are not adequate * * * to make complete reparation for all such loss and damage.

"The Allied and Associated Governments, however, require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage as defined in Annex I hereto."

Annex I provides that "Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories". Then follows an enumeration of ten categories, including three.

¹⁰ Lord Bacon's Maxims of the Law.

numbered 5, 6, and 7, which deal with reimbursement to the Government of the United States as such of the cost of pensions and separation allowances, rather than damages suffered by the "civilian population". The Government of the United States has expressly committed itself not to press against Germany the claims arising under these three categories and no such claims are before this Commission.¹¹

It is manifest that Article 231 is qualified and limited by the provisions of Article 232 and the Annex I pertaining thereto, which in express terms recognize the inadequacy of Germany's resources to make complete reparation for all loss and damage suffered as a consequence of the war and limit the obligation of Germany to making compensation to the civilian population of the Allied and Associated Powers for such damages as fall within the terms of Article 232 and Annex I. Clearly the United States is not in a position to base a claim on an isolated provision of the Treaty without reading it in connection with all related provisions to ascertain its meaning and intent. Especially is this true in view of the second paragraph of subdivision (1) of Article II of the Treaty of Berlin, which provides that the United States in availing itself of the rights and advantages stipulated for its benefit in the provisions of the Versailles Treaty read by reference into the Treaty of Berlin "will do so in a manner consistent with the rights accorded to Germany under such provisions."

Article 231 of the Versailles Treaty at most amounts to no more than an acceptance by Germany of the affirmation by the Allied and Associated Governments of Germany's responsibility for all loss and damage suffered as a consequence of the war—a *moral responsibility*. Germany's *financial responsibility* for losses occurring during belligerency is limited and clearly defined in the succeeding Article and the Annex pertaining thereto and other provisions of the Treaty.

¹¹ When the Treaty of Berlin was before the Senate of the United States, Senator Walsh of Montana moved to strike from it these provisions obligating Germany to reimburse the United States for pension and separation allowances paid by the latter. He said, *inter alia* (page 6367, Volume 61, Congressional Record), "at the conference of Versailles an insistent demand was made by certain of the Allies to exact compensation of Germany for all damages occasioned by the war; and * * * after the debate progressed before the Versailles conference, the contention was finally abandoned by every one of them, and it was agreed that the compensation to be exacted of Germany should be limited to the damage which was done to the civilian population * * *. I challenged anyone to attempt to defend pensions and separation allowances as damages done to the civilian population, and no one has attempted so to defend them".

At this point Senator Shortridge, of California, asked Senator Walsh in substance if he feared or thought that the United States, "by whomsoever guided or directed", will ever make a demand on Germany for the payment of pensions and separation allowances, in effect expressing the opinion that such a contingency was so remote as to make of no consequence the objection of Senator Walsh to the Treaty as it stood. This opinion expressed by Senator Shortridge, which was not challenged and which, as appears from the debates, expressed the view held by the Senate, was fully justified when the President of the United States authorized the statement that he had no intention of pressing against Germany or presenting to this Commission any claims falling within paragraphs 5, 6, and 7 of Annex I to Section I of Part VIII of the Treaty of Versailles. See exchange of notes between Chancellor Wirth and Ambassador Houghton of August 10, 1922, printed in connection with the Agreement between the United States and Germany providing for the creation of this Commission and submitted to the Congress of the United States, Treaty Series 665.

Applying the rule of proximate cause to the provisions of Administrative Decision No. I, no difficulty should be experienced in determining what claims fall within its terms.

Done at Washington November 1, 1923.

Edwin B. PARKER
Umpire

Concurring in the conclusions:

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

OPINION IN THE *LUSITANIA* CASES

(*November 1, 1923, pp. 17-32.*)

NEUTRALITY: NEUTRAL PASSENGERS ABOARD ENEMY VESSEL.—ADMISSION OF LIABILITY. Admission by Germany through note of February 4, 1916, of liability for losses sustained by American nationals as a consequence of sinking of British liner *Lusitania* by German submarine on May 7, 1915, during period of American neutrality.

DAMAGES IN DEATH CASES: (1) GENERAL RULE OF MUNICIPAL LAW: COMPLETE PECUNIARY COMPENSATION FOR LOSS TO CLAIMANT; (2) FACTORS: FINANCIAL CONTRIBUTIONS, PERSONAL SERVICES, CLAIMANT'S MENTAL SUFFERING; (3) LIFE-INSURANCE.—EVIDENCE: LAW OF PROBABILITIES AND AVERAGES, LIFE-EXPECTANCY AND PRESENT-VALUE TABLES. General rule in both common and civil law countries is to give complete pecuniary compensation for loss resulting to claimant from death of human being. Applying rule to Germany's obligations under Treaty of Berlin (see Administrative Decision No. 11, p. 23 *supra*), Commission will generally take into account: (*a*) amounts, and (*b*) personal services which decedent would have contributed to claimant, and (*c*) the latter's mental suffering, all reduced to present cash value. Factors to be considered in estimating loss. *Held* that no deductions should be made of payments to claimant under policies of insurance on life of deceased: life-insurance contract is not one of indemnity, but of investment: claimant's rights under contract existed prior to commission of act complained of, hastening of death and of exercise of rights cannot operate to Germany's benefit: not death, but time of death was uncertain, and no speculation is permitted as to who might have received payment in case deceased had survived claimant. *Held* also that in death cases law of probabilities and averages to be applied in estimating damages: standard life-expectancy and present-value tables in connexion with other evidence and with deceased's probable physical and mental capacity and earning powers.

DAMAGES: LEGAL CONCEPT, MENTAL SUFFERING, EXEMPLARY (PUNITIVE, VINDICTIVE) DAMAGES.—PRECEDENT.—JURISDICTION: TREATY OF BERLIN, FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW.—INTERPRETATION: FUNDAMENTAL PRINCIPLE.—INTERPRETATION OF TREATIES: (1) TERMS, CLEAR AND UNAMBIGUOUS LANGUAGE, INTENTION OF PARTIES, (2) FRAMER, BENEFICIARY, PRINCIPLES OF INTERNATIONAL LAW. PENAL CLAUSES. The

legal concept of damages is: judicially ascertained compensation for wrong. *Held* that real and actual mental suffering, though difficult to measure, forms basis of recovery. *Held* also (1) that concept of damages does not include "exemplary (punitive, vindictive) damages" (origin: difficulty for judges in tort cases of clearly instructing juries how to measure mental suffering etc. by pecuniary standards; no precedent in arbitrations between one sovereign State against another presenting claim on behalf of national), and (2) that Commission without jurisdiction to award exemplary damages: (a) terms, clear and unambiguous language of Treaty of Berlin, intention of Parties, (b) fundamental principles of international law. Principles of interpretation: (1) fundamental principle that "it is not allowable to interpret that which has no need of interpretation", (2) of treaties: (a) construction against party who framed language for own benefit, (b) construction so as to best conform to principles of international law, (c) construction of penal clauses against party asserting them.

AWARDS: DATE, INTEREST. Awards in individual *Lusitania* cases shall be made as of date of this decision and shall bear 5% interest per annum from that date.

Cross-references: A.J.I.L., Vol. 18 (1924), pp. 361-373; Annual Digest, 1923-24, pp. 193-194, 202-203, 209-211, 339, 340; Kiesselbach, *Probleme*, pp. 186-198 (German text); Witenberg, Vol. I. pp. 22-38 (French text).

Bibliography: Borchard, p. 140; Isay, p. 607; Kersting, p. 1843; Kiesselbach, *Probleme*, pp. 11, 56-66; Partsch, pp. 135-136; Prossinagg, p. 12.

PARKER, *Umpire*, delivered the opinion of the Commission, the American and German Commissioners concurring in the conclusions:

These cases grow out of the sinking of the British ocean liner *Lusitania*, which was torpedoed by a German submarine off the coast of Ireland May 7, 1915, during the period of American neutrality. Of the 197 American citizens aboard the *Lusitania* at that time, 69 were saved and 128 lost. The circumstances of the sinking are known to all the world, and as liability for losses sustained by American nationals was assumed by the Government of Germany through its note of February 4, 1916, it would serve no useful purpose to rehearse them here.

Applying the rules laid down in Administrative Decisions Nos. I and II handed down this date,¹ the Commission finds that Germany is financially obligated to pay to the United States all losses suffered by American nationals, stated in terms of dollars, where the claims therefor have continued in American ownership, which losses have resulted from death or from personal injury or from loss of, or damage to, property, sustained in the sinking of the *Lusitania*.

This finding disposes of this group of claims, save that there remain to be considered (1) issues involving the nationality of each claimant affecting the Commission's jurisdiction and (2) the measure of damages to be applied to the facts of each case.

¹ Reference is made to Administrative Decision No. I for the definition of the terms used herein.

We are here dealing with a group of cases all growing out of a single catastrophe. As it is manifestly of paramount importance that the same rules of decision shall govern the disposition of each and all of them, whether disposed of by agreement between the two Commissioners or in the event of their disagreement by the Umpire, this opinion announcing such rules is, at the request of the two Commissioners, prepared by the Umpire, both Commissioners concurring in the conclusions. The principles and rules here laid down will, where applicable, govern the American and German Agents and their respective counsel in the preparation and presentation of all claims.

In this decision rules applicable to the measure of damages in *death cases* will be considered. In formulating such rules and determining the weight to be given to the decisions of courts and tribunals dealing with this subject, it is important to bear in mind the basis of recovery in death cases in the jurisdictions announcing such decisions.

At common law there existed no cause of action for damages caused by the death of a human being. The right to maintain such actions has, however, been long conferred by statutes enacted by Great Britain and by all of the American States. The German Code expressly recognizes liability for the taking of life.² These legislative enactments vary in their terms to such an extent that there can not be evolved from them and the decisions of the courts construing them any composite uniform rules governing this branch of the law. Such statutes and decisions as well as the other governing principles set out in this Commission's Administrative Decision No. II will, however, be considered in determining the applicable rules governing the measuring of damages in death cases.

The statutes enacted in common-law jurisdictions conferring a cause of action in death cases where none before existed have frequently limited by restrictive terms the rules for measuring damages in such cases. The tendency, however, of both statutes and decisions is to give such elasticity to these restrictive rules as to enable courts and juries in applying them to the facts of each particular case to award full and fair compensation for the injury suffered and the loss sustained.³ The statutes of several States of the American Union authorize juries to award such damages as are "fair and just" or "proportionate to the injury". Under such statutes the decisions of the courts give to the juries much broader latitude in assessing damages than those of other States where the statutes expressly limit them to so-called "pecuniary injuries",⁴ which is a term much misunderstood.

² Section 823. See also Huebner's "History of Germanic Private Law", 1918, pages 578-579, and Schuster's "Principles of German Civil Law", 1907, sections 284-286.

³ *Nohrden v. Northeastern Railroad Co.*, 1900, 59 South Carolina Reports 87, 105-108, 37 Southeastern Reporter 228, 238-240; *Stuckey v. Atlantic Coast Line Railroad Co.*, 1901, 60 South Carolina Reports 237, 252-253; *Parker v. Crowell & Spencer Lumber Co.*, 1905, 115 Louisiana Reports 463, 468, 39 Southern Reporter 445, 446; *Bourg v. Brownell-Drews Lumber Co.*, 1908, 120 Louisiana Reports 1009, 1022-1027, 45 Southern Reporter 972, 977-979; *Seaboard Air Line Railway v. Moseley*, 1910, 60 Florida Reports 186, 189; *Peters v. Southern Pacific Co.*, 1911, 160 California Reports 48, 69-71; *Underwood v. Gulf Refining Co.*, 1911, 128 Louisiana Reports 968, 987-1003, 55 Southern Reporter 641, 646-653; *Johnson v. Industrial Lumber Co.*, 1912, 131 Louisiana Reports 897, 910, 60 Southern Reporter 608, 612.

⁴ *Mynning v. The Detroit, Lansing & Northern Railroad Co.*, 1886, 59 Michigan Reports 257, 261-262, 26 Northwestern Reporter 514, 516-517; *Simmons v. McConnell*, 1890, 86 Virginia Reports 494, 496-497, 10 Southeastern Reporter 838, 839; *The Ohio and Mississippi Railway Co. v. Wangelin*, 1894, 152 Illinois Reports 138, 142, 38 Northeastern Reporter 760, 761; *Turner v. Norfolk & W. R. Co.*, 1895, 40 West Virginia Reports 675, 688-689, 693-695, 22 Southeastern Reporter 83, 87, 89; *Strother v. South Carolina & Georgia Railroad Co.*, 1896, 47 South Carolina Reports 375, 383-384, 25 Southeastern Reporter, 272, 274; *Mason v. Southern Railway Co.*, 1900, 58 South Carolina Reports 70, 77, 36 Southeastern Reporter 440, 442; *Parker v. Crowell & Spencer Lumber Co.*, 1905, 115 Louisiana Reports 463, 468, 39 Southern Reporter 445, 446; *Norfolk & Western Railway Co. v. Cheatwood's Administratrix*, 1905, 103 Virginia Reports 356, 364-365, 49 Southeastern Reporter 489, 491-492; *Butte Electric Ry. Co. v. Jones*, 1908, C. C. A., 164 Federal Reporter 308, 311, 18 Lawyers' Reports Anno-

In most of the jurisdictions where the civil law is administered and where the right of action for injuries resulting in death has long existed independent of any code or statute containing restrictions on rules for measuring damages, the courts have not been hampered in so formulating such rules and adapting them to the facts of each case as to give complete compensation for the loss sustained.

It is a general rule of both the civil and the common law that every invasion of private right imports an injury and that for every such injury the law gives a remedy. Speaking generally, that remedy must be commensurate with the injury received. It is variously expressed as "compensation", "reparation", "indemnity", "recompense", and is measured by pecuniary standards, because, says Grotius,⁵ "money is the common measure of valuable things".

In death cases the right of action is for the loss sustained by the *claimants*, not by the estate. The basis of damages is, not the physical or mental suffering of deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death. The enquiry then is: What amount will compensate claimants for such losses?

Bearing in mind that we are not concerned with any problems involving the punishment of a wrongdoer but only with the naked question of fixing the amount which will compensate for the wrong done, our formula expressed in general terms for reaching that end is: Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.

In making such estimates there will be considered, among other factors, the following:

(*a*) The age, sex, health, condition and station in life, occupation, habits of industry and sobriety, mental and physical capacity, frugality, earning capacity and customary earnings of the deceased and the uses made of such earnings by him;

(*b*) The probable duration of the life of deceased but for the fatal injury, in arriving at which standard life-expectancy tables and all other pertinent evidence offered will be considered;

(*c*) The reasonable probability that the earning capacity of deceased, had he lived, would either have increased or decreased;

(*d*) The age, sex, health, condition and station in life, and probable life expectancy of each of the claimants;

(*e*) The extent to which the deceased, had he lived, would have applied his income from his earnings or otherwise to his personal expenditures from which claimants would have derived no benefits;

(*f*) In reducing to their present cash value contributions which would probably have been made from time to time to claimants by deceased, a 5% interest rate and standard present-value tables will be used;

(Footnote continued from page 34.)

tated (New Series) 1205, 1208; *Brennen v. Chicago & Carterville Coal Co.*, 1909, 147 Illinois Appellate Court Reports 263, 270-273; *Chesapeake & O. Ry. Co. v. Hawkins* (West Virginia), 1909, C. C. A., 174 Federal Reporter 597, 601-602, 98 Circuit Court of Appeals 443, 447-448.

⁵ "The Rights of War and Peace", by Hugo Grotius, Whewell translation, 1853 (hereinafter cited as "Grotius"), Book II, Chapter XVII. Section XXII; Sedgwick on Damages, 9th (1912) edition (hereinafter cited as "Sedgwick"), section 30.

(g) Neither the physical pain nor the mental anguish which the *deceased* may have suffered will be considered as elements of damage;

(h) The amount of insurance on the life of the deceased collected by his estate or by the claimants will not be taken into account in computing the damages which claimants may be entitled to recover;

(i) No exemplary, punitive, or vindictive damages can be assessed.

The foregoing statement of the rules for measuring damages in death cases will be applied by the American Agent and the German Agent and their respective counsel in the preparation and submission of all such cases. The enumeration of factors to be taken into account in assessing damages will not be considered as exclusive of all others. When either party conceives that other factors should be considered, having a tendency either to increase or decrease the *quantum* of damages, such factors will be called to the attention of the Commission in the presentation of the particular case.

Most of the elements entering into the rules here expressed for measuring damages, and the factors to be taken into account in applying them, are so obviously sound and firmly established by both the civil and common law authorities as to make further elaboration wholly unnecessary. As counsel for Germany, however, very earnestly contends that the mental suffering of a claimant does not constitute a recoverable element of damage in death cases, and also contends that life insurance paid claimants on the happening of the death of deceased should be deducted in estimating the claimant's loss, we will state the reasons why we are unable to adopt either of these contentions. The American counsel, with equal earnestness, contends that exemplary, punitive, and vindictive damages should be assessed against Germany for the use and benefit of each private claimant. For the reasons hereinafter set forth at length this contention is rejected.

Mental suffering. The legal concept of damages is judicially ascertained compensation for wrong. The compensation must be adequate and balance as near as may be the injury suffered. In many tort cases, including those for personal injury and for death, it is manifestly impossible to compute mathematically or with any degree of accuracy or by the use of any precise formula the damages sustained, involving such inquiries as how long the deceased would probably have lived but for the fatal injury; the amount he would have earned, and of such earnings the amount he would have contributed to each member of his family; the pecuniary value of his supervision over the education and training of his children; the amount which will reasonably compensate an injured man for suffering excruciating and prolonged physical pain; and many other inquiries concerning elements universally recognized as constituting recoverable damages. This, however, furnishes no reason why the wrongdoer should escape repairing his wrong or why he who has suffered should not receive reparation therefor measured by rules as nearly approximating accuracy as human ingenuity can devise. To deny such reparation would be to deny the fundamental principle that there exists a remedy for the direct invasion of every right.

Mental suffering is a fact just as real as physical suffering, and susceptible of measurement by the same standards. The interdependency of the mind and the body, now universally recognized, may result in a mental shock producing physical disorders. But quite apart from any such result, there can be no doubt of the reality of mental suffering, of sickness of mind as well as sickness of body, and of its detrimental and injurious effect on the individual and on his capacity to produce. Why, then, should he be remediless for this injury? The courts of France under the provisions of the Code Napoleon have always held that mental suffering or "prejudice morale" is a proper element to be considered

in actions brought for injuries resulting in death. A like rule obtains in several American States, including Louisiana, South Carolina, and Florida.⁶ The difficulty of measuring mental suffering or loss of mental capacity is conceded, but the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree.

On careful analysis it will be found that decisions announcing a contrary rule by some of the American courts are measurably influenced by the restrictions imposed by the language of the statutes creating the right of action for injuries resulting in death. As hereinafter pointed out, these very restrictions have in some instances driven the courts to permit the juries to award as exemplary damages what were in truth compensatory damages for mental suffering, rather than leave the plaintiff without a remedy for a real injury sustained.

Mental suffering to form a basis of recovery must be real and actual, rather than purely sentimental and vague.⁷

Insurance. Counsel for Germany insist that in arriving at claimants' net loss there should be deducted from the present value of the contributions which the deceased would probably have made to claimants had he lived all payments made to claimants under policies of insurance on the life of deceased. The contention is opposed to all American decisions and the more recent decisions of the English courts. The various reasons given for these decisions are, however, for the most part inconclusive and unsatisfactory. But it is believed that the contention here made by the counsel for Germany is based upon a misconception of the essential nature of life insurance and the relations of the beneficiaries thereto.

Unlike marine and fire insurance, a life insurance contract is not one of indemnity, but a contract absolute in its terms for the payment of an amount certain on the happening of an event certain—death—at a time uncertain. The consideration for the claimants' contract rights is the premiums paid. These premiums are based upon the risk taken and are proportioned to the amount of the policy. The contract is in the nature of an investment made either by, or in behalf of, the beneficiaries. The claimants' rights under the insurance contracts existed prior to the commission of the act complained of, and prior to the death of deceased. Under the terms of the contract these rights were to be exercised by claimants upon the happening of a certain event. The mere fact that the act complained of hastened that event can not inure to Germany's benefit, as there was no uncertainty as to the happening of the event, but only as to the *time* of its happening. Sooner or later payment must be made under the insurance contract. Such payment of insurance, far from springing from Germany's act, is entirely foreign to it. If it be said that the acceleration of death secures to the claimants *now* what might otherwise have been paid to others had deceased survived claimants, and that therefore claimants may *possibly* have benefited through Germany's act, the answer is that the law will not for the benefit of the wrongdoer enter the domain of speculation and consider the probability of probabilities in order to offset an

⁶ *Nohrden v. Northeastern Railroad Co.*, 1900, 59 South Carolina Reports 87, 105-108, 37 Southeastern Reporter 228, 238-240; *Stuckey v. Atlantic Coast Line Railroad Co.*, 1901, 60 South Carolina Reports 237, 253; *Bourg v. Brownell-Drews Lumber Co.*, 1908, 120 Louisiana Reports 1009, 1022-1026, 45 Southern Reporter 972, 977-978; *Seaboard Air Line Railway v. Moseley*, 1910, 60 Florida Reports 186, 189-190; *Underwood v. Gulf Refining Co.*, 1911, 128 Louisiana Reports 869, 986, 990-1003; *Johnson v. Industrial Lumber Co.*, 1912, 131 Louisiana Reports 897, 908-909.

⁷ Sedgwick, Sec. 46a.

absolute and certain contract right against the uncertain damages flowing from a wrong.

Use of life-expectancy and present-value tables. Ordinarily the facts to which must be applied the rules of law in measuring damages in death cases lie largely in the future. It results that, absolute knowledge being impossible, the law of probabilities and of averages must be resorted to in estimating damages, and these preclude the possibility of making any precise computations or mathematical calculations. As an aid—but solely as an aid—in estimating damages in this class of cases, the Commission will consider the standard life-expectancy and present-value tables. These will be used not as absolute guides but in connection with other evidence, such as the condition of the health of deceased, the risks incident to his vocation, and any other circumstances tending to throw light on the probable length of his life but for the act of Germany complained of. To the extent that happenings subsequent to the death of deceased make certain what was before uncertain, to such extent the rules of probabilities will be discarded.

Neither will we lose sight of the fact that life tables are based on statistics of the length of life of individuals, not upon the duration of their physical or mental capacity or of their earning powers. In using such tables it will be borne in mind that the present value of the probable earnings of deceased depends on many more unknowable contingencies than does the present value of a life annuity or dower. Included among these contingencies are possible and probable periods of illness, periods of unemployment even when well, and various degrees of disability arising from gradually increasing age. The weight to be given to such tables will, therefore, be determined by the Commission in the light of the facts developed in each particular case.

Exemplary damages. American counsel with great earnestness insists that exemplary, or, as they are frequently designated, punitive and vindictive, damages should be assessed by this Commission against Germany in behalf of private claimants. Because of the importance of the question presented the nature of exemplary damages will be examined and the Commission's reasons for declining to assess such damages will be fully stated.

Undoubtedly the rule permitting the recovery of exemplary damages as such is firmly entrenched in the jurisprudence of most of the States of the American Union, although it has been repudiated by the courts of several of them and its soundness on principle is challenged by some of the leading American text writers.⁸

The reason for the rule authorizing the imposition of exemplary in addition to full reparation or compensatory damages is that they are justified "by way of punishing the guilty, and as an example to deter others from offending in like manner".⁹ The source of the rule is frequently traced to a remark alleged to have been made by Lord Chief Justice Pratt (afterwards Lord Camden) in instructing a jury (*italics ours*) that:¹⁰

"Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."

⁸ *Fay v. Parker*, 1873, 53 New Hampshire Reports 342; Sedgwick, sec. 354; Greenleaf on Evidence, 15th (1892) edition, Volume II, sections 253, 254, 266, and 267.

⁹ *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 1893, 147 United States Reports 101, 107.

¹⁰ *Wilkes v. Wood*, 1763, 19 Howell's State Trials (1816) 1153, 1167, Lofft's Reports (1790), pages 1 and 19 of first case.

That such a charge was ever in fact given has been questioned.¹¹ However this may be, this alleged instruction has been quoted and requoted by the courts of England and of America as authority for the awarding of exemplary damages where the tort complained of has been wilfully or wantonly or maliciously inflicted.

In some of the earlier cases the awards of exemplary damages were sustained "for example's sake" and "to prevent such offense in the future", and again "to inflict damages for example's sake and by way of punishing the defendant". In one early New York case¹² it was said:

"We concede that smart money allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime."

In our opinion the words exemplary, vindictive, or punitive as applied to *damages* are misnomers. The fundamental concept of "damages" is satisfaction, reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong.¹³ The remedy should be commensurate with the loss, so that the injured party may be made whole.¹⁴ The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought. Many of the American authorities lay down the rule that where no actual damage has been suffered no exemplary damages can be allowed, giving as a reason that the latter are awarded, not because the *plaintiff* has any *right* to recover them, but because the *defendant* deserves punishment for his wrongful acts; and that, as the plaintiff can not maintain an action merely to inflict punishment upon a supposed wrongdoer, if he has no cause of action independent of a supposed right to recover exemplary damages, he has no cause of action at all.¹⁵ It is apparent that the theory of the rule is not based upon any *right* of the *plaintiff* to receive the award assessed against the defendant, but that the *defendant* should be *punished*. The more enlightened principles of government and of law clothe the state with the sole power to punish but insure to the individual full, adequate, and complete compensation for a wrong inflicted to his detriment.¹⁶

An examination of the American authorities leads to the conclusion that the exemplary damage rule owes its origin and growth, to some extent at least, to the difficulties experienced by judges in tort cases of clearly defining in their instructions to juries the different factors which may be taken into account and readily applied by them in assessing the *quantum* of damages which

¹¹ Sedgwick, Sec. 350.

¹² *Cook v. Ellis*, 1844, 6 Hill's (New York) Reports 466, 467.

¹³ Sedgwick, Sec. 571a.

¹⁴ Grotius, Book II, Chapter XVII, Section X; Blackstone's Commentaries, Book II, Chapter 29, Section VII, paragraph 2 (*page 438); Sedgwick, section 29.

¹⁵ *Schippel v. Norton*, 1888, 38 Kansas Reports 567, 572; *Meighan v. Birmingham Terminal Co.*, 1910, 165 Alabama Reports 591, 599.

¹⁶ Vattel's Law of Nations, Chitty edition with notes by Ingraham, 1852 (1857), (hereinafter cited as "Vattel") Book I, section 169, where it is said: "Now, when men unite in society,—as the society is thenceforward charged with the duty of providing for the safety of its members, the individuals all resign to it their private right of punishing. To the whole body, therefore, it belongs to avenge private injuries, while it protects the citizens at large. And as it is a moral person, capable also of being injured, it has a right to provide for its own safety, by punishing those who trespass against it;—that is to say, it has a right to punish public delinquents. Hence arises the right of the sword, which belongs to a nation, or to its conductor. When the society use it against another nation, they make war; when they exert it in punishing an individual, they exercise vindictive justice."

a plaintiff may recover. It is difficult to lay down any rule for measuring injury to the feelings, or humiliation or shame, or mental suffering, and yet it frequently happens that such injuries *are very real and call for compensation as actual damages* as much as physical pain and suffering and many other elements which, though difficult to measure by pecuniary standards, are, nevertheless, universally considered in awarding compensatory damages. The trial judges, following the lead of Lord Camden,¹⁷ have found it easier to permit the juries to award plaintiffs in the way of damages a penalty assessed against defendants guilty of wilful, malicious, or outrageous conduct toward the plaintiffs, rather than undertake to formulate rules to enable the juries to measure in pecuniary terms the extent of the actual injuries.¹⁸ In cases cited and numerous others, the damages dealt with and designated by the court as "exemplary" were in their nature purely compensatory and awarded as reparation for actual injury sustained.

That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty. The tendency of the decisions and statutes of the several American States seems to be to broaden the scope of the elements to be considered in assessing actual and compensatory damages, with the corresponding result of narrowing the application of the exemplary damages rule.¹⁹

The industry of counsel has failed to point us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals.²⁰ Great stress is laid by counsel

¹⁷ Wilkes v. Wood, note 10 *supra*.

¹⁸ Boydan v. Haberstumpf, 1901, 129 Michigan Reports 137, where it was held (page 140; italics ours) that the term "exemplary damages," as employed in Michigan, "has generally been understood to mean an increased award of damages in view of the supposed *aggravation* of the injury to the feelings by the wanton or reckless act of the defendant", and that "It has never been the policy of the court to permit juries to award capiously any sum which may appear just to them, *by way of punishment* to the offender, but rather to award a sum in addition to the actual proven damages, as what, in their judgment, constitutes a *just measure of compensation* for injury to feelings, in view of the circumstances of each particular case."

Pegram v. Stortz, 1888, 31 West Virginia Reports 220, 229, 242-243; Gillingham v. Ohio River Railroad Co., 1891, 35 West Virginia Reports 588, 599-600; Levy v. Fleischer, Mayer & Co., 1895, 12 Washington Reports 15, 17-18.

¹⁹ See the cases cited in note 6 *supra*. In the case cited from 128 Louisiana Reports the court said, at page 992, "the idea that damages allowed for mental suffering are exemplary, punitive, or vindictive in their character has been very generally abandoned, and they are now recognized by this court and other courts as actual and compensatory".

²⁰ "International Arbitral Law and Procedure", by Jackson H. Ralston, 1910, section 369, where he says:

"While there is little doubt that in many cases the idea of punishment has influenced the amount of the award, yet we are not prepared to state that any commission has accepted the view that it possessed the power to grant anything save compensation. * * *

Borchard's "The Diplomatic Protection of Citizens Abroad", 1915 (1922), section 174, makes substantially the same statement in these words: "Arbitral com-

on the Moses Moke case²¹ which arose under the convention between the United States and Mexico of July 4, 1868. Moke, an American citizen, was subjected to a day's imprisonment to "force" him to "loan" \$1,000. He sought to recover the amount of the "loan" and damages. The American Commissioner Wadsworth speaking for the Commission said:

" . . . we wish to condemn the practice of forcing loans by the military, and think an award of \$500 for 24 hours' imprisonment will be sufficient * * *. If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them."

This *language* is the nearest approach to a recognition of the doctrine of exemplary damages that we have found in any reported decision of a mixed arbitral tribunal, but we do not regard the *decision* in this case as a recognition of this doctrine. On the contrary, an award of \$500 for the humiliation and inconvenience suffered by this American citizen for the outrageous treatment accorded him by the Mexican authorities can hardly be said to be adequate compensation. Certainly the award has in it none of the elements of punishment, nor can it be evoked as an example to deter other nations from according similar treatment to American citizens.

But it is not necessary for this Commission to go to the length of holding that exemplary damages can not be awarded in *any* case by *any* international arbitral tribunal. A sufficient reason why such damages can not be awarded by *this* Commission is that it is without the power to make such awards under the terms of its charter—the Treaty of Berlin. It will be borne in mind that this is a "Treaty between the United States and Germany Restoring Friendly Relations"—a Treaty of Peace. Its terms negative the concept of the imposition of a penalty by the United States against Germany, save that the undertaking

(Footnote continued from page 40)

missions, while often apparently taking into consideration the seriousness of the offense and the idea of punishment in fixing the amount of an award, have generally regarded their powers as limited to the granting of compensatory, rather than exemplary, damages."

Dr. Lieber, Umpire of the Commission under the convention of July 4, 1868, between the United States and Mexico, in awarding the sum of \$4,000 on an \$85,000 claim, said (page 4311, Volume IV, of Moore's "History and Digest of the International Arbitrations to which the United States Has Been a Party," 1898, hereinafter cited as "Moore's Arbitrations"): "Nor can these high damages be explained as exemplary damages. Our commission has no punitive mission, nor is there any offense to be punished."

See also opinion of Umpire Bertinatti in the case of Ogden, Administrator of the estate of Isaac Harrington, in which an award of \$1,000 was made on an original demand of \$160,000 where the claim was made that an American citizen was treated oppressively and with great indignity by Costa Rica. II Moore's Arbitrations, page 1566.

²¹ IV Moore's Arbitrations, 3411.

Counsel also lays much stress on the language used by Umpire Duffield of the German-Venezuelan Mixed Claims Commission in the Metzger Case (pages 578-580, "Venezuelan Arbitrations of 1903", report by Jackson H. Ralston, 1904, hereinafter cited as "Venezuelan Arbitrations 1903"), where it is said (page 580; italics ours): "Neither can anything be allowed in the way of punitive or exemplary damages against Venezuela, *because* it appears, as above stated, that the general commanding the army promptly took action against the offender and punished him by imprisonment." Clearly this is *dictum*. The case was apparently correctly decided and there was no reason for giving any careful consideration to the *right* of the commission to go further than award compensatory damages.

by Germany to make reparation to the United States and its nationals as stipulated in the Treaty may partake of the nature of a penalty.²²

Part VII of the Treaty of Versailles (Articles 227 to 230, inclusive) deals with "Penalties". It is significant that these provisions *were not* incorporated in the Treaty of Berlin.

In negotiating the Treaty of Peace, the United States and Germany were of course dealing directly with each other. Had there been any intention on the part of the United States to exact a penalty either as a punishment or as an example and a deterrent, such intention would have been clearly expressed in the Treaty itself; and, had it taken the form of a money payment, would have been claimed by the Government of the United States on its own behalf and not on behalf of its nationals. As to such nationals, care was taken to provide for full and adequate "indemnities," "reparations," and "satisfaction" of their claims for losses, damages, or injuries suffered by them. While under that portion of the Treaty of Versailles which has by reference been incorporated in the Treaty of Berlin, Germany "accepts" responsibility for all loss and damage to which the United States and its nationals have been subjected as a consequence of the war, nevertheless the United States frankly recognizes the fact "that the resources of Germany are not adequate * * * to make complete reparation for all such loss and damage", but requires that Germany make "compensation" for specified damages suffered by American nationals.²³ For the enormous cost to the Government of the United States in prosecuting the war no claim is made against Germany. No claims against Germany are being asserted by the Government of the United States on account of pensions paid, and compensation in the nature of pensions paid, to naval and military victims of the war and to their families and dependents.²⁴ In view of this frank recognition by the Government of the United States of Germany's inability to make to it full and complete reparation for all of the consequences of the war, how can it be contended that there should be read into the Treaty an obligation on the part of Germany to pay penalties to the Government of the United States for the use and benefit of a small group of American nationals for whose full and complete compensation for losses sustained adequate provision has been made?

The United States is in effect making one demand against Germany on some 12,500 counts. That demand is for compensation and reparation for certain losses sustained by the United States and its nationals. While in determining the amount which Germany is to pay each claim must be considered separately, no one of them can be disposed of as an isolated claim or suit but must be considered in relation to all others presented in this one demand. In all of the claims the parties are the same. They must all be determined and disposed of under the same Treaty and by the same tribunal. If it were possible to read into the Treaty a provision authorizing this Commission to assess a penalty against Germany as a punishment or as an example or deterrent, what warrant is there for allocating such penalty or any part of it to any particular claim, and how should it be distributed? Why should one

²² Oppenheim on International Law, 3rd (1920) edition (hereinafter cited as "Oppenheim"), Vol. II, Sec. 259a, page 353, where it is said (*italics ours*): "There is no doubt that, if a belligerent can be made *to pay compensation for all damage* done by him in violating the laws of war, this will be an indirect means of securing legitimate warfare."

²³ Articles 231 and 232 and Annex I to Section I of Part VIII of the Treaty of Versailles.

²⁴ See note 11 to this Commission's Administrative Decision No. II handed down this day.

American national who has sustained a loss receive in addition to full compensation "smart money" rather than another? Should the full amount of the penalty be imposed in connection with a particular claim, or in connection with a particular incident out of which a number of claims arose, or in connection with all acts of a particular class? Why impose a penalty for the use and benefit of a small group of American nationals who are awarded full compensation, and at the same time waive reimbursement for the cost of the war which falls on all American taxpayers alike?

If it were competent for this Commission to impose such a penalty, what penalty stated in terms of dollars would suffice as a deterrent? And if this Commission should arrogate to itself the authority to impose in the form of damages a penalty which would effectively serve as a deterrent, where lie the boundaries of its powers? It is not hampered with any constitutional limitations save those found in the Treaty; and if the power to impose a penalty exists under the Treaty may not the Commission exercise that power in a way to affect the future political relations of the two Governments?²⁵ The mere statement of the question is its answer. Putting the inquiry only serves to illustrate how repugnant to the fundamental principles of international law is the idea that this Commission should treat as justiciable the question as to what penalty should be assessed against Germany as a punishment for its alleged wrongdoing. It is our opinion that as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal in its nature, and therefore not a subject within the jurisdiction of this Commission.

The Treaty is our charter. We can not look beyond its express provisions or its clear implications in assessing damages in any particular claim. We hold that its clear and unambiguous language does not authorize the imposition of penalties. Hence the fundamental maxim "It is not allowable to interpret that which has no need of interpretation" applies.²⁶ But all of the rules governing the interpretation of treaties would lead to the same result were it competent for us to look to them. Some of these are: The Treaty is based upon the resolution of the Congress of the United States, accepted and adopted by Germany. The language, being that of the United States and framed for its benefit, will be strictly construed against it.²⁷ Treaty provisions must be so construed as to best conform to accepted principles of international law rather than in derogation of them.²⁸ Penal clauses in treaties are odious and must be construed most strongly against those asserting them.²⁹

The Treaty is one between two sovereign nations—a Treaty of Peace. There is no place in it for any vindictive or punitive provisions. Germany must make

²⁵ Vattel, Book II, Chapter XVIII, Sec. 329.

²⁶ Vattel, Book II, Chapter XVII, Sec. 263.

²⁷ Vattel, Book II, Chapter XVII, Sec. 264; Digest of Justinian, Book II, Title XIV, paragraph 39, Monro translation, 1904; "Treaties—Their Making and Enforcement" by Samuel B. Crandall, 2nd (1916) edition (hereinafter cited as "Crandall"), sec. 171, page 401; Pothier on Obligations (Evans, 1806), Vol. I, page 58 (7th rule, Article VII, Chapter I, Part I); Woolsey on International Law, 6th (1891) edition, sec. 113; opinion of Ralston, Umpire, Italian-Venezuelan Mixed Claims Commission, Sambiaggio Case, Venezuelan Arbitrations 1903, pages 666 and 688-689.

²⁸ Opinion of Plumley, Umpire, in Arao Mines (Limited) Case, British-Venezuelan Mixed Claims Commission, pages 344 and 386-387 Venezuelan Arbitrations 1903; reference to Sambiaggio Case in note 27 above; Vilas v. Manila, 1911, 220 United States 345, 358-359; Crandall, sec. 170.

²⁹ Vattel, Book II, Chapter XVII, sections 301-303; Grotius, Book II, Chapter XVI, Sec. X and paragraph 3 of Sec. XII.

compensation and reparation for all losses falling within its terms sustained by American nationals. That compensation must be full, adequate, and complete. To this extent Germany will be held accountable. But this Commission is without power to impose penalties for the use and benefit of private claimants when the Government of the United States has exacted none.

This decision in so far as applicable shall be determinative of all cases growing out of the sinking of the Steamship *Lusitania*. All awards in such cases shall be made as of this date and shall bear interest from this date at the rate of five per cent (5%) per annum.

Done at Washington November 1, 1923.

Edwin B. PARKER
Umpire

Concurring in the conclusions:

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH,
German Commissioner

UNITED STATES STEEL PRODUCTS COMPANY
(UNITED STATES) *v.* GERMANY

COSTA RICA UNION MINING COMPANY
(UNITED STATES) *v.* GERMANY

SOUTH PORTO RICO SUGAR COMPANY
(UNITED STATES) *v.* GERMANY

(*War-Risk Insurance Premium Claims, November 1, 1923, pp. 33-59.*)

DAMAGE: WAR-RISK INSURANCE PREMIUMS, RULE OF PROXIMATE CAUSE.—EXTENT OF LIABILITY UNDER TREATY OF BERLIN, ENLARGEMENT BY AGREEMENT UNDER WHICH COMMISSION CONSTITUTED. Claims on behalf of American nationals for reimbursement for war-risk insurance premiums paid either during period of United States neutrality, or during period of United States belligerency, for protection against acts of naval warfare which never occurred (losses resulting from payments not passed on to purchaser or ultimate consumer). *Held* that, under Treaty of Berlin, Germany not liable: losses not attributable to “acts of Germany or her agents” as proximate cause (reference made to Administrative Decisions Nos. I and II, see pp. 21 and 23 *supra*); and that, in particular, no reimbursement for war-risk insurance premiums, paid during period of United States belligerency, imposed either by Article 232, Treaty of Versailles, carried into Treaty of Berlin (same reference made as above), or by Article I, Agreement of August 10, 1922 (Germany’s liabilities as fixed by Treaty of Berlin cannot be enlarged by Agreement).

PRECEDENTS.—EXTRAJUDICIAL ACTION. *Held* that decisions of Tribunal of Arbitration and of Court of Commissioners in *Alabama* Claims are no controlling precedents: (1) Tribunal, international in character and governed by Treaty of Washington of May 8, 1871, and applicable international law, dealt with “enhanced payments of insurance” in extrajudicial declaration

of June 19, 1872, not in its award of September 14, 1872; (2) Court of Commissioners rendering judgments in favour of war-risk premium claimants was created and governed by national law (United States Congress, Acts of 1874 and 1882, dealing with distribution among American nationals of lump sum awarded by Tribunal to United States in its capacity as sovereign).

DAMAGE: DIRECT AND INDIRECT; "NATIONAL" CLAIMS. *Held* that term "indirect" to describe "national claims" is inapt, inaccurate, and ambiguous, and that distinction between "direct" and "indirect" damage is frequently illusory and fanciful and should have no place in international law.

Cross-references: A.J.I.L., Vol. 18 (1924), pp. 611-613; Annual Digest, 1923-1924, pp. 195-198; Kiesselbach, *Probleme*, pp. 199-220 (German text); Witenberg, Vol. I, pp. 39-67 (French text).

Bibliography: Annual Digest, 1923-24, pp. 198-199; Borchard, p. 142; Isay, pp. 607-608; Kersting, p. 1844; Kiesselbach, *Probleme*, pp. 10, 100; Partsch, p. 136; Prossinagg, p. 12.

PARKER, *Umpire*, delivered the opinion of the Commission, the American and German Commissioners concurring in the conclusions:

The Commission is here dealing with a group of claims put forward by the United States on behalf of its nationals in which reimbursement is sought for war-risk insurance premiums paid by them for protection against stipulated hazards of war. There is no complaint of injury to or destruction or seizure of property by the acts of Germany or her agents. The premiums were paid for protection against possible acts which never occurred.

That these claims may be understandingly dealt with it will prove helpful at the outset to consider: What were the pertinent problems growing out of the war confronting American nationals, especially those engaged directly or indirectly in maritime commerce, at the time such insurance was written and premiums paid, and against what risks was protection sought?

The initial eruptions of the world war in the last days of July, 1914, found the United States, in common with other neutral powers, in a state of unpreparedness. Its commerce was on every sea, yet it was without an adequate merchant marine to keep it afloat. Intricate questions affecting the safety of neutral freights and cargoes, even when carried in neutral vessels, were, and some of them still are, unsettled, rendering uncertain the protection of a neutral flag. Yet American institutions were not then prepared to protect American commerce by insurance against the risks of war.

During the first two years and eight months of the war, which we designate the "period of neutrality", the United States was neutral.¹ Its nationals had, therefore, nothing to fear from war risks for their vessels or their cargoes, or for their freights shipped on vessels flying foreign flags, save

- (a) When part or all of the cargo was contraband,
- (b) When violating a blockade,
- (c) From mines, and
- (d) When shipments of American ownership were made under a belligerent flag.

The difficulty lay in determining what was and what was not contraband, and what ports were and what were not blockaded, and the location of mines. With a view to removing, as far as practicable, these uncertainties prejudicial to neutral commerce, the United States very promptly, by identic notes addressed to all belligerent powers, suggested that all agree to be bound by

¹ Reference is made to Administrative Decision No. I for the definition of the terms used herein.

the laws of naval warfare as laid down by the signed but unratified Declaration of London of 1909. In making this suggestion the opinion was expressed that "an acceptance of these laws by the belligerents would prevent grave misunderstandings which may arise as to the relations between neutral powers and the belligerents".² Germany and her allies acquiesced in this suggestion.³ Great Britain and her allies responded that they had "decided to adopt generally the rules of the declaration in question, subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations".⁴ On examination it was found that these "modifications and additions" touching the laws of contraband and blockade were so substantial and far-reaching in their nature that the United States, despairing for the time being at least of bringing the conflicting powers to agreement with respect to the laws of naval warfare, withdrew its suggestion and notified all belligerents that it would "insist that the rights and duties of the United States and its citizens in the present war be defined by the existing rules of international law and the treaties of the United States irrespective of the provisions of the Declaration of London".⁵

Then followed in quick succession numerous additions by the British Government to her lists of both contraband and conditional contraband, as defined by the Declaration of London, with modifications and extensions of the rule of "continuous voyage" or "ultimate destination" as applicable to blockade as well as contraband—all promptly followed by both her allies and her enemies. In their wake came numerous seizures, detentions, and requisitions of American cargoes by the British Government; the declaration by the German Government that the English Channel and the North and West Coasts of France and the waters surrounding the British Isles constituted a war area and that all enemy ships found therein would be destroyed⁶ and even neutral ships endangered—the latter vigorously protested by the United States;⁷ the declaration of the British Government and the French Government of March 1, 1915, that they would "detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin", a course of action protested by the United States as previously unknown to international law;⁸ the declaration that "The British fleet has instituted a blockade, effectively

² Telegrams of Secretary of State to American Embassies at London, Paris, St. Petersburg, Berlin, and Vienna, and the American Legation at Brussels, Aug. 6, 1914, page 1 of Special Supplement to Volume 9 of American Journal of International Law, July, 1915, being "Diplomatic Correspondence between the United States and Belligerent Governments Relating to Neutral Rights and Commerce" (hereinafter cited as "Dip. Cor."), with volume and page numbers, vol. 10 being for October, 1916, and vol. 11 for October, 1917, supplements).

³ Telegram, Ambassador Penfield to Secretary of State, Aug. 13, 1914, Dip. Cor. vol. 9, p. 1. Telegrams, Ambassador Gerard to Secretary of State, Aug. 20 and 22, 1914, Dip. Cor., vol. 9, p. 2.

⁴ Dispatch, Ambassador Page to Secretary of State, August 27, 1914, enclosing note of Aug. 27, 1914, from British Foreign Office, Dip. Cor., vol. 9, p. 2-3; telegram Chargé Wilson to Secretary of State, Aug. 27, 1914, *ibid.*, p. 5; telegram, Ambassador Herrick to S. of S., Sept. 3, 1914, *ibid.*, p. 6.

⁵ Telegrams, Acting Secretary of State, Oct. 22 and 24, 1914, Dip. Cor., vol. 9, p. 7-8.

⁶ Dispatch, Ambassador Gerard to Secretary of State, Feb. 6, 1915, transmitting proclamation and memorial of German Government of Feb. 4, 1915, Dip. Cor., vol. 9, p. 83-85.

⁷ Telegram, Secretary of State to Ambassador Gerard, Feb. 10, 1915, *ibid.*, p. 86-88.

⁸ Declarations from British and French Ambassadors to Secretary of State, Mar. 1, 1915, *ibid.*, p. 101-102; telegrams, Secretary of State to Ambassadors Page and Sharp, Mar. 5, 1915, *ibid.*, p. 102-104.

controlling by cruiser 'cordon' all passage to and from Germany by sea";⁹ constant and emphatic protests directed by the Government of the United States against both the British Government and her allies and the German Government and her allies for "vexatious", "unwarranted", "unjustifiable", "oppressive", "indefensible", and "illegal" interference with American commerce;¹⁰ until on July 7th, 1916, the British and French Governments revoked their partial adherence to the Declaration of London and promulgated specific substitutes of their own devising,¹¹ protested by the Government of the United States "as at variance with the law and practice of nations in several respects".¹² Both Germany and Great Britain admitted planting mines.¹³ As stated in one of the briefs filed before this Commission by claimants in support of this group of claims, "retaliatory acts, *first of one belligerent and then of another*, accumulated progressively until what had always been believed to be the rights of neutrals substantially disappeared".¹⁴

Under the provisions of Article 59 of the Declaration of London, believed to be declaratory of the preexisting rules of international law "In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods".¹⁵ Article 3 of the Declaration of Paris (to which the United States has never unqualifiedly adhered) protects neutral goods, except contraband of war, under the enemy's flag against *confiscation*. Whether this rule will afford a neutral owner protection from loss flowing from damage to or *destruction* of his property, when such loss is incidental to its transportation on a belligerent vessel, is still involved in doubt.¹⁶ French Prize Courts have held that no such protection is afforded; that the Declaration

⁹ Telegram, Ambassador Page to Secretary of State, Mar. 15, 1915, transmitting memorandum of Mar. 13, 1915, from British Secretary of State for Foreign Affairs, *ibid.*, p. 106-108.

¹⁰ Instruction, Secretary of State to Ambassador Page, Oct. 21, 1915, Dip. Cor., vol. 10, p. 73-88; telegram, Secretary of State to Ambassador Gerard, Feb. 10, 1915, same, vol. 9, p. 86-88; note, Secretary of State to German Ambassador, Apr. 21, 1915, *ibid.*, p. 127-129; telegram, Secretary of State to Ambassador Page, July 14, 1915, *ibid.*, p. 153-154; telegram, Secretary of State to Ambassador Gerard, July 21, 1915, *ibid.*, 155-157; telegram, Secretary of State to Ambassador Penfield, Aug. 12, 1915, *ibid.*, 166-171; telegram, Secretary of State to Ambassador Gerard, Apr. 18, 1916, *ibid.*, p. 186-190; same to same, May 8, 1916, *ibid.*, p. 199-200.

¹¹ Dispatch, Ambassador Page to Secretary of State, July 10, 1916, enclosing copies of "The Maritime Rights Order in Council, 1916", Dip. Cor., vol. 10, p. 5.

¹² Instruction, Secretary of State to Chargé Laughlin, London, Sept. 18, 1916, Dip. Cor., vol. 11, p. 1-2.

¹³ Memorandum from British Secretary of State for Foreign Affairs to American Ambassador, Mar. 15, 1915; reply of German Govt. to protest of British Govt. against the laying of German mines, transmitted by Ambassador Gerard to Secretary of State, Nov. 13, 1914; notice of British Govt. of laying of mines given through Ambassador Page and transmitted by the latter to the Secretary of State, Jan. 25, 1917; Feb. 15, 1917; Mar. 23, 1917, and by Consul General Skinner, Apr. 27, 1917. See also note of Secretary of State to British Ambassador, Feb. 19, 1917.

¹⁴ Brief of George Grafton Wilson, page 11 (*italics* ours). See particularly par. 33 of note from Secretary of State to Ambassador Page, Oct. 21, 1915; and pars. 37 and 38 of Sir Edward Grey's memorandum in reply thereto of Apr. 24, 1916; also British Ambassador to Secretary of State, Mar. 1, 1915; memorial of German Govt. respecting retaliatory measures dated Feb. 4, 1915 transmitted by Ambassador Gerard to Secretary of State, Feb. 6, 1915.

¹⁵ The Roland, 1 B. & C. P. C. 188.

¹⁶ Hall Int. Law, 7th Ed., pages 787, 788; *The Magnus* (1798), 1 Ch. Rob. 31; *The Rosalie and Betty* (1800), 2 Ch. Rob. 343; *The Jenny* (1866), 5 Wall. 183; *The Carlos F. Roses* (1899), 177 U. S. 655; *The Roland* (1915), 1 B. & C. P. C. 188; *The Porto*, Journal Officiel, Mar. 30, 1915; *The Czar Nicolai*, Jour. Off. 19 Ap. 1915.

of Paris simply insures the owner of a seized neutral cargo the restitution of his property or the proceeds of its sale; but where German ships were destroyed at sea because the French captor could not bring them into port as prizes, the owners of the neutral cargoes could not complain, inasmuch as "such destruction was an act of war the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity".¹⁷ Hence the risks taken by American exporters and importers in the use of belligerent vessels for the transportation of their property are obvious.

We are not here concerned with either justifying or condemning any one or all of the parties to the conflict for the measures taken by them. We have briefly sketched the situation confronting American maritime commerce solely for the purpose of clearly understanding and stating the nature, source, and extent of the risks insured against, for the cost of which insurance recovery is sought. It is manifest that the very existence of maritime warfare inevitably entails inconvenience and loss to neutral commerce, no matter how precisely established rules of international law may be observed. It is equally manifest that the kaleidoscopic changes in the lists of both absolute and conditional contraband; the extensions of the rule of "ultimate destination"; the novel conditions of the blockade and counter-blockade, and in part the novel naval instruments and methods used for their enforcement; the widespread mine fields; and, last but not least, the fact that the channels of American foreign commerce would have been choked but for the use of belligerent bottoms—all combined to create war hazards so numerous and so bewildering that sound discretion impelled American exporters and importers to insure against the numerous known and unknown and constantly increasing risks suddenly thrust upon them.

War-risk insurance afforded at least a measure of protection. But American companies were not at the outbreak of the war in a position to write in large volume insurance of this character, which had in the past been carried principally by foreign underwriters. These latter were for the moment suffering from the general demoralization resulting from the shock of the outbreak of the war and functioning but imperfectly. The varying conditions from day to day, the uncertainties as to the boundaries, extent, or duration of the conflict—in a word, the practical absence of known factors with which to construct formulæ based on the law of averages as a measure for the risks which the insurance companies were called upon to take—made it impossible for the American companies at the outset, with their limited facilities, to take any risks save at what seemed to be almost prohibitive rates. As pointed out in the American brief above mentioned, "many merchants refused to pay the premiums charged by American companies, which had in some instances advanced 400%". Fully realising the extreme gravity of the situation, the Congress of the United States acted promptly and effectively. By the act of September 2, 1914, the Bureau of War Risk Insurance was established in its Treasury Department, and the Government of the United States almost immediately began to write war-risk insurance on American vessels and cargoes at reasonable rates. It is significant that the writer of the American brief above mentioned assigns as the cause of particular suffering by American citizens not acts of Germany but the fact that "no adequate system of maritime insurance had been developed in the United States", and adds:

¹⁷ Calvo, Sec. 2817; see also *The Glitra*, decided by the German Imperial Supreme Prize Court Sept. 17, 1915; Amer. Jour. Int. Law, Vol. X, p. 921-927; *Indian Prince*, decided by the German Imperial Supreme Prize Court Apr. 15, 1915, Amer. Jour. Int. Law, Vol. X, p. 930-935; Oppenheim Int. Law, Vol. II, 3rd Ed. secs. 185 and 424; *The Nereide*, 9 Cranch, 388-418.

"In consequence cotton planters had almost no market and individuals were urged to buy bales of cotton to assist producers who had no market. Freight rates from many ports were consequently forced up, for example: per 100 lb., cotton New York to Liverpool July, 1914, \$.25; November, 1914, \$.50; January, 1915, \$1; April, 1915, \$2; December, 1916, \$5. * * * Such figures indicate in a measure the abnormal risks which the World War had brought upon merchants of the United States and against which they were compelled to insure."

The war situation with respect to cotton has very aptly been put forward by American counsel as typical, and we may profitably briefly examine it. At the outbreak of war the price of cotton to the American *producer* according to the reports of the United States Department of Agriculture was 12.4c. per lb. By September, 1914, it had declined to 8.7c. per lb.; by October to 7.8c. per lb. and in November to 6.3c. per lb.; notwithstanding the Government of the United States began to write war-risk insurance in September, 1914. After November, 1914, the price curve to the *producers* of cotton, speaking generally, was upward, until in December, 1916, it was 19.6c. per lb. and in September, 1918, the peak of 32.2c. per lb. was reached. The Declaration of London places "raw cotton" on the list of articles which "may not be declared contraband of war." It remained noncontraband until August 24, 1915, when the British Government by Order in Council declared it *absolute contraband*. Prior to that time cotton had received special consideration and treatment at the hands of Great Britain and its allies. While on March 1st the British and French Governments gave notice that they would "prevent commodities of any kind from reaching or leaving Germany"¹⁸ the British Government on March 9th announced in substance that all cotton for which contracts of sale and freight engagements had been made prior to March 2 would "be allowed free or bought at contract price if stopped, provided the ship sails not later than March 31st."¹⁹ This arrangement applied to cotton *for neutral destination only*.²⁰ Under the practice thus instituted by Great Britain, American cargoes of cotton, whether on American or other vessels, were detained and most of the cotton was purchased by the British Government, although some of it was permitted to move to neutral ports when the British became satisfied that it did not have an ultimate enemy destination. It appears that on May 14, 1915, when the British Secretary of State for Foreign Affairs prepared his memorandum for the Secretary of State of the United States, there were then being detained by Great Britain two American ships with cotton cargoes, and 23 other vessels carrying cargoes of American cotton. The cotton thus "detained" when not released by the British Government was paid for by it with reasonable promptness, usually on the basis of the market price at the port of shipment, *plus freight if prepaid, plus the current rate of insurance*. Thus the shipper was made whole as if he had sold at the American port of shipment. In this way neutral cotton was prevented from finding its way either directly or indirectly into Germany.²¹

¹⁸ British Ambassador to Secretary of State, Mar. 1, 1915.

¹⁹ Telegram Consul General Skinner to Secretary of State, Mar. 9, 1915; par. 5 of Note Sir Edward Grey to Secretary of State, Mar. 15, 1915; par. 4 memorandum of Lord Crewe, June 17; see telegram Ambassador Page to Secretary of State, June 22, 1915.

²⁰ Memorandum of Sir Edward Grey "Respecting American Ships and Cargoes detained at British Ports", May 14, with note of May 15, 1915; see also communication from Ambassador Page to Secretary of State, May 20, 1915.

²¹ Pars. 19, 20, and 36 of Sir Edward Grey's memo. delivered by the British Ambassador to Secy. of State, Apr. 24, 1916.

An American counsel has pointed out that ocean freight rates on cotton from New York to Liverpool advanced from 25c. per 100 lbs. in July, 1914, to \$5 per 100 lbs. in December, 1916. When opposite these figures we place the prices received for their cotton by American *producers* of 12.4c. per lb. in July, 1914, which declined to 6.3c. per lb. in November, 1914, during the period of general demoralization; then consider the gradual advance in price as war-risk insurance came to be more freely written and dislocated commercial conditions came to be readjusted to a state of war, until in December, 1916, the price was 19.6c. per lb. (although ocean freights had advanced from 25c. to \$5 per 100 lbs.); and further consider the continued advance in price during the period in which most of the American cotton not consumed at home was taken and paid for by Great Britain on the basis of the market price in the United States, plus insurance and freight—until the peak was reached in September, 1918, when the American *producer* received 32.2c. per lb.; all these facts considered together point directly to the conclusion that, in the great majority of cases if not in all of them, the war-risk insurance premiums and freights on raw cotton and cotton linters exported from the United States were *ultimately* paid (a) in the early days of the war by the *producer* in the decreased price received by him and (b) later by the *consumer* in the increased price paid by him—rather than by the shipper or exporter from whom the insurance companies directly received the premiums and in whose behalf claims are presented to this Commission. No such claims are being here asserted on behalf of the foreign *consumer*, for under the Treaty this tribunal is not competent to consider them. No such claims are being here asserted on behalf of the *producers* who were the real sufferers in the early days of the war when cotton declined from 12.4c. to 6.3c. per lb. The reason is obvious. These losses which were very real and substantial, and in many instances resulted in great distress, were simply inevitable and incidental consequences of the existence of a state of war, losses which must to some extent fall on neutrals as well as belligerents. Many of such premiums forming the basis of claims against Germany were paid to foreign underwriters either directly or indirectly through reinsurance. All such payments constitute an economic national loss to the United States. Similar considerations doubtless prompted Mr. Sumner, in 1869, in enumerating the several classes of damages embraced in the "Alabama Claims", to treat the "rise of insurance on all American vessels" as a "national loss" as contradistinguished from "private claims", which he separately dealt with,²² for in many cases it is practically impossible to allocate such premium payments to the individuals ultimately paying them. But even where they can be so allocated, this fact, for reasons presently mentioned, can not affect the result of this decision.

The situation as above outlined gives a fairly accurate understanding of the risks confronting those American nationals directly or indirectly interested in maritime commerce following the outbreak of the war. That business prudence suggested insuring against such risks is obvious. Diligent enquiry of counsel fails to discover any comprehensive compilation of the war-risk insurance actually written on American vessels and cargoes and disclosing what risks were actually covered thereby. There is available, however, a complete and accurate record of all such insurance written by the Bureau of War Risk Insurance of the Treasury Department of the United States, constituting a substantial percentage of all such insurance written by American

²² Moore, Vol. I, 511-12; also *post*, pages 50 and 57. (*Note by the Secretariat*, this volume, pp. 57 and 62 *infra*).

institutions, both public and private. An examination of these records throws a flood of light not only on the risks actually covered but also on the sources of such of these risks as matured into actual losses. The policies of insurance issued by this Bureau contain this clause:

"Touching the adventures and perils which the insurer is contented to bear, and does take upon itself, they are men-of-war, letters of marque and counter-marque, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and peoples, of what nations, condition, or quality soever and all consequences of hostilities or warlike operations, whether before or after declarations of war."

Insurance on merchandise to ports in Europe and Mediterranean ports in Africa, as expressed in the applications therefor, was based on "the amount of invoice (including freight, insurance premiums, and other charges when prepaid and included in the invoice) plus 10%." The experience of this Bureau with respect to policies written, premiums collected, and losses paid is reflected by the table, copy of which is in the margin.²³ From this table it will be noted that losses were lodged against the Bureau on 29 out of 2,590 policies issued during the period of neutrality. An analysis of these claims for losses is reflected by the other table copied in the margin.²⁴ (See page 52.)

From this it appears that there were 13 ships or their cargoes involved in the claims for losses based on the 29 policies in question. Of these 13 losses, five were directly attributable to Germany; while four were based on British detentions and seizure; three were presumably caused by German mines and one (unsettled and in litigation) was due to the wrecking of an American vessel on a submerged rock while under the control of a British naval prize crew.

Rejecting all speculations and considering only the actual experience of the United States Bureau of War Risk Insurance, it is apparent that American exporters and importers who paid war-risk insurance premiums to that Bureau were insured against "all consequences of hostilities or warlike operations", including "takings at sea, arrests, restraints, and detainments of all kings, princes, and peoples, of what nations, condition, or quality soever"; and that the losses actually sustained, against which American nationals were protected, directly resulted from the acts of the British Government as well as from the acts of the German Government. While the terms of some of the policies issued by private insurers, both domestic and foreign, differed in some particulars from those issued by the War Risk Bureau, this fact does not affect the result of this decision.

²³ Note:

Period	Insurance			Losses	
	Number of policies	Insurance \$	Premiums \$	Number of policies	Losses sustained \$
September, 1914, to March 31, 1917	2,590	293,915,486.00	5,048,678.96	29	1,711,555.96
April 1, 1917, to December 31, 1918	24,340	1,690,999,930.00	41,445,358.62	670	27,619,249.07
Total to approximate end of actual war	26,930	1,984,915,416.00	46,494,037.58	699	29,330,805.03
January 1, 1919, to December 31, 1920	297	82,337,077.00	246,366.88
GRAND TOTAL	27,227	2,067,273,293.00	46,740,404.46	699	29,330,805.03

Having examined the conditions confronting American nationals engaged in foreign commerce, the nature of the risks to such commerce, the sources from which they sprang, and the measures taken to protect against them, we come now to inquire: Do the premiums for insurance against such risks constitute claims for which Germany is financially liable falling within the jurisdiction of this Commission? We hold that they do not.

In announcing our reasons for so holding, we will apply them to the facts put forward by the United States in three claims, one on behalf of the United States Steel Products Company, one on behalf of the Costa Rica Union Mining Company, and one on behalf of the South Porto Rico Sugar Company, being

²⁴ Note :

United States Bureau of War Risk Insurance—Analysis of losses sustained August 1, 1914, to March 31, 1917, inclusive

[Compiled for the Commission from statements submitted by the United States Veterans' Bureau]

	<i>Insurance</i> \$	<i>Claimed</i> \$	<i>Net losses</i> \$
Directly attributed to Germany: 5 ships (Frye, Portland, Borinquen, Illinois, and Healdton), 7 policies (6 hull, 1 freight)	1,413,050.00	765,420.91	765,309.73
Presumably German mines: 3 ships (Evelyn, Carib, and Greenbrier), 14 policies (3 hull, 11 cargo) . . .	709,103.00	709,103.00	650,047.13
Total presumably and directly attributed to Germany: 8 ships, 21 policies (9 hull, 11 cargo, and 1 freight), being 2 submarine sinkings, 1 raider sinking, 3 mine sinkings, 1 seizure, and 1 detention	2,122,153.00	1,474,523.91	1,415,356.86
British detentions and seizures: 4 ships (Seguranca, Navajo, Carolyn, McCullough), 6 policies, cargo only, being 3 detentions and 1 seizure . .	623,480.00	136,422.76	136,199.10
Submerged-rock case in litigation (Llama): 2 policies on 1 ship (1 hull, 1 freight)	160,000.00	160,000.00	
	<u>2,905,633.00</u>	<u>1,770,946.67</u>	<u>1,551,555.96</u>
If Llama loss is paid			160,000.00
			<u>1,711,555.96</u>
GRAND TOTAL: 13 ships (8 German and 5 British claims), 29 policies (10 hull, 17 cargo, 2 freight) . .	2,905,633.00	1,770,946.67	1,711,555.96

claims numbered 20, 22, and 27, respectively, all selected by the Agent of the United States as typical and among the strongest cases of the war-risk premium group pending before this Commission. The facts are:

Case No. 20. United States Steel Products Company

In the latter part of 1913 and early part of 1914, long prior to any rumblings of a world war, the United States Steel Products Company, a New Jersey corporation, entered into a contract to fabricate and transport materials and apparatus to be used in the erection of bridges at the site of the coaling station at Cristobal, Panama. The Company's contract bound it to make deliveries at Cristobal for stipulated sums. The materials were shipped from Baltimore, Md., on or about October 30, 1914, by the *British* steamship *Westlands*. The Company, in the exercise of what it deemed business prudence, insured the shipment against the risks of war while being transported from Baltimore to Cristobal. The premium paid therefor by the Company on November 16, 1914, amounted to \$1,111.76. For this amount, with interest from the date of payment, claim is made.

Case No. 22. Costa Rica Union Mining Company

The Costa Rica Union Mining Company, a West Virginia corporation, owned and operated a producing gold mine in Costa Rica. On December 11, 1917, it shipped on the *American* steamship *Santa Marta* a consignment of cyanide of sodium which it protected with war-risk insurance, paying a premium therefor amounting to \$13.44, for which amount, with interest from the date of payment, it makes claim.

Case No. 27. South Porto Rico Sugar Company

The South Porto Rico Sugar Company, a New Jersey corporation, owned and operated sugar factories and plants on the Islands of Porto Rico and Santo Domingo, engaged in the manufacture of sugar for refining and sale in the United States. Several of these plants were in close proximity to harbors navigated by ocean-going vessels, and the high smokestack of one plant was clearly visible by day and night to vessels several miles at sea. Because of the exposed position of the plants the Company, upon the entrance of the United States into the war, protected them against risk from bombardment. The total amount of premiums for insurance of this class paid by this Company during the war amounted to \$60,760.00, for which amount, with interest, claim is made.

In the two cases first mentioned the voyages were uneventful and the shipments safely reached their respective destinations. In the third case the plants insured against bombardments were unmolested.

Inasmuch as long prior to the war the Steel Corporation had for a stipulated sum sold its products "delivered at Cristobal," it is clear that it could not pass the cost of the war-risk insurance on to the purchaser. Hence its profits were diminished to the extent of the premiums paid by it. The voyage was coastwise on mineless seas. The shipment was neutral and noncontraband. The destination, both immediate and ultimate, was unblockaded. The risk insured against was attributable to shipping under a British flag. The premiums paid unquestionably represented a loss suffered as a consequence of the war by the Steel Corporation during the period of the neutrality of the United States.

The Mining Company's shipment was made and premium paid during the period of belligerency of the United States. The insurance covered supplies for

use by the Company in its mining operations. It follows that the premium paid increased the Company's operating costs to that extent. Here also was a loss suffered as a consequence of the war.

The operating costs of the Sugar Company were increased to the extent of the premiums paid by it for insurance against the hazards of bombardment. We will assume (although the record is silent on this point) that this additional cost of operation was not passed on to the purchaser or ultimate consumer. On this assumption premiums claimed by the Sugar Company constitute a loss suffered as a consequence of the war.

The premiums paid for which reimbursement is sought in these three cases are, for the purpose of this decision, treated as losses to claimants not passed on by them. The precise terms of the policies for which such premiums were paid are immaterial. The pertinent enquiry is, Were these losses attributable to Germany's act as a proximate cause? If they were not, then all claims pending before this Commission for the recovery of amounts expended for war-risk insurance *as such* must be dismissed.

The principal arguments advanced by numerous counsel in several briefs presented by the American Agent pressing claims of this group may be summarized thus:

That under Section 5 of the Resolution of Congress and also under Article 231 of the Treaty of Versailles, both carried into and made a part of the Treaty of Berlin, Germany is (in the language of an American counsel) "responsible for all damage or loss in consequence of the war, no matter what act or whose act was the immediate cause of the injury"; and that the war-risk insurance premiums paid by American nationals constitute losses to them resulting as a consequence of the war and are therefore within the terms of the Treaty of Berlin.

Other statements of the argument made by American counsel are quoted in the three succeeding paragraphs as follows:

"It must be concluded that no matter how *remote* a particular loss, damage, or injury may have been with respect to some act on the part of Germany, *other than the initiation of the war itself*, if the loss, damage, or injury was the natural and connected effect of the war, Germany is liable therefor."

"The prime and direct cause of the risk was the illegality of the warfare which was then and thereafter conducted by the Imperial German Government."

"Under Section 5 of this same Joint Resolution German property was to be retained till suitable provision for American claims against the Governments of Austria-Hungary and Germany had been made. These claims were to include those of American nationals who had suffered 'since July 31, 1914, loss, damage, or injury to their persons or their property, directly or indirectly, * * * in consequence of hostilities or of any operations of war, or otherwise.'"

Examining these arguments in the light of the construction of the Treaty of Berlin as embodied in Administrative Decisions Nos. I and II of this Commission, handed down this day, it is apparent that in the opinion of this Commission they are based on a wholly erroneous interpretation of the language of that Treaty, coupled with a confusion of the legal concept of the proximate cause of a loss with that of the consequential and indirect damages flowing therefrom.²⁵

²⁵ Particular reference is here made to so much of Administrative Decision No. II as is embraced under the last caption, "Losses Suffered Directly or Indirectly".

Leaving out of consideration claims falling within defined categories, not applicable here. Germany's liabilities under the Treaty of Berlin for losses sustained by American nationals is limited to losses "caused by the acts of Germany or her agents." The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of *that act* must have been the loss, damage, or injury suffered. The *capacity* in which the American national suffered—whether the act *operated* directly on him or indirectly as a stockholder or *otherwise*, whether the subjective nature of the loss was direct or indirect, is immaterial, but the *cause* of his suffering must have been the act of Germany or her agents. Such an act proximately causing a loss, though sustained through an indirect channel, renders Germany liable. But where the causal connection between the act complained of and the loss is broken, or so involved and tangled and remote that it can not be clearly traced, there is no liability. The simple test to be applied in all cases is: Has an American national proven a loss suffered by him susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?

Applying this simple test to the facts in this group of cases the Commission has no hesitation in holding that they do not fall within the terms of the Treaty of Berlin. They are not claims for injury or damage to, or destruction or conversion of, property by the acts of Germany or her agents. They are claims put forward to recover the amount of premiums paid for protection against possible happenings which never in fact happened; for protection against risks to both neutral and belligerent commerce of a highly speculative and uncertain nature, incident to the very existence of a state of maritime warfare, participated in by both groups of belligerents.

From the quotation hereinbefore made from one of the briefs filed by American counsel ²⁶ it will be noted that freight rates on cotton from New York to Liverpool were advanced from 25c per 100 pounds in July, 1914, to \$5.00 per 100 pounds in December, 1916, as a direct consequence of the war. There is no more reason why war-risk insurance premiums paid by American nationals should be recovered from Germany than there is that these advances in ocean freight rates, which, as heretofore pointed out, were during the early days of the war in a large measure indirectly paid by the American cotton planters, should be so recovered. If the terms of the Treaty can be so expanded by forced construction as to embrace such claims, then they will include all increased living costs, increased railroad freights, increased income and profits taxes, in a word *all* costs or consequences of the war, direct or remote, to the extent that such costs were paid or losses suffered by American nationals. The rejection of such a construction must follow its mere statement.

While in no wise binding on this tribunal, it is worthy of note that the Reparation Commission, constituted under the Versailles Treaty, has so construed that treaty as to exclude amounts paid by nationals of the Allied Powers as premiums for war-risk insurance.

The United States has declined to press very large claims against Germany representing the cost to it of pensions and separation allowances; costs which were undoubtedly incurred as a "consequence of the war"; costs which must be borne by all American taxpayers; costs which the United States was authorized to assert and which the Allied Powers are asserting under the Treaty of Versailles. ²⁷

²⁶ Page 38 *ante*. (Note by the Secretariat, this volume, p. 49 *supra*.)

²⁷ See note 11, this Commission's Administrative Decision No. II handed down this day.

There is nothing in the Treaty of Berlin or the history of its making to support the contention that the United States, while declining to press claims of the character mentioned in the preceding paragraph, nevertheless intended to assert, on behalf of a comparatively small group of American exporters and importers, claims for refund of war-risk insurance premiums, which belong to that numerous class of losses suffered as an incidental and remote consequence of the war, when similar claims are not being asserted by any Allied Power.

In a brief filed by private counsel and adopted by the American Agent, the argument is put forward that under the Treaties of 1785, 1799, and 1828 between the United States and Prussia American nationals were guaranteed freedom from "confiscation or condemnation and loss of property" even where contraband, and that these guarantees were violated by the unlawful warfare instituted by Germany, necessitating American nationals purchasing war-risk insurance. Without expressing any opinion with respect to the binding effect of the Treaties in question or the quality of the conduct of either party with respect thereto, suffice it to say that the claims for the recovery of war-risk insurance premiums paid by American nationals are not based on any alleged confiscation or condemnation or loss of property in the sense that these terms are used in those Treaties, but are rather to recover expenses incurred for protection against risks incident to the existence of a state of war, participated in by both groups of belligerents, claims not embraced within the terms of the Treaty of Berlin, which determines the jurisdiction of this Commission.

There is a suggestion in another brief filed by private counsel and presented by the American Agent that the Terms of Article 232 of the Treaty of Versailles, read in connection with Annex I to Section I of Part VIII thereof, impose liability on Germany to reimburse American nationals for war-risk insurance premiums paid by them during the period of belligerency. It follows from the rules laid down in Administrative Decisions Nos. I and II that such a construction must be rejected by this Commission.

In another brief, prepared by private counsel and presented by the American Agent, it is urged that under Article I of the Agreement under which this Commission is constituted Germany is obligated to pay claims of this class. While the construction placed by counsel on the language of the Agreement must be rejected, still if accepted the result would be the same, inasmuch as Germany's liabilities, which are fixed by the Treaty of Berlin, can not be enlarged by the Agreement.

The Alabama claims decisions considered and applied. The decisions of the Geneva Tribunal and the decisions of the *Alabama* Claims Courts in disposing of the so-called *Alabama* Claims are respectively invoked and earnestly pressed upon our consideration, the former by the German and the latter by the American counsel. A careful analysis will disclose that these decisions do not bear with controlling weight on the questions presented by this group of cases. So far as they are in point, they support the conclusions reached by this Commission. As, however, they are being constantly cited in cases here pending, and as the use of the terms "indirect claims," "indirect damages," and "indirect losses" in connection with these *Alabama* claims has led to much confusion of thought and a misapprehension of the real decisions made, they may be here profitably examined with care, historically and analytically.²⁸

The claims which came to be known by the generic term "Alabama Claims" were asserted by the United States against Great Britain because of the latter's

²⁸ By the designation "Moore" herein is meant the work of John Bassett Moore on "International Arbitrations." Italics used in quotations are ours.

alleged breach of neutrality in allowing cruisers to be built and fitted out or manned in British ports for the use of the Confederate States during the American Civil War. After diplomatic negotiations extending over a period of approximately seven years, during which the merits of these claims, their nature, and scope became political issues on both sides of the Atlantic, the Treaty of Washington of May 8, 1871, was executed, providing, among other things, for the creation of a "tribunal of arbitration" to dispose of them. They were finally disposed of, so far as Great Britain was concerned, by the "Geneva Award" of September 14, 1872, under which it was decreed that Great Britain should pay to the United States a lump sum of \$15,500,000 in gold "for the satisfaction of all the claims referred to the consideration of the tribunal."

This sum was awarded and paid to the United States in its capacity as sovereign, rather than in behalf of any of its individual nationals or group or groups of nationals. The disposition of this fund rested entirely with Congress, which by two acts—the first approved June 23, 1874, the second approved June 5, 1882—provided for the creation of a "Court of Commissioners of Alabama Claims" to hear and determine, in accordance with the provisions of these acts, the claims of all those seeking satisfaction out of this fund.

The Geneva "tribunal of arbitration" was international in character and was governed by the provisions of the Treaty of Washington and applicable international law.

The Court of Commissioners of Alabama Claims was a creature of the Congress of the United States, governed by the provisions of the acts creating it, constituting a part of the machinery for the distribution of a fund in the Treasury of the United States over which the Congress had absolute control.

This distinction must be constantly borne in mind in weighing the decisions of each of these tribunals.

It is significant that the term "indirect" to identify the particular class of claims which afterwards came to be known as "indirect claims", was not used in any of the diplomatic correspondence or in any of the negotiations preliminary to the execution of the Treaty of Washington or in that document itself. To an impassioned speech delivered by Charles Sumner in the Senate of the United States on April 13, 1869, may be traced the conception of a definite political issue in the form of a demand upon Great Britain for the payment, not only of "private claims", but "*national claims*". Mr. Sumner estimated the private claims at about \$15,000,000, and in addition thereto he enumerated classes of "national claims", embracing, as one of several classes, the "enhanced payment of insurance". He put forward this claim on behalf of the United States as a sovereign nation and not on behalf of any individual or group of individuals. The reason, doubtless, was that the exporter or importer who actually paid the war-risk premiums did not in the majority of cases sustain a loss equal to the premium paid or any loss at all; but took the cost of insurance into account in the purchase or sale of the product, passing such cost on to either the producer or the consumer, so that it was practically impossible to trace the loss to the individual ultimately bearing it. Hence Mr. Sumner treated this item as an economic loss sustained by the nation as a whole.²⁹ Mr. Sumner anticipated the objection that these enumerated national losses were too *indirect* and *remote* to afford a solid ground for claims against Great Britain, but brushed this objection to one side as of little moment.

The first time these and similar classes of claims were officially designated as "indirect" was on February 3, 1872, when Earl Granville, then British Minister of Foreign Affairs, addressed a note to General Schenck, then

²⁹ Moore, 509-512.

American Minister to Great Britain, announcing that it was the view of Her Majesty's Government "that it was not within the province of the tribunal of arbitration at Geneva to decide upon the claims for *indirect losses*". This was followed by a similar pronouncement in the Queen's speech opening Parliament three days later, and thenceforth these claims which Mr. Sumner had classed as "national claims" as contradistinguished from "private claims" came to be referred to in the press and elsewhere as "indirect claims".

A careful reading of the history of the Alabama Claims from their inception to the handing down of the Geneva Award strongly suggests that the Government of the United States in putting forward these so-called "national claims" was actuated by two motives: (1) domestic political considerations rendered it expedient for the Government to assert these claims for what they might be worth, and (2) they were put forward as makeweights, not with the hope that they would be allowed, but for trading purposes in the expectation of securing a large lump-sum award.³⁰ That the second motive mentioned actuated the Government of the United States is made manifest by a letter from Mr. Hoar, one of the American members of the Joint High Commission to Mr. Fish, written in response to the latter's inquiry after a controversy had arisen between the two governments with respect to these so-called "indirect claims," in which Mr. Hoar said that he—

"Always thought and expected that those claims, though incapable from their nature of computation and from their magnitude incapable of compensation, were to be submitted to the tribunal of arbitration, and urged as a reason why a gross sum should be awarded, which should be an ample and liberal compensation for our losses by captures and burnings, without going into petty details."

Mr. Fish, then Secretary of State, never had any confidence in the soundness of these claims.³¹ Mr. Adams, the American Commissioner, had, to Mr. Fish and others, expressed the opinion that these claims were without merit.³² All concerned agreed that the familiar rule of proximate cause must be applied in determining Great Britain's liability in each claim presented. The following excerpts from the "Counter Case" presented by the *American Agent* are significant:

"Both parties contemplate that the United States will endeavor to establish in these proceedings *some tangible connection of cause and effect* between the injuries for which they ask compensation and the '*acts committed by the several vessels,*' which the treaty contemplates are to be shown to be the fount of these injuries."

"The tribunal of arbitration being a judicial body, invested by the parties with the functions necessary for determining the issues between them, and being now seized of the substance of the matters in dispute, will hold itself bound by *such reasonable and established rules of law regarding the relations of cause and effect* as it may assume that the parties had in view when they entered into their engagement to make this reference."

It will be noted that the American Agent in substance admitted that claims must be limited to those proximately caused by the acts of the particular vessels in connection with the building, fitting out, and manning of which Great Britain had failed in her duties of neutrality. Parenthetically, attention is called to the fact that the language of paragraph 5 of the Peace Resolution

³⁰ Instructions of Mr. Fish to Mr. Motley, Moore, 512-513. Statement of Mr. Fish to Joint High Commission March 8, 1871, Moore, 629-630.

³¹ See instructions of Mr. Fish to Mr. J. Lothrop Mottey May 15, 1868, Moore, 512-516; statement of Mr. Fish to Joint High Commission March 8, 1871, Moore, 629-630; telegram of Mr. Fish to General Schenck April 27, 1872, Moore, 642.

³² Moore, 642-643.

and paragraph 4 of the Annex to Section IV of Part X of the Versailles Treaty (both carried into the Treaty of Berlin), fixing liability for *acts committed by Germany or her agents*, is not broader, so far as concerns the application of the rule of proximate cause, than the language of the Treaty of Washington, where the liability of Great Britain was restricted to losses sustained by American vessels "growing out of the *acts committed by the several vessels* which have given rise to the claims generically known as the 'Alabama claims'".

There is no reason to doubt that had the question been squarely presented to the Geneva Tribunal it would have *unanimously* held to the view which had already been expressed by Mr. Adams, the American Commissioner, that these so-called national or indirect claims were not within the purview of the Treaty of Washington. It will be borne in mind that the Geneva Tribunal found that under the terms of the treaty Great Britain was liable only for the damages inflicted by (1) the *Alabama* and her tender, the *Tuscaloosa*; (2) the *Florida* and her tenders, the *Clarence*, the *Tacony*, and the *Archer*, and (3) the *Shenandoah* after leaving Melbourne on February 18, 1865. These three cruisers and four tenders named will be hereinafter referred to as "inculpatated cruisers". The Tribunal further found that Great Britain was not liable for any damages inflicted by a number of other cruisers and vessels, including the *Retribution*, *Georgia*, *Sumter*, *Nashville*, *Tallahassee*, *Chickamauga*, *Sallie*, *Jefferson Davis*, *Music*, *Boston*, and *V. H. Joy*, which will be hereinafter referred to as "exculpated cruisers". In addition to the vessels above named, it appears from the British Case³³ that there were fitted out in Confederate ports a number of armed vessels, mostly of small tonnage, which preyed upon and captured and destroyed vessels of the United States. Some of these were the *Calhoun*, *Savannah*, *Saint Nicholas*, *Winslow*, *York*, *Echo*, and *Patrick Henry*. These vessels were stated to have taken from sixty to seventy prizes.

It was manifestly impossible to determine to what extent the inculpatated cruisers had required the purchase by American nationals of war risk insurance or influenced the rate thereof or the amount of the premiums paid. Manifestly, it could not be contended that the specific act of a specific cruiser caused the payment of a specific premium. But the Treaty of Washington fixed liability upon Great Britain only for claims "growing out of *acts committed by*" inculpatated cruisers, and all other claims were necessarily excluded from consideration by the Tribunal.

Had the question been submitted to the Geneva Tribunal and it had found—as it was apparent from the record it would have found—that these so-called "indirect claims" were not within the purview of the Treaty of Washington, then we would have had a decision of an international tribunal acting within its jurisdiction and as such entitled to due weight. However, the domestic political pressure on the then Government of Great Britain was so strong that it declined to be a party to the submission of these claims in any form to the commission, vigorously contending that under the Treaty of Washington they lay entirely outside of the commission's jurisdiction and hence it was not competent to receive, consider, or deal with them. In these circumstances and in order to prevent making abortive the work of the commission, resort was had to political expediency, which took the form of the reading of a statement by Count Sclopis, the president of the tribunal, in behalf of all the arbitrators, which, after reciting the facts of the controversy between the contending parties with respect to certain specified classes of claims (which were not, however, designated as "indirect claims"), proceeded: ³⁴

³³ Moore, 594-595.

³⁴ Moore, 4113-4114.

“ . . . the arbitrators think it right to state that, after the most careful perusal of all that has been urged on the part of the Government of the United States in respect to these claims, they have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the tribunal in making its award.”

While this ruling was in the nature of an interlocutory order or judgment, it was, when considered in the light of the record, nothing more than an extrajudicial declaration made necessary by political expediency and entirely justified on that ground. It was accepted and acquiesced in by both agents, being authorized by their respective governments so to do. Mr. Davis, the Agent of the United States, among other things stated that this ruling “is accepted by the President of the United States as determinative of their judgment upon the important question of public law involved.” After the commission had decided the issue of Great Britain’s liability with respect to the particular vessels, the agent and counsel of the United States devoted their energies toward securing a lump-sum award, “such a sum as should be practically an indemnity to the sufferers.”³⁵ These efforts resulted in the final award of \$15,500,000. It is important to determine how this result was reached. The estimate prepared by Mr. Staempfli and the memorandum of Sir Alexander Cockburn (both members of the Tribunal)³⁶ strongly indicate that it was a compromise figure. However, it is significant that Mr. Sumner in his speech in the Senate on April 13, 1869, in opposition to the Johnson-Clarendon Convention estimated the “private claims” at about \$15,000,000;³⁷ Mr. Fish in his statement which he read in opening the meeting of the Joint High Commission on March 8, 1871, recited that the “claims for the loss and destruction of private property which have thus far been presented amount to about \$14,000,000 without interest”;³⁸ and according to the records in the office of the Secretary of State of the United States the list of claims *presented* to the Geneva Tribunal for damages actually *inflicted by the inculpated cruisers and their tenders* aggregated \$15,530,434.00. It is also significant to note that this total of claims so presented included claims presented on behalf of insurance companies or associations claiming through subrogation reimbursement for losses paid by them to American nationals aggregating in amount \$5,111,133.01. This figure should be borne in mind in connection with the history of the distribution of this award by the United States.

While the history of such distribution is important and interesting, it is not sufficiently relevant here to do more than note that the provisions of the first act creating and governing the court with respect to the right to recover and the measure of damages conformed in the main to the bases used by the Geneva Tribunal. The outstanding exception was the extraordinary provision which denied to any insurance company the right to recover sums paid by it for losses sustained under war risk policies issued by it unless it could show that the aggregate of all war risk losses paid exceeded the aggregate of all war risk premiums received. The act authorized the allowance by the court of interest at the rate of 4% per annum on the “amount of actual loss or damage” from such date as the court should decide that such loss or damage was sustained

³⁵ Moore, 651

³⁶ Moore, 4116-4119.

³⁷ Moore, 511

³⁸ Moore, 630.

by the claimant. The fact that the Geneva award included interest at the rate of 6%³⁹ and that this Act of Congress limited interest to 4% suggests a belief on the part of Congress that the fund would not be more than sufficient to pay all of the awards which the court was authorized to make in pursuance of the provisions of the act. This may furnish a possible explanation for excluding claims of insurers, notwithstanding their claims to the extent of approximately \$5,000,000 had been embraced in the Geneva award. The court rejected a number of claims as being *indirect* and *remote* in their nature, including claims for war risk insurance premiums paid where the property insured had not been destroyed.⁴⁰ These decisions are not, however, regarded as important, as clearly claims of this class were placed beyond the jurisdiction of the court by the Act of Congress creating it.⁴¹

The judgments rendered by this first court, including interest, aggregated \$9,316,120.25.⁴²

The Geneva Award fund had been invested in bonds since its payment by Great Britain, and the accumulations, with the coin premiums on bonds sold and currency premiums sums, brought the total to an amount which, after paying the awards of the first court, left \$10,089,004.96 in the Treasury of the United States subject to disposition by Congress. It is worthy of note that a few public men advocated returning to Great Britain the fund remaining,⁴³ but this suggestion apparently was not taken seriously. It would seem that the more logical course would have been to have satisfied the claims of the American underwriters which had been allowed by the Geneva Tribunal based on losses actually sustained by American nationals and then to have returned to Great Britain the balance, if any, remaining. After heated political contests, apparently among those espousing (1) the cause of insurers who had taken risks on property destroyed by the inculpated cruisers and who sought to be subrogated to the rights of the insured, (2) those who had paid war-risk insurance premiums by reason of the Confederate cruisers being on the sea, and (3) those whose property was destroyed by Confederate vessels designated "exculpated cruisers" and others, for whose depredations Great Britain was held not to be responsible, the Act of June 5, 1882, was passed. This restricted the Court of Commissioners of Alabama Claims, which was reconstituted, to receiving and examining and entering judgment on claims falling within two classes: (1) "claims directly resulting from damage done on the high seas by Confederate cruisers"—exculpated as well as inculpated cruisers—excluding only those claims proven under the Act of 1874; (2) "claims for the payment of premiums for war risks, whether paid to corporations, agents, or individuals, after the sailing of any Confederate cruiser".⁴⁴

It was provided that claims of the first class should be first satisfied out of the fund. If any then remained, claimants of the second class should be paid *pro rata*.

As heretofore pointed out, an examination of the list of claims presented by the United States growing out of the acts of the inculpated cruisers discloses that approximately one-third in amount of these claims were asserted on behalf of insurance companies claiming to be subrogated for losses paid by them.

³⁹ Sir Alexander Cockburn's dissenting opinion, Moore 651.

⁴⁰ Davis Report 22. Also *Gannett v. U.S.*, 184, Davis Report 42; *Hyneman v. U.S.*, 643, Davis Report 45; *v. U.S.*, 1228, Davis Report 56.

⁴¹ See language of court in Davis Report 35-41.

⁴² Moore, 4648.

⁴³ Moore, 4662.

⁴⁴ This language is particularly significant when it is remembered that a number of Confederate cruisers were active long before the Confederate States came into possession of any of the inculpated cruisers.

The records of the Geneva Tribunal indicate that these claims were considered and allowed on the same basis as those of American nationals whose losses were not protected by insurance, care being taken, however, to eliminate "double claims," that is, claims where the owners of the property destroyed and the insurer had each put in a claim for its value.⁴⁵ Of these claims by insurance companies, aggregating a little more than \$5,111,000, which were apparently allowed by the Geneva Tribunal, only six, aggregating in amount a trifle over \$111,000, could be brought within the terms of the Act of 1874 by showing that their war risk losses were greater in amount than their aggregate premiums on the war-risk insurance written by them. It would seem, therefore, that approximately \$5,000,000 allowed by the Geneva Tribunal on behalf of the insurance companies was by the Acts of 1874 and 1882 diverted from the course for which it was intended, and applied (1) to the payment of claims for damages inflicted by cruisers other than the "inculpated cruisers", all of which claims were rejected by the Geneva Tribunal, and (2) to the payment of war risk premium claims which had been treated by Mr. Sumner and others as "national claims" and later came to be designated as "indirect claims", not falling within the terms of the Treaty of Washington.

The judgments rendered by the second court on claims of the first class aggregated \$3,346,000. This left nearly \$7,000,000 to be prorated among war-risk premium claimants, in whose favor judgments aggregating approximately \$16,313,000 had been rendered.

It is apparent from the foregoing that the fact that a portion of the lump-sum award paid by Great Britain to the United States was by the latter paid to war-risk premium claimants can not be regarded as a controlling precedent in support of a like class of claims before this tribunal. The acts of 1874 and 1882 of the Congress of the United States dealt solely with the *distribution* of an international award after it had been made and paid. Whatever the motives of Congress may have been, it was clearly acting within its jurisdiction in disposing of a fund which it had the absolute right to control. Its acts, however, were purely national in their scope and were not intended to have, and could not possibly have, any international effect. The disposition or distribution of this fund by Congress was not a matter of international concern. The numerous decisions of American courts dealing with the distribution of the Alabama award cited and discussed by American counsel are without application here.

While for the reasons hereinbefore indicated the decisions of the Geneva Tribunal are of doubtful value as precedents, still, in so far as they are entitled to be weighed, they hold: (1) that claims for war-risk premiums paid are not recoverable under the applicable principles of international law, and (2) that claims asserted by American underwriters for reimbursement of losses paid by them to American owners of property lost or damaged, which losses furnish a solid basis for a claim put forward by such owners, are direct losses and recoverable as such.

The use of the term "indirect" as applied to the "national claims" involved in the Alabama case is not justified by the early debates in the Senate of the United States, by the record of the preliminary diplomatic negotiations, by the Treaty of Washington, by the "American Case" as presented by the American Agent, or by the Award. Its use in this connection has been productive of great confusion and misunderstanding. The use of the term to describe a particular class of claims is inapt, inaccurate, and ambiguous. The distinction sought to be made between *damages* which are direct and those which are indirect is frequently illusory and fanciful and should have no place in inter-

⁴⁵ Moore, 4116.

national law. The legal concept of the term "indirect" when applied to an act proximately causing a loss is quite distinct from that of the term "remote." The distinction is important.

In the Alabama case the United States—a belligerent—asserted, on behalf of its nationals, claims against Great Britain—a neutral—for war risk insurance premiums paid by such nationals, based on the theory that the risks insured against which never matured into actual losses, were created by Great Britain's unneutral acts.

In this case the United States—both as a neutral and a belligerent—is asserting on behalf of its nationals, claims against Germany—a belligerent—for war risk insurance premiums paid by such nationals, based on the theory that the risks insured against, which never matured into actual losses, were created by Germany's acts.

In the Alabama case it appeared that while the activities of the inculpated cruisers for which Great Britain was held liable were, speaking generally, greater and more destructive than other Confederate cruisers, still the Confederate States had on the seas numerous other vessels preying on commerce of the United States. Great Britain, under the terms of the Treaty of Washington, could be held liable only for the losses inflicted by the acts of the inculpated cruisers. Obviously, it was impossible to attribute the risks insured against solely to them.

In this case it is evident that during the period of neutrality *both* groups of belligerents freely resorted to "retaliatory measures" to the detriment of all neutral commerce, over the vigorous and repeated protests of the Government of the United States; and in both theory and in practice, as demonstrated by actual experience, the American nationals insured against the risks created by the acts of *both groups*; risks inevitably incident to the very existence of a state of war. Obviously it is impossible, therefore, to attribute these risks to the acts of Germany without holding her liable for all the consequences of the war, which under the Treaty is not permissible.

In this group of claims there is no complaint of injury to or destruction or seizure of property by the acts of Germany or her agents. The sole complaint here is that the hazards of the war required the claimants as a matter of business prudence to protect by insurance against risks which never matured into damage to or destruction of the property insured, and the claimants seek to recover from Germany the cost to them of such insurance. Under the terms of the Treaty of Berlin as construed by Administrative Decisions Nos. I and II handed down this day, Germany is financially obligated to make full and complete compensation for all losses sustained by American nationals proximately caused by Germany's acts. But under the terms of that Treaty Germany can not be held liable for all losses incident to the very existence of a state of war. To this class belong claims by American nationals for refund of premiums paid by them for insurance against the risks of possible losses which never occurred, risks in their very nature uncertain, indefinite, indeterminable, and too remote to furnish a solid basis on which to rest a claim.

Done at Washington November 1, 1923.

Edwin B. PARKER
Umpire

Concurring in the conclusions:

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

ADMINISTRATIVE DECISION No. III

(December 11, 1923, pp. 61-70.)

DAMAGES: IN THE NATURE OF INTEREST, *dies a quo*, RATE, PERSONAL INJURIES, DEATH, PROPERTY LOSSES; DETERMINATION OF DAMAGES. A JUDICIAL FUNCTION; MARKET VALUE, INTRINSIC VALUE.—WAR: SEIZURE OF PRIVATE PROPERTY, RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN.—PRECEDENTS.—INTERPRETATION OF TREATIES: ANOMALIES, INTENTION OF PARTIES, RELATED PROVISIONS, *interpretatio a contrario*. *Held* that there is no basis for damages in the nature of interest in claims based on personal injuries or death: loss neither liquidated nor amount thereof capable of being ascertained by computation merely as of time when actual loss occurred; and that in claims for such losses wherever occurring sustained at any time during war period award will bear interest from its date at rate of 5% per annum. *Held* also that Commission not directly concerned with question of conformity to laws of war of seizure of property: Germany's obligation to pay fixed by Treaty of Berlin; and that mere ascertainment of amount of compensation is a judicial function. *Held* further that in claims based on property loss (property taken—and not returned—or destroyed) sustained during: (1) *period of United States neutrality*: Germany, under Treaty of Berlin, obligated to pay reasonable market value as of time and place of taking or destruction in condition in which property then was, or else intrinsic value as of such time and place (reference made to Administrative Decision No. II, see p. 23 *supra*), plus interest of such sum at 5% per annum from date of actual loss, whether loss occurred at time of or after taking or destruction, to date of payment (rule in harmony with great weight of decisions of international arbitral tribunals in similar cases; anomalies, manifestly not intended consequences, if interest computed only from date of award); (2) *period of United States belligerency*: Germany obligated to pay (a) in claims based on property destroyed and not replaced (Administrative Decision No. I, classes (B) (2) (e) and (B) (3) (a), see p. 22 *supra*) or taken by Germany or allies outside German territory and not returned: interest at 5% per annum from November 11, 1918, to date of payment (Treaty of Versailles, Part VIII, Section I, Annex II, para. 16—carried into Treaty of Berlin—read in light of the other reparation provisions of Treaty of Versailles and applied to the other provisions of Treaty of Berlin), and (b) in claims based on property taken by Germany or agents (civil or military) in German territory and not returned: interest at 5% per annum from date of actual loss, whether occurred at time of or after taking, to date of payment (Treaty of Versailles, Article 297 (e), *unctis* Part X, Section IV, Annex, para. 14, and Section III, Annex, para. 22, carried into Treaty of Berlin). *Held* further that in claims arising during belligerency falling within Administrative Decision No. I, classes (B) (1), (2) (a)—(d), and (3) (b) (see p. 22 *supra*), compensation will not include damages in the nature of interest, but each award will bear interest from its date at 5% per annum (Treaty of Versailles, Part VIII, Section I, Annex II, para. 16, *a contrario*).

EVIDENCE: AWARDS AND RECORDS OF MUNICIPAL COURTS. Production by German Agent of awards and records of German Tribunals in property cases; in each case weight to be determined by Commission.

Cross-references: A.J.I.L., Vol. 18 (1924), pp. 603-611; Annual Digest, 1923-24, pp. 211-214; Kiesselbach, *Probleme*, pp. 221-227 (German text); Witenberg, Vol. I, pp. 68-77 (French text).

Bibliography: Borchard, pp. 137-138; Kiesselbach, *Probleme*, p. 11; Prosinagg, p. 13.

PARKER, *Umpire*, delivered the opinion of the Commission, the American Commissioner concurring, and the German Commissioner concurring save as his dissent is indicated in the opinion:

For the guidance of the American Agent and the German Agent and their respective counsel there are here set down rules with respect to compensation or damages in the nature of interest in all claims falling within this Commission's Administrative Decision No. I and also with respect to the measure of damages in all claims for property taken. Reference is made to Administrative Decision No. I for the definition of terms used herein.

Under the Treaty of Berlin as construed by this Commission in that decision as supplemented by the application of Article 297 of the Treaty of Versailles (carried into the Treaty of Berlin) Germany is financially obligated to pay to the United States all losses of the classes dealt with in this opinion. The amounts of such obligations must be measured and fixed by this Commission.

There is no basis for awarding damages in the nature of interest where the loss is neither liquidated nor the amount thereof capable of being ascertained by computation merely. In claims of this class no such damages will be awarded, but when the amount of the loss shall have been fixed by this Commission the award made will bear interest from its date. To this class belong claims for losses based on personal injuries, death, maltreatment of prisoners of war, or acts injurious to health, capacity to work, or honor.

But where the loss is either liquidated or the amount thereof capable of being ascertained with approximate accuracy through the application of established rules by computation merely, as of the time when the actual loss occurred, such amount, so ascertained, plus damages in the nature of interest from the date of the loss, will ordinarily fill a fair measure of compensation. To this class, which for the purposes of this opinion will be designated "property losses", belong claims for property taken, damaged, or destroyed.

Consideration will first be given to

Claims for property losses arising during the period of neutrality

These in turn divide into

- (1) Claims for property taken,
- (2) Claims for property destroyed, and
- (3) Claims for property injured or damaged but neither taken nor destroyed.

There are pending before the Commission numerous claims put forward by the United States on behalf of its nationals, in which compensation is sought for losses suffered by them through the taking of their property during the period of neutrality by Germany or her agents, and during the period of belligerency by Germany or her allies. The German Agent contends that the property was lawfully taken in each case as a war measure. Whether or not the property was taken for the needs of Germany in the prosecution of the war, in the exercise of the right of angary or otherwise, whether taken during the period of neutrality or the period of belligerency, whether taken in German territory, in territory occupied by Germany or her allies, or elsewhere, it will, for the purposes of this opinion, be assumed that it was in each case taken in conformity to the laws of war. This Commission, however, is not directly concerned with examining the quality of the acts causing the losses on which these claims are based, inasmuch as under the terms of the Treaty of Berlin Germany's obligation to pay is fixed.

The provisions of the Armistice require "*Reparation for damage done*". Throughout the Treaty of Berlin the provisions fixing Germany's pecuniary liabilities express the measure of her obligation in terms of "*compensation*" or "*reparation*". As pointed out by this Commission in that part of its opinion in *The Lusitania Cases* dealing with exemplary damages, pages 28-31,^a while there is no warrant in the Treaty of Berlin for the assessment of any penalty against Germany she is obligated (save where limited by the Treaty terms) to make full, adequate, and complete *compensation or reparation* for all losses sustained by American nationals falling within its terms. The ascertainment of the amount of such *compensation* is a judicial function—the task of this Commission.

Applying the principles announced in Administrative Decision No. II at pages 7-8,^b the Commission holds, that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place.¹ But as compensation was not made at the time of taking, the payment *now* or at a later day of the value which the property had at the time and place of taking would not make the claimant whole. He was *then* entitled to a sum equal to the value of his property. He is *now* entitled to a sum equal to the value which his property then had plus the value of the use of *such sum* for the entire period during which he is deprived of its use. Payment must be made *as of* the time of taking in order to meet the full measure of compensation. This measure will be met by fixing the value of the property taken as of the time and place of taking and adding thereto an amount equivalent to interest at 5% per annum² from the date of the taking to the date of payment. This rule the Commission will apply in all cases based on property taken during the period of neutrality.

The German Commissioner dissents from this conclusion and points out that it results in giving to American nationals with claims for property losses sustained during the period of American neutrality an advantage with respect to the element of damages in the nature of interest over Allied belligerents with similar claims arising during that period. While this is true, it is due to the fact that under both the Treaty of Versailles and the Treaty of Berlin the treatment of losses sustained during neutrality is quite different from the treatment of losses sustained during belligerency. In measuring compensation no restriction or limitation is found in either treaty on the right to allow damages in the nature of interest on the value of property lost during neutrality, although as hereinafter pointed out there is such a limitation with respect to property lost during belligerency. On the other hand, Germany is held liable for losses sustained by the nationals of the Allies who were belligerents against Germany during the period of American neutrality, in numerous cases where such losses were caused by Germany or *her allies*, and in other cases where such losses were caused by *any* belligerent; while during the same period Germany's liability for losses sustained by American nationals is limited to losses caused by Germany or *her agents*.

^a *Note by the Secretariat*, this volume, pp. 38-44.

^b *Note by the Secretariat*, this volume, pp. 25-26.

¹ The measure of damages as here expressed is not contested by either the United States or Germany.

² Five per cent is the rate of interest prescribed by paragraph 16 of Annex II to Section I of Part VIII, and also by paragraph 22 of the Annex to Section III of Part X, of the Treaty of Versailles.

This difference in treatment places in some respects a greater burden on Germany in measuring damages in neutrality losses than in belligerency losses; but on the whole Germany's burden is much greater with respect to losses occurring during belligerency than with respect to similar losses occurring during neutrality. It is no more competent for this Commission to read into the Treaty provisions reducing the heavier measure of damages in neutrality claims in order to make them balance with those arising during belligerency than it would be competent for it to read into the Treaty provisions expanding Germany's liabilities arising during the period of neutrality so as to make them as broad as during the period of belligerency.

The German Agent contends that in all cases based on property taken during the period of neutrality no damages in the nature of interest should be awarded by this Commission but the awards when made should bear interest from their date at the rate of 5% per annum. While this contention must be rejected for reasons already indicated, the application of the rule he proposes will demonstrate its unsoundness.

Under the provisions of Section IV of Part X of the Treaty of Versailles (carried into the Treaty of Berlin) the nationals of the Allied Powers must be compensated by Germany for their property taken by Germany in German territory during the period of the belligerency of each as an Allied Power against Germany, such compensation to include an amount equivalent to interest at the rate of 5% per annum from the date of taking to the date of payment computed on the value of the property taken.³ If like compensation were denied to American nationals whose property was taken by Germany in German territory during the period of American neutrality and, as contended by German counsel, compensation in the form of interest should be computed only from the date of the award made by this Commission, then the following anomalies would result:

The value of property taken by Germany in German territory

(a) During the period of American neutrality,

(1) Belonging to Allied nationals, would bear interest from the date of taking;

(2) Belonging to American nationals, would bear interest only from the date of the award made by this Commission;

(b) During the period of American belligerency, belonging either to American nationals or to Allied nationals, would bear interest from the date of taking.

It would follow that the value of property of Allied nationals taken by Germany in German territory, say on September 1, 1914, would bear interest from that date, while the value of property of American nationals taken at the same time and place by the same German authorities would bear interest only from the date of the award made by this Commission, although the value of property of American nationals taken by Germany in German territory, say on April 7, 1917, or later, would bear interest from the date of taking.

Such a construction of the Treaty of Berlin would penalize American nationals because of the delay of their Government in entering the war. Such consequences, which manifestly could not have been intended, fortify the construction heretofore announced. This construction yields a rule in harmony with the great weight of decisions of international arbitral tribunals in similar

³ See paragraph (e) of Article 297, paragraph 14 of the Annex to Section IV of Part X, and paragraph 22 of the Annex to Section III of Part X, of the Treaty of Versailles.

cases in which the terms of submission did not expressly or impliedly prohibit the awarding of interest.⁴

The reasons governing the allowance of damages in the nature of interest on the value of property taken as of the time and place of taking apply also to property destroyed by Germany or her agents during the period of neutrality, and the same rule will be applied by the Commission in claims of this latter class.

There remain for consideration.

Claims for property losses arising during the period of belligerency

As is apparent from this Commission's Administrative Decision No. I, Germany's financial obligations for damages suffered by American nationals during the period of belligerency cover losses sustained by such nationals caused not only by the acts of Germany or her agents but also, in designated classes of claims, by the allies of Germany or by any belligerent. This liability of Germany, broader during the period of belligerency than during the period of neutrality, is fixed by those provisions of the Treaty of Versailles stipulated for the benefit of the United States, and is availed of by the United States under the Treaty of Berlin but subject to "the rights accorded to Germany under such provisions".⁵

Claims for damages suffered during the period of belligerency by American nationals asserting rights under the reparation provisions of the Treaty of Versailles,⁶ all of which fall within class (B) of Administrative Decision No. I, are subject to all of the limitations and restrictions contained in that treaty applicable to the provisions conferring such rights.

Under Article 232 of the Treaty of Versailles, as here applied, Germany has in substance undertaken to make compensation for all damage done to the civilian population of the United States during the period of belligerency and falling within the categories enumerated in class (B) of Administrative Decision No. I. Article 233 provides for the creation of a "Reparation Commission" to determine the amount of such damage, which amount "shall be concluded and notified to the German Government on or before May 1, 1921, as representing the extent of that Government's obligations". Annex II to Section I

⁴ The international commission in adjudicating claims arising under Article VII of the Treaty between the United States and Great Britain of November 19, 1794, known as the Jay Treaty, as supplemented by the Convention of January 8, 1802, allowed interest on the value of neutral American cargoes seized by Great Britain, a belligerent, the latter contending that the seizures were legal. Mr. Pinkney, one of the American commissioners, in his opinion (IV Moore's Arbitrations at page 4318) points out that, while the treaty does not *eo nomine* empower the commission to award interest, that power is derived simply from the words in the treaty "which submit the amount of the compensation to our decision".

See also Ward case, pages 41-42, Wilkinson case, page 42, and "Allowance of Interest," page 21, Hale's Report, Volume VI of "Papers Relating to the Treaty of Washington." Also IV Moore's Arbitrations, pages 3734, 3737. Opinion of Umpire Duffield of German-Venezuelan Commission in *Christern & Co.* and other cases, Ralston's Report of Venezuelan Arbitrations of 1903, pages 520-526. *Russia v. Turkey*, award rendered by International Arbitral Tribunal November 11, 1912, VII American Journal of International Law 190-193. Geneva Award under the Treaty of Washington, pages 53 and 542-543, Volume IV of "Papers Relating to the Treaty of Washington". Also I Moore's Arbitrations, page 658, and Sir Alexander Cockburn's dissenting opinion, footnote page 651; IV Moore's Arbitrations, pages 4313-4327. Ralston's International Arbitral Law and Procedure, sections 162-172, inclusive. Borchard's Diplomatic Protection of Citizens Abroad, section 179.

⁵ Second paragraph of clause (1) of Article II of the Treaty of Berlin.

⁶ Part VIII of the Treaty of Versailles, especially Annex I to Section I.

of Part VIII of the treaty contains provisions defining the powers of that commission and the rules governing it. Paragraph 16 of that Annex provides that "Interest shall be debited to Germany as from May 1, 1921, in respect of her debt as determined by the Commission," and the rate of interest is fixed at 5% per annum. The paragraph concludes: "The Commission, in fixing on May 1, 1921, the total amount of the debt of Germany, may take account of interest due on sums arising out of the reparation of material damage as from November 11, 1918, up to May 1, 1921."

This commission holds that the "material damage" mentioned in the clause last quoted includes all damages in respect of the taking or destruction of or injury to property as defined in paragraph 9 of Annex I to Section I of Part VIII, which are those embraced in classes (B) (2) (e) and (B) (3) (a) of Administrative Decision No. I.

The Treaty of Versailles contemplated that the aggregate amount to be paid by Germany under the reparation provisions should be fixed on or before May 1, 1921, and should bear interest from that date, although on sums allowed to repair losses of the nature designated "material damage" the Reparation Commission was authorized to compute interest as from November 11, 1918, but not prior to that date, and to add such interest to such sums in fixing the amount of Germany's obligations. Applying well-established rules of construction to the provisions of the paragraph 16 quoted above, no claims embraced in the Reparation Commission's findings other than those for "material damage" could bear interest prior to May 1, 1921.

The United States did not elect to become a party to the Treaty of Versailles or to present its claims to the Reparation Commission. By agreement with Germany it created this Commission, whose functions include, with others, those which would have been performed by the Reparation Commission had the claims of the United States been presented to it. The date of May 1, 1921, as found in the paragraph 16 above mentioned is, therefore, without significance in construing the Treaty of Berlin save as it is the date when all reparation claims of the Allies against Germany became liquidated and fixed and Germany notified of their aggregate amount. Reading paragraph 16 in the light of the other reparation provisions of the Treaty of Versailles, and applying it to the other provisions of the Treaty of Berlin, of which it forms a part, this Commission construes it to mean: All claims asserted under the reparation provisions for "material damage," as hereinbefore defined, shall, in accordance with the demand therefor made by the United States through its Agent, bear interest at the rate of 5% per annum from November 11, 1918. All other claims asserted under the reparation provisions shall bear interest only from the date of the award in each case by this Commission, at the rate of 5% per annum.

Claims for losses based on property taken during the period of belligerency by Germany or her agents (whether civil or military)⁷ in German territory are within the terms of paragraph (e) of Article 297 of the Treaty of Versailles (carried into the Treaty of Berlin), which, as here applied, in substance requires that Germany shall make compensation for all damage with respect to American property located in German territory as it existed on August 1, 1914, and taken or used by Germany during the period of belligerency, including interest at the rate of 5% per annum from the date of taking.⁸

⁷ The German Commissioner dissents with respect to claims for losses based on property taken by German military authorities.

⁸ See the references contained in Note 3 *ante*.

Numerous factors, varying as the facts in the cases vary, must be considered in assessing damages in claims for losses sustained at any time during the war period based on property (1) damaged but not destroyed, (2) destroyed but replaced,⁹ or (3) taken but returned to the private owner. All questions concerning damages in the nature of interest in claims falling within these classes will, therefore, be dealt with in each case as presented.

From the foregoing the Commission deduces the following

Rules governing damages in the nature of interest

I. In all claims for losses wherever occurring based on property taken or destroyed by Germany or her agents during the period of neutrality, the measure of compensation expressed in awards made will be the amount fixed by the Commission as the value of such property, with interest thereon at the rate of 5% per annum from the date of the actual loss, whether such loss occurred at the time of or after the taking or destruction, to the date of payment.

II. In all claims for losses based on property taken during the period of belligerency by Germany or her agents (whether civil or military) in German territory and not returned, the measure of compensation expressed in awards made will be the amount fixed by the Commission as the value of such property, with interest thereon at the rate of 5% per annum from the date of the actual loss, whether such loss occurred at the time of or after the taking, to the date of payment.

III. In all claims for losses wherever occurring based on property destroyed during the period of belligerency and not replaced, falling within classes (B) (2) (e) and (B) (3) (a) as defined in this Commission's Administrative Decision No. I, and also in all claims for losses based on property taken by Germany or her allies outside of German territory during the period of belligerency and not returned, the measure of compensation expressed in awards made will be the amount fixed by the Commission as the value of such property, with interest thereon at the rate of 5% per annum from November 11, 1918, to the date of payment.

IV. In all claims for losses wherever occurring sustained at any time during the war period based on personal injuries or on death, and in all claims arising during the period of belligerency falling within classes (B) (1), (B) (2) (a), (B) (2) (b), (B) (2) (c), (B) (2) (d), and (B) (3) (b) as defined in this Commission's Administrative Decision No. I, the measure of compensation expressed in awards made will not include damages in the nature of interest, but each award made will bear interest from its date at the rate of 5% per annum.

V. In all claims wherever arising for losses sustained at any time during the war period, based on property damaged but not destroyed, or on property destroyed and replaced, or on property taken and returned to the private owner, all questions concerning damages in the nature of interest will be dealt with by the Commission in each case as presented.

The awards which have been made by German tribunals in cases based on property taken, together with all their records in such cases, or certified copies of such awards and records, will be produced by the German Agent, where practicable, and will be considered here in assessing damages. The Commission will determine in each case the weight to be given such awards and records, dependent upon the parties before the German tribunal, the extent and nature of the evidence developed, and the nature of its award.

⁹ See paragraph 12 (e) of Annex II to Section I of Part VIII of the Treaty of Versailles.

This opinion in so far as applicable will control the preparation, presentation, and decision of all claims falling within its scope submitted to the Commission. Whenever either Agent or his counsel is of the opinion that the peculiar facts of any case take it out of the rules here announced, such facts, with the differentiation believed to exist, will be called to the attention of the Commission in the presentation of that case.

Done at Washington December 11, 1923.

Edwin B. PARKER
Umpire

Concurring:

Chandler P. ANDERSON
American Commissioner

Concurring, save as dissent is indicated in the opinion:

W. KIESSELBACH
German Commissioner

EASTERN STEAMSHIP LINES, INC.
(UNITED STATES) *v.* GERMANY

(*War-Risk Insurance Premium Claim, March 11, 1924, pp. 71-74.*)

DAMAGE: WAR-RISK INSURANCE PREMIUMS, RULE OF PROXIMATE CAUSE, PROXIMATE AND INCIDENTAL RESULTS. War-risk insurance for vessels bought by claimant following and because of attack by German submarine, during period of United States belligerency, of other American company's tug and barges operating in same waters as claimant's vessels. Claim presented for premiums paid until after Armistice, with interest. *Held* that premiums not a loss proximately resulting from attack, but simply incident to existence of state of war (reference made to Administrative Decisions Nos. I and II and United States Steel Products Company award, see pp. 21, 23, and 44 *supra*).

Cross-references: A.J.I.L., Vol. 18 (1924), pp. 611-613; Kiesselbach, *Probleme*, pp. 228-230 (German text); Witenberg, Vol. I, pp. 78-81 (French text).

Bibliography: Kersting, p. 1844; Kiesselbach, *Probleme*, pp. 10, 100, 102-103; Prossinagg, pp. 12-13.

PARKER, *Umpire*, delivered the opinion of the Commission, the American and German Commissioners concurring in the conclusions:

The United States asserts this claim on behalf of the Eastern Steamship Lines, Inc., a Maine corporation, operating in 1918 a fleet of eight steamships in the freight and passenger service between points along the New England coast and as far south as New York, reaching the latter port through Long Island Sound and the Cape Cod Canal when open. On the morning of July 21, 1918, during the period of belligerency between the United States and Germany, the American tug *Perth Amboy*, owned by the Lehigh Valley Railroad, in which the claimant had no interest, with four light barges in tow, when about two miles off shore on the Massachusetts coast was attacked by a German submarine. The barges were sunk by her gunfire and the *Perth Amboy* was set on fire by explosive shells and burned but not sunk. Following this attack and because of it, the claimant at once covered its vessels operating in these and near-by waters with war-risk insurance, which it renewed, and most of which it continued to carry until after the Armistice of November 11, 1918,

at a cost to it in premiums of \$17,351.19. This claim is asserted to recover the amount of these premiums with interest.

The American counsel contends that the facts in this case take it out of the principles and rules announced by this Commission November 1, 1923, in its Opinion in War-Risk Insurance Premium Claims (pages 33-59 of Decisions and Opinions), and that the aggregate amount of the premiums paid by this claimant for insurance against war perils is a loss to it proximately resulting from Germany's act, to pay which Germany is obligated under the Treaty of Berlin.

The basis of the demand, as stated in the claimant's brief, is that the submarine attack on the *Perth Amboy* was "the direct and proximate cause of this claimant's taking out insurance against war perils" and therefore "the legal connection between the threatened destruction and the insurance is completely established". The argument rests on a false premise. The losses proximately resulting from the submarine attack within the meaning of the Treaty of Berlin were the damage to the tug *Perth Amboy* and the destruction of the barges which it had in tow. These offensive operations of Germany off the coast of her then enemy doubtless did create a fear in the mind of the president of the claimant corporation for the safety of claimant's property and that fear may have influenced the claimant in doing a number of different things to protect its physical properties, the lives of its employees, and to preserve its established business. But the expenses incurred by it in taking such measures, on its own volition and in the exercise of its own discretion, were simply incident to the existence of a state of war in which the United States was then a participant and in no sense losses, damages, or injuries caused by Germany or her allies within the meaning of the Treaty of Berlin.

The claimant's ships were never attacked by or in any way injured or damaged by Germany or her allies. It may be that business prudence required that claimant protect its property as far as practicable, through war-risk insurance against *threatened loss*. However, as pointed out in its brief, such insurance did not give it full protection against the losses which resulted from the warlike activities of a German submarine off the New England Coast during the period when Germany was at war with the United States.

The claimant suffered losses in revenues from the falling-off of the passenger business because of this threatened danger from submarines. Suppose the claimant had, in the exercise of its discretion, in order to protect its established business, diverted it by rail and handled it during the period of belligerency through trackage arrangements with rail lines; could it recover now from Germany the additional cost to it of such an operation?

And if the claimant had arranged to handle its business by rail instead of by water, and as a result its masters and crews had been thrown out of employment, would the losses resulting to them have been attributable to Germany's act as a proximate cause?

Or suppose the claimant had continued the operation of its water lines but concluded that, in order to maintain its organization and as far as possible protect its passenger business, it would, in addition to protecting its property, insure the lives of its masters, its crews, and its passengers, and also insure against injury to their persons; would the cost of such insurance have been a loss suffered by claimant as the proximate result of Germany's act?

Or suppose the summer residents on this coast, moved through fear of attack by hostile submarines, had not only covered their properties with war-risk insurance but temporarily leased and moved into other residences further inland out of reach of enemy guns; can expenses incurred in making such changes and in procuring such insurance be seriously treated as losses for which Germany is obligated to pay under the Treaty of Berlin?

These questions are put simply to illustrate the far-reaching application of the contention earnestly pressed by American counsel.

The proximate result of Germany's act complained of by claimant was the damaging of the tug *Perth Amboy* belonging to the Lehigh Valley Railroad and the destruction of the barges which it had in tow. One of the incidental results of Germany's offensive operations off the coast of her then enemy was to create in the mind of the president of the claimant corporation a fear of danger to its property, to partially protect against which the claimant incurred the expenses here sought to be recovered in procuring insurance against losses which were threatened but which in fact never occurred. Because of this fear, claimant's president, acting on his own volition and in the exercise of what, it is assumed, was business prudence, bought and paid for insurance against these threatened losses. The procuring of this insurance was not Germany's act but that of the claimant. The resulting expense was incurred not to repair a loss caused by Germany's act but to provide against what claimant's president feared Germany might do resulting in loss to it, although these fears were never realized. Such expenses are losses to claimant incident to the existence of a state of war, but they are not losses for which Germany is obligated to pay under the terms of the Treaty of Berlin, as construed by Administrative Decisions Nos. I and II and the Opinion in War-Risk Insurance Premium Claims, all handed down by this Commission on November 1, 1923.

It results from the foregoing that this claim must be dismissed and it is hereby so ordered.

Done at Washington March 11. 1924.

Edwin B. PARKER
Umpire

Concurring in the conclusions:

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

UNITED STATES, GARLAND STEAMSHIP CORPORATION, AND
OTHERS (UNITED STATES) *v.* GERMANY

(*March 25, 1924, pp. 75-101; dissenting opinion of American Commissioner, undated, p. 101.*)

SEA WARFARE: DESTRUCTION OF VESSELS, RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAWS, TREATY OF BERLIN. Destruction of thirteen vessels by Germany or allies during period of belligerency. Claims presented for loss of hulls. *Held* that Commission not concerned with question of conformity to laws of war of destruction of vessels: Germany's obligation to pay fixed and limited by Treaty of Berlin.

WAR: NAVAL AND MILITARY WORKS AND MATERIALS AS DISTINCT FROM MERCHANT VESSELS; REQUISITION OF AMERICAN AND FOREIGN MERCHANT VESSELS, PUBLIC SHIPS; CONVOYS.—UNITED STATES SHIPPING BOARD AND —EMERGENCY FLEET CORPORATION.—INTERPRETATION OF TREATIES: (1) INTERPRETATION BY FRAMERS, BENEFICIARIES, (2) RELATED PROVISIONS, (3) DICTIONARIES, (4) EQUALLY AUTHENTIC TEXTS, (5) TECHNICAL LEGAL AND

ORDINARY POPULAR SENSE, (6) MUNICIPAL LAW ANALOGIES.—INTERPRETATION OF MUNICIPAL LAW.—EVIDENCE: *prima facie*, CONCLUSIVE EVIDENCE, PRESUMPTIONS. Interpretation of phrase “naval and military works or materials” in Treaty of Versailles, Part VIII, Section I, Annex I, para. 9, as carried into Treaty of Berlin. Construction by Reparation Commission not binding either on Mixed Claims Commission or on Germany, but considered as early *ex parte* construction by European Allies who participated in drafting and are principal beneficiaries. *Held* (1) that phrase, understood in context of principal reparation provisions (Treaty of Versailles, Article 232 and Annex I) read as a whole, relates solely, in so far as present claims are concerned, to vessels operated at time of destruction by United States, not as merchantmen, but directly in furtherance of military operation against Germany or her allies (impossibility for vessel privately operated for private profit to be impressed with military character, since only government can lawfully engage in direct warlike activities; interpretation of terms “works” and “materials”: dictionaries, reading of equally authentic English and French texts together); (2) that neither mobilization of shipping for war, nor its control, by United States (through “United States Shipping Board” and “United States Shipping Board Emergency Fleet Corporation”, created under United States “Shipping Act, 1916”), whether vessels owned or requisitioned by United States, raises presumption that vessels must be classed as “naval and military works or materials” (interpretation of “Shipping Act, 1916”, taken in its entirety, together with reparation provisions) (the *Pinar del Rio*, the *Alamance*, the *Tyler*, the *Santa Maria*, the *Marak*, the *Texel*); (3) that operation of vessel (owned or requisitioned by United States) by agent of United States other than established government agency does not, but that operation (as a “public ship”) by United States Navy or War Department does raise presumption (*prima facie* but not conclusive evidence) of naval or military character (the *John G. McCullough*, the *Joseph Cudahy*, the *A. A. Ravens*); and (4) that merchant vessel not converted into “naval and military . . . materials” when (a) armed for defensive purposes and guns manned by United States Navy gun crew (the *Rockingham*, the *Motano*, the *Rochester*, the *Moreni*, the *Alamance*, the *Tyler*, the *Santa Maria*), (b) operated in accordance with routing and defense instructions given by United States Navy Department or British Government (the *Rockingham*, the *Motano*), or (c) convoyed by fighting forces of belligerent power (the *Motano*, the *Alamance*, the *Tyler*, the *Santa Maria*). *Held* also that phrase “property . . . belonging to” in Treaty of Versailles, Part VIII, Section I, Annex I, para. 9, as carried into Treaty of Berlin, includes special or qualified property, tantamount to absolute ownership for the time being, resulting from requisition by United States on March 20, 1918, in accordance with international law and practice, of vessels of Netherlands registry, belonging to Netherlands nationals, and lying in American ports (the *Merak*, the *Texel*); “belonging to” should be understood not as a technical legal term, but in ordinary popular sense (see French text and analogies in United States and British maritime law; see also reparation provisions as a whole requiring Germany to pay all losses sustained by Allied and Associate States or their nationals resulting from “damage in respect of all property wherever situated” of a non-military character).

INTERLOCUTORY JUDGMENTS: EVIDENCE AGAINST.—Agents may file further evidence bearing on points decided in present interlocutory decisions, which in absence of such evidence, will become final.

Cross-references: A.J.I.L., Vol. 18 (1924), pp. 614-634; Annual Digest, 1923-24, pp. 405-410, 420-421; Kiesselbach, *Probleme*, pp. 231-250 (German text); Witenberg, Vol. I, pp. 82-101 (French text).

Bibliography: Borchard, pp. 140-142; Kersting, p. 1845; Kiesselbach, *Probleme*, pp. 11, 123-140; Prossinagg, pp. 13-14.

PARKER, *Umpire*, delivered the opinion of the Commission, the German Commissioner concurring in the conclusions, and the American Commissioner concurring save as his dissent is indicated:

There is here presented a group of thirteen typical cases in which the United States, in some instances on its own behalf and in others on behalf of certain of its nationals, is seeking compensation for losses suffered through the destruction of ships by Germany or her allies during the period of belligerency. These claims do not embrace damages resulting from loss of life, injuries to persons, or destruction of cargoes but are limited to losses of the ships themselves, sometimes hereinafter designated "hull losses".¹

With the exception of the construction and the application to requisitioned Dutch ships of the phrase "property * * * belonging to" as found in paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles as carried by reference into the Treaty of Berlin, the sole question considered and decided in this opinion is: Were any or all of the thirteen hulls in question when destroyed "naval and military works or materials" within the meaning of that phrase as used in that paragraph?

The cases in which an affirmative answer to this question is given must, on final submission, be dismissed on the ground that Germany is not obligated to pay such losses under the Treaty of Berlin. The cases in which a negative answer is given will be reserved by the Commission for further consideration of the other issues raised.

The Commission is not here concerned with the quality of the act causing the damage. The terms of the Treaty fix and limit Germany's obligations to pay, and the Commission is not concerned with enquiring whether the act for which she has accepted responsibility was legal or illegal as measured by rules of international law. It is probable that a large percentage of the financial obligations imposed by said paragraph 9 would not arise under the rules of international law but are terms imposed by the victor as one of the conditions of peace.

The phrase "naval and military works or materials" has no technical signification. It is not found in previous treaties. It has never been construed judicially or by any administrative authority save the Reparation Commission. The construction by that body is not binding on this Commission nor is it binding on Germany under the Treaty of Berlin. It will, however, be considered by this Commission as an early *ex parte* construction of this language of the Treaty by the victorious European Allies who participated in drafting it and are the principal beneficiaries thereunder.

The construction of this phrase is of first impression, and the Commission must, in construing and applying it, look to its context. It is found in the principal reparation provisions of the Treaty of Versailles as embraced in Article 232 and the Annex I expressly referred to therein. That article, after reciting that the "Allied and Associated Governments recognize that the resources of Germany are not adequate * * * to make complete reparation for all" losses and damages to which they and their nationals had been subjected as a consequence of the war, provides that:

¹ Reference is made to definition of terms contained in Administrative Decision No. I.

"The Allied and Associated Governments, however, require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage as defined in Annex I hereto."

It is apparent that the controlling consideration in the minds of the draftsmen of this article was that Germany should be required to make *compensation* for all damages suffered by the *civilian population* of each of the Allied and Associated Powers during the period of its belligerency. It was the reparation of the private losses sustained by the *civilian population* that was uppermost in the minds of the makers of the Treaty rather than the public losses of the governments of the Allied and Associated Powers which represented the cost to them of prosecuting the war.²

Article 232 makes express reference to "Annex I hereto" as more particularly defining the damages for which Germany is obligated to make compensation. Annex I provides that "Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories". Then follows an enumeration of ten categories, of which Nos. 1, 2, 3, 4, 8, and 10 deal solely with damages suffered by the civilian populations of the Allied and Associated Powers. Categories 5, 6, and 7 deal with reimbursement to the governments of the Allied and Associated Powers as such of the cost to them of pension and separation allowances, rather than damages suffered by the "civilian population". The Government of the United States has expressly committed itself against presenting claims arising under these three categories.³ There remains of the 10 categories enumerated in Annex I only category 9, which reads:

"(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war."

Under the terms of this paragraph arise Germany's financial obligations, if any, to pay the claims now before this Commission for the hulls destroyed during the period of belligerency.

It cannot be doubted that the language of this paragraph 9 so expands that used in Article 232 as to include certain property losses sustained by the governments of the Allied and Associated Powers as well as the losses sustained by their "civilian populations." It was found that property belonging to the victorious powers not designed or used for military purposes had been destroyed or damaged, so in addition to requiring that Germany compensate the civilian population for their property losses this paragraph requires that Germany shall also compensate those governments for government losses suffered through destruction or damage with respect to property of a non-military character.

² The reparations provided for in the exchange of notes between the United States and Germany culminating in the Armistice of November 11, 1918, executed by the military representatives of the belligerent powers, were limited to reparations for losses to the civilian population. The Lansing note of November 5, 1918, provides that the Allied Powers "understand that compensation will be made by Germany for all damage done to the *civilian population* of the Allies and their property by the aggression of Germany by land, by sea, and from the air".

Italics appearing throughout this opinion are, as a rule, added by the Commission.

³ See Note 11 of Administrative Decision No. II, pages 14 and 15 of Decisions and Opinions of this Commission (*Note by the Secretariat*, this volume, p. 31 *supra*.)

Much property belonging to the governments of the victorious powers, especially to the governments of the European Allies, and not impressed by reason of its inherent nature or of its use with a military character, had been destroyed or damaged. Under this provision it is clear that Germany is obligated to compensate the governments suffering such losses. But, reading the reparation provisions as a whole, it is equally clear that the Allied and Associated Powers did not intend to require that Germany should compensate them, and that Germany is not obligated to compensate them, for losses suffered by them resulting from the destruction or damage of property impressed with a military character either by reason of its inherent nature or by the use to which it was devoted at the time of the loss. Property so impressed with a military character is embraced within the phrase "naval and military works or materials" as used in paragraph 9, which class described by this phrase will sometimes hereinafter be referred to as "excepted class".

This phrase, in so far as it applied to hulls for the loss of which claims are presented to this Commission, relates solely to ships operated by the United States, not as merchantmen, but directly in furtherance of a military operation against Germany or her allies. A ship privately operated for private profit cannot be impressed with a military character, for only the government can lawfully engage in direct warlike activities.

By the terms of the Treaty of Versailles, the French and English texts are both authentic. The French word *matériel*, in the singular, is used in the French text, against which the English word "materials," in the plural, is used in the English text. Littré, whose dictionary is accepted as an authority on the French language, defines *matériel* thus: "The articles of all kinds taken as a whole which are used for some public service in contradistinction to personnel," and he gives as an example *matériel* of an army, the baggage, ammunition, etc., as distinguished from the men.

The Century Dictionary defines this French word thus: "The assemblage or totality of things used or needed in carrying on any complex business or operation, in distinction from the *personnel*, or body of persons, employed in the same: applied more especially to military supplies and equipments, as arms, ammunition, baggage, provisions, horses, wagons, etc."

The English word "materials" means the constituent or component parts of a product or "that of or with which any corporeal thing is or may be constituted, made, or done" (Century Dictionary).

Reading the French and English texts together, it is apparent that the word "materials" is here used in a broad and all inclusive sense, with respect to all physical properties not attached to the soil, pertaining to either the naval or land forces and impressed with a military character; while the word "works" connotes physical properties attached to the soil, sometimes designated in military parlance as "installations," such as forts, naval coast defenses, arsenals, dry docks, barracks, cantonments, and similar structures. The term "materials" as here used includes raw products, semi-finished products, and finished products, implements, instruments, appliances, and equipment, embracing all movable property of a physical nature from the raw material to the completed implement, apparatus, equipment, or unit, whether it were an ordinary hand grenade or a completed and fully equipped warship, provided that it was used by either the naval or land forces of the United States in direct furtherance of a military operation against Germany or her allies.

While it is difficult if not impossible to so clearly define the phrase "naval and military works or materials" that the definition can be readily applied to the facts of every claim for the loss of a hull pending before this Commission, the true test stated in general terms is: Was the ship when destroyed being

operated by the United States for purposes directly in furtherance of a military operation against Germany or her allies? If it was so operated, then it is embraced within the excepted class and Germany is not obligated to pay the loss. If it was not so operated, it is not embraced within the excepted class and Germany is obligated to pay the loss.

The United States Shipping Board (sometimes hereinafter referred to as "Shipping Board") exerted such a far-reaching influence over American shipping both prior to and during the period of American belligerency that the scope and effect of its activities and powers must be clearly understood in order to reach sound conclusions with respect to the cases here under consideration.

The Shipping Board was established in pursuance of the act of the Congress of the United States of September 7, 1916 (39 Statutes at Large 728), entitled "An act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes." The act as amended provided that the members of the board should be appointed by the President subject to confirmation by the Senate; that they should be selected with due regard for the efficient discharge of the duties imposed on them by the act; that two should be appointed from States touching the Pacific Ocean, two from States touching the Atlantic Ocean, one from States touching the Gulf of Mexico, one from States touching the Great Lakes, and one from the interior, but that not more than one should be appointed from the same State and not more than four from the same political party. All employees of the board were selected from lists supplied by the Civil Service Commission and in accordance with the civil-service law. The board was authorized to have constructed and equipped, as well as "to purchase, lease, or charter, vessels *suitable, as far as the commercial requirements of the marine trade of the United States may permit*, for use as naval auxiliaries or Army transports, or for other naval or military purposes".

The President was authorized to transfer "either permanently or for limited periods to the board such vessels belonging to the War or Navy Department *as are suitable for commercial uses* and not required for military or naval use in time of peace".

Provision was made for the American registry and enrollment of vessels purchased, chartered, or leased from the board and it was provided that "Such vessels *while employed solely as merchant vessels* shall be subject to all laws, regulations, and liabilities governing merchant vessels, *whether the United States be interested therein as owner*, in whole or in part, or hold any mortgage, lien, or other interest therein".

The board was authorized to create a corporation with a capital stock of not to exceed \$50,000,000 "for the purchase, construction, equipment, lease, charter, maintenance, and operation *of merchant vessels in the commerce of the United States*". In pursuance of this latter provision the United States Shipping Board Emergency Fleet Corporation (sometimes hereinafter referred to as "Fleet Corporation") was organized under the laws of the District of Columbia with a capital stock of \$50,000,000, all fully paid and all held and owned by the United States save the qualifying shares of the trustees. Under the terms of the act, this corporation could not engage in the *operation* of vessels owned or controlled by it unless the board should be unable to contract with citizens of the United States for the purchase or operation thereof.

Then followed in the act numerous provisions clothing the board with broad powers with respect to transportation by water of passengers or property in interstate and foreign commerce, provisions for investigations and hearings, for the fixing of maximum rates, and for penalties for failure to observe the terms of the statutes and the orders of the board.

The act as amended provided that it "may be cited as 'Shipping Act, 1916' ". The board created by virtue of its terms possessed none of the indicia of a military tribunal. Its members, all civilians, were drawn from remote sections, that the board might represent the commercial and shipping interests of the entire Nation. The act taken in its entirety indicates that the controlling purpose of the Congress was to promote the development of an American merchant marine and also "*as far as the commercial requirements of the marine trade of the United States may permit*" provide vessels susceptible of "use as naval auxiliaries or Army transports, or for other naval or military purposes". This act was approved September 7, 1916, during the period of American neutrality. The World War had found American nationals engaged in an extensive foreign commerce but without an adequate merchant marine to keep it afloat. The channels of American foreign commerce would have been choked but for the use of belligerent bottoms with the resultant risks. This situation, coupled with the possibility of the developments of the war forcing American participation therein, prompted the enactment of this statute for the creation of a merchant marine and setting up the machinery for the mobilization and control of all American shipping.

Following America's entrance into the war on April 6, 1917, Congress through the enactment of several statutes clothed the President of the United States with broad powers including the taking over of title or possession by purchase or requisition of constructed vessels or parts thereof or charters therein and the operation, management, and disposition of such vessels and all other vessels theretofore or thereafter acquired by the United States. From time to time through Executive Orders the President, being thereunto duly authorized, delegated these powers with respect to shipping to the Shipping Board, to be exercised directly by it or, in its discretion, by it through the Fleet Corporation.

Under these powers the Shipping Board and the Fleet Corporation proceeded to requisition the use of all power-driven steel cargo vessels of American registry of 2,500 tons dead weight or over and all passenger vessels of American registry of 2,500 tons gross registry or over, adapted to ocean service. Immediately upon the execution of these requisition orders a "requisition charter" was entered into between the Shipping Board and the owner, fixing the compensation to be paid by the United States to the owner for the use of the vessel and providing for the operation of the vessel on what was known as the "time-form" basis, the board reserving the right to change the charter to a "bare-boat" basis on giving five days' notice. The time-form basis provided for the operation of the vessel by the owner as agent of the United States and fixed the terms and conditions of such operation, stipulating among other things that the owner should pay all expenses of operation, including the wages and fees of the master, officers, and crew, and should assume all marine risks including collision liabilities, but that the United States should assume all war risks. The Shipping Board directed the owner as its agent to operate the vessel in its regular trade. The bare-boat basis provided that all the expenses of manning, victualling, and supplying the vessel and all other costs of operation should be borne by the United States. This latter form was used in requisitioning ships for service in the War Department, and also in some other instances where requisitioned ships were delivered by the Shipping Board to third parties to

operate as agents of the United States. When a ship was delivered by the Shipping Board to the War Department no formal agreement was entered into between these two Government agencies but the War Department recognized the agreement between the Shipping Board and the owner of the vessel and duly accounted to the Shipping Board under the terms and conditions of the requisition charter.

When the requisitioned vessel was redelivered to the owner for operation by him under a time-form requisition charter, an "operating agreement" was also entered into between the Fleet Corporation, acting for the United States, and the owner, whereby the owner as agent of the Fleet Corporation undertook the operation of the vessel including the procurement of cargoes and the physical control of the ship. For these services the owner as agent received stipulated fees and commissions in addition to the compensation which he received as owner for the use of the vessel as provided in the requisition charter.

When the vessel was requisitioned under a bare-boat form charter and delivered to a third party other than an established government agency to operate, a "managing agreement" was entered into between the Fleet Corporation and such third party whereby the latter as agent for the Fleet Corporation assumed physical control of the ship, receiving fees and commissions for such services.

It was not the practice of the Shipping Board or the Fleet Corporation to issue detailed and minute instructions to agents operating requisitioned vessels with respect to the conduct of the particular voyage or the particular cargoes which such vessels should carry. These operating or managing agents were selected because of their experience and ability in handling commercial shipping. While the United States reserved to itself full power and authority to exercise complete control over vessels requisitioned by it, such control was in practice delegated to the operating or managing agent, who exercised his sound discretion in the management of ships operated by him as agent, with a view to preventing any unnecessary dislocation of trade or disturbance in the established channels of commerce.

Thus the United States through the agencies of the Shipping Board and the Fleet Corporation effectively and speedily mobilized all American shipping, exercising such control over it that, as emergency required, it could be immediately utilized by the United States in the prosecution of its military operations against its enemies; but pending such emergency the requisitioned vessels were commercially operated, by their owners or by third parties, as agents of the United States, and these agents were given the greatest latitude and freedom of action in the management and control of vessels operated by them in order to prevent any unnecessary disturbance in the free movement of commerce. Under the requisition charter it was expressly stipulated that the vessel "*shall not have the status of a Public Ship, and shall be subject to all laws and regulations governing merchant vessels * * **. When, however, the requisitioned vessel is engaged in the service of the War or Navy Department, the vessel shall have the status of a Public Ship, and * * * the master, officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control of the United States." At another point in the requisition charter it was stipulated that the master "shall be the agent of the owner in all matters respecting the management, handling, and navigation of the vessel, *except when the vessel becomes a Public Ship*".

The German Agent contends that presumptively the control by the Shipping Board thus exercised over vessels, whether owned by the United States or

held by the United States under requisition, was in furtherance of the conduct of the military effort of the United States against Germany, and hence—in the absence of satisfactory proof to the contrary, the burden being on the United States—all such vessels must be classed as “naval and military works or materials”. The Commission has no hesitation in rejecting this contention. After America entered the war, its entire commerce and industry were in a broad sense mobilized for war. Because of the urgent war requirements, steel and numerous other products became government-controlled commodities, their uses being rigidly restricted to war purposes. Yet it cannot be contended that the fact that an American steel plant was operated 100% on war work raised a *prima facie* presumption of its conversion into “military works.” The railroads of the United States were taken over and operated by the Government as a war measure, but this did not presumptively convert them into “military works or materials” within the meaning of that term as used in the Treaty of Versailles. Nor can the mobilization for war of American shipping through the agency of the Shipping Board create even a rebuttable presumption that the vessels so mobilized, whether owned or requisitioned by the United States, had a military character. Nothing short of *their operation by the United States directly in furtherance of a military operation against Germany* can have such an effect. So long as such vessels were performing the functions of merchant vessels, even though engaged in a service incident to the existence of a state of war, they will not fall within the excepted class.

Construing the Shipping Act, the Executive Orders of the President, and the provisions of an operating agreement similar to that hereinbefore described, the Supreme Court of the United States held a vessel *owned* by the Fleet Corporation but operated by an American national as an agent of the Shipping Board was a merchant vessel and subject to libel in admiralty for the consequences of a collision.⁴ It is apparent that a vessel either owned or requisitioned by the Shipping Board or Fleet Corporation and operated by an agent of the United States under such an operating or managing agreement as hereinbefore described was a merchantman and in no sense impressed with a military character.

When, however, the Shipping Board delivered such vessels to either the War Department or the Navy Department of the United States their status at once changed and they became public ships, their masters, officers, and crews at once became employees and agents of the United States with all of the resultant rights and duties; and it will be presumed that such delivery was made to the military arms of the Government to enable them to be used (in the language of section 5 of the Shipping Act) “as naval auxiliaries or Army transports, or for other naval or military purposes”. Such assignment of vessels to and their operation by the War Department or the Navy Department will be treated by the Commission as *prima facie* but not conclusive evidence of their military or naval character. The facts in each case will be carefully examined and weighed by the Commission in order to determine whether or not the particular ship, at the time of her destruction, was operated by the United States directly in furtherance of a military operation against Germany or her allies. If she was so operated, she will fall within the excepted class; otherwise she will not.

The application of this general rule to the facts as disclosed by the records in the thirteen typical cases preliminarily submitted will illustrate its scope and its limitations.

⁴ The *Lake Monroe*, (1919) 250 U.S. 246.

Case No. 127. Steamship Rockingham

The Steamship *Rockingham*, owned and operated by the Garland Steamship Corporation, an American national, sailed on April 16, 1917, from Baltimore, Maryland, via Norfolk, Virginia, which she left April 19, bound for Liverpool, England, with a general cargo for numerous consignees. She was armed for defensive purposes with two 4-inch guns, one fore and one aft, manned by a civilian crew of 36, and in addition had a naval gun crew of 13 enlisted men. She was sunk by a German submarine on May 1, 1917, before reaching Liverpool. In the early part of the afternoon of May 1, the weather being hazy, two small objects were sighted by the *Rockingham* at a distance of approximately five miles, one on the starboard bow, the other on the port quarter, and assuming that they were German submarines the master steered a zig-zag course in accordance with instructions issued by the United States Navy Department designed to elude the operations of hostile submarines. The two objects were seen to submerge and thereafter were not sighted until after the sinking. The gun crew of the *Rockingham* had, therefore, no target to fire upon, and no effort was made at resistance. The attack was upon the starboard side, was made without warning, the torpedo entering the engine room, tearing a great hole in the ship and causing her to sink in 25 minutes.

The German Agent contends that the *Rockingham* at the time of her destruction had lost her status as a private peaceful trading ship and had become "naval and military * * * materials" as that term is used in the treaty because: (1) she was armed, (2) her guns were manned by a naval gun crew, (3) she was operated in accordance with instructions given by the Navy Department of the United States although by a civilian master with a civilian crew. The contention is that, notwithstanding such arming and manning and operation may have been entirely legal and justified, they nevertheless stripped the *Rockingham* of her character of a peaceful merchantman and impressed her with a military character.

This contention must be rejected. It is clear that the *Rockingham* was being privately operated by an American national for private profit. She was armed in pursuance of the policy adopted by the Government of the United States, of which all foreign missions in Washington were given formal notice on March 12, 1917, during the period of American neutrality, in the following language:

"In view of the announcement of the Imperial German Government on January 31, 1917, that all ships, those of neutrals included, met within certain zones of the high seas would be sunk without any precautions being taken for the safety of the persons on board, and without the exercise of visit and search, the Government of the United States has determined to place upon all American merchant vessels sailing through the barred areas an armed guard for the protection of the vessels and the lives of the persons on board."

The instructions given by the Navy Department of the United States to the masters of these merchant vessels and to the commanders of the naval gun crews clearly indicate that the purpose of so arming and operating such vessels was to *protect against* the offensive operations of German submarines and to elude or escape from them if possible, and not to initiate offensive operations against such submarines. The control in the nature of routing instructions which the civilian masters received from the Navy Department and followed was designed to avoid and to escape from the submarines, not to seek them out and destroy them.

The arming for defensive purposes of a merchantman and the manning of such armament by a naval gun crew, coupled with the routing of such ship by

the Navy Department of the United States for the purpose of avoiding the danger of submarines and the following by the civilian master of the ship of instructions given by the Navy Department for the defense of the ship when in danger of attack by submarines, certainly do not change the juridical status of the ship or convert it from a merchant ship to a war ship or make of it naval material.

The Commission holds that the *Rockingham* at the time of her destruction was being operated as a merchant vessel and that she does not fall within the excepted class.

Case No. 551. Steamship Motano—oil tanker

The Steamship *Motano*, owned and operated by the Standard Oil Company of New Jersey, an American national, sailed from New York on July 6, 1917, with a cargo of fuel oil for account of the British Ship Control for use of the British Admiralty. She left Plymouth with other vessels convoyed by three British destroyers for Portsmouth, England, as her final discharge port. She was armed for defensive purposes with two 3-inch guns, one fore and one aft, and had a civilian master and crew of 33 men and a gun crew of 13 enlisted men of the United States Navy. She was sunk on July 31, 1917, on her voyage between Plymouth and Portsmouth by a torpedo fired by a German submarine. The air was hazy, the sea choppy, the submarine had not been sighted, and no resistance was made by the naval gun crew. The *Motano* was insured with the British Government for \$616,000, which sum has been paid to the claimant, and this claim is made for the difference between that amount and the true value of the vessel, which difference is placed at the sum of \$594,000, plus interest and expenses.

The German Agent contends that the *Motano* at the time of her destruction constituted "naval * * * works or materials" because (1) she carried armament susceptible of use for hostile purposes and was manned by a naval gun crew, (2) she was convoyed by regular fighting forces of a belligerent power, and (3) she was controlled by the belligerent British Government and used for warlike purposes. The Commission rejects this contention because it is apparent that the *Motano* was privately owned and privately operated for private profit, was not employed or designed to be employed directly in furtherance of a military operation of the United States or its associated powers against Germany or her allies, and was not impressed with a military character.

We have heretofore examined the test of armament manned by a naval gun crew on a privately operated commercial ship and held that it did not have the effect of converting such ship into naval material.

The German Agent with great earnestness and ability insists that a ship associating itself with a belligerent convoy assumes the character of its associates and that when it becomes a part of the convoy flotilla, which is a military unit and subject to naval instructions and naval control, it participates in hostilities and must be classed as naval material. We have no quarrel with the contention that a vessel, whether neutral or belligerent, forming part of a convoy under belligerent escort may, through the methods prescribed by international law, be lawfully condemned and destroyed as a belligerent. But that is not the question before this Commission. If we assume that the *Motano*—a belligerent merchantman—was lawfully destroyed, this does not affect the result. The fact that the *Motano*, because of its helpless and non-military character, sought the protection of a convoy and voluntarily subjected itself to naval instructions as to routing and operation, for the purpose of avoiding the German submarines rather than seeking them out to engage them in combat, certainly

can not, by some mysterious and alchemic process, have the effect of transforming the ship from a merchantman into naval material. The control exercised by the British Government over the *Motano* was not such as to affect its status. Such control was limited to directions looking to the protection of the vessel and the furtherance of its commercial activities, and not directly in furtherance of any military operation against Germany or her allies.

The Commission therefore concludes that the *Motano* at the time of her destruction maintained her character as a peaceful commercial vessel and that she does not fall within the excepted class.

Case No. 29. Steamship Pinar del Rio

The Steamship *Pinar del Rio*, owned by the American and Cuban Steamship Line, Incorporated, an American national, was requisitioned by the United States through the Shipping Board, and a time-form requisition charter was entered into February 4, 1918. By the terms of this charter the owner became the agent of the Shipping Board and as such continued to operate the ship. She was unarmed and manned by a civilian crew. While en route from Cuba to Boston with a cargo of sugar she was sunk, on June 8, 1918, through gunfire by a German submarine.

It is apparent that at the time of her destruction she was being operated as a merchant vessel and in no sense impressed with a military character. She does not, therefore, fall within the excepted class.

Case No. 550. Steamship Rochester

The Steamship *Rochester*, owned and operated by the Rochester Navigation Corporation, an American national, after having discharged a general cargo at Manchester, England, sailed from that port in ballast October 26, 1917. She was armed for defensive purposes with two 3-inch guns, mounted one fore and one aft, and had a civilian crew of 36 men and a naval gun crew of 13 men. After leaving Manchester she with nine other merchantmen was convoyed for several days by five destroyers and one armed cruiser, and, after the convoying ships returned to their base, the *Rochester* was sunk on November 2, 1917, by a torpedo and shells fired from a German submarine.

It is apparent that the *Rochester* at the time of her destruction was being operated as a merchant vessel and was not in any sense impressed with a military character. The Commission, therefore, finds that the *Rochester* does not fall within the excepted class.

Case No. 555. Steamship Moreni—oil tanker

The Steamship *Moreni*, owned and operated by the Standard Oil Company of New Jersey, an American national, sailed from Baton Rouge, Louisiana, May 19, 1917, with a cargo of gasoline consigned to the Italian-American Oil Company at Savona, Italy, to call at Gibraltar for orders. She was armed for defensive purposes with two 4-inch guns, one fore and one aft, and manned with a civilian crew of 35 and a naval gun crew of 12. After calling at Gibraltar for orders she sailed from that port June 10, 1917, and on the morning of June 12 was fired upon and finally sunk by a German submarine after a running fight in which the *Moreni* endeavored to escape and in which 200 to 250 shots were fired by the submarine and about 150 shots by the *Moreni*.

It is apparent that the *Moreni* was at the time of her destruction being privately operated for private profit as a merchant vessel, and for the reasons heretofore given the Commission holds that she does not fall within the excepted class.

Case No. 549. Steamship Alamance

The Steamship *Alamance*, owned by the Garland Steamship Corporation, an American national, was requisitioned by the Shipping Board October 20, 1917, and at once redelivered to the Garland Steamship Corporation under a time-form requisition charter, executed December 28, 1917, by the terms of which the owner operated the vessel as agent of the Shipping Board. She was manned with a civilian crew of 38 men, armed for defensive purposes with two 4-inch guns, one fore and one aft, which were manned by a naval gun crew of 19 men. On February 5, 1918, while en route from Hampton Roads, Virginia, to Liverpool, England, with a cargo consisting principally of tobacco, cotton, zinc, and lumber, and while in a convoy of 15 ships escorted by naval vessels, she was torpedoed and sunk by a German submarine.

For the reasons heretofore given the Commission holds that at the time of her destruction the *Alamance* was a merchant vessel and that she does not fall within the excepted class.

Case No. 553. Steamship Tyler

The Steamship *Tyler*, owned by the Old Dominion Steamship Company, of New York, an American national, was requisitioned by the Shipping Board November 29, 1917, and a time-form requisition charter executed on January 4, 1918. On March 2, 1918, the Shipping Board entered into an operating agreement with Chase Leaveth and Company by the terms of which they operated the *Tyler* as agent of the Shipping Board, and she was being so operated at the time of her destruction. She was manned by a civilian crew, armed for defensive purposes with two 3-inch guns, one fore and one aft, which were manned by a naval gun crew of 19 men. On April 30, 1918, the *Tyler* left Genoa, Italy, in convoy, bound for New York in ballast. On May 2, 1918, she was sunk by torpedoes fired by a German submarine.

For the reasons hereinabove given the Commission holds that at the time of her destruction the *Tyler* was a merchantman in no sense impressed with a military character, and hence is not within the excepted class.

Case No. 554. Steamship Santa Maria—oil tanker

The Steamship *Santa Maria*, owned by the Sun Company, an American national, was requisitioned by the Shipping Board October 12, 1917, delivered on January 14, 1918, and on the same day redelivered to the owner, which operated her as agent of the Shipping Board under a requisition agreement constituting a part of the requisition charter. She sailed from Chester, Pennsylvania, the latter part of January, 1918, via Norfolk, Virginia, bound for Great Britain in convoy with a cargo of fuel oil. She was manned by a civilian crew of 39 men, armed with two 4-inch guns, one fore and one aft, and had a naval gun crew of 22 men. On February 25, while under convoy of British trawlers, she was sunk by a torpedo fired by a German submarine.

The Commission holds that at the time of her destruction the *Santa Maria* was a merchant vessel and that she does not fall within the excepted class.

Case No. 552. Steamship Merak

By virtue of a proclamation of the President of the United States of March 20, 1918, 87 vessels of Holland registry and belonging to her nationals, lying in American ports, were, in accordance with international law and practice, requisitioned by the United States, the President in his proclamation directing

that the Shipping Board "make to the owners thereof full compensation, in accordance with the principles of international law". Of these vessels 46, including the Steamships *Merak* and *Texel*, were delivered to the Shipping Board.

The *Merak* was operated as a merchantman by Wessel Du Val and Company, American nationals, as agents of the Shipping Board. She sailed under the American flag, was unarmed, and was manned by a civilian crew. While en route from Norfolk, Virginia, to Chile with a cargo of 4,000 tons of coal she was, on August 6, 1918, captured by a German submarine and sunk by bombs.

Case No. 556. Steamship Texel

As appears from the statement made in connection with the *Merak* case *supra*, the Steamship *Texel* was one of the Dutch ships requisitioned by the United States and assigned to the Shipping Board, after which she was operated by the New York and Porto Rico Steamship Company as agent for the Shipping Board. She was unarmed and manned by a civilian crew. She sailed under the American flag from Ponce, Porto Rico, on May 27, 1918, for New York with a cargo of sugar. On June 2 she was attacked by a German submarine, overhauled, and sunk by bombs.

It is apparent that the Steamships *Merak* and *Texel* were at the time of their destruction being operated as merchant vessels and in no sense impressed with a military character. For the reasons heretofore given the Commission holds that neither the Steamship *Merak* nor the Steamship *Texel* falls within the excepted class and that neither can in any sense be held to have constituted "naval and military works or materials" as that phrase is used in the treaty.

But notwithstanding this holding the German Agent contends that these claims do not fall within the terms of the Treaty of Berlin because these Dutch ships were not vessels "*belonging to*" the United States or its nationals as that term is used in the paragraph 9 here under consideration. That these ships were lawfully requisitioned, reduced to possession, and operated by the United States is conceded by Germany. It results that at the time of their destruction the right of the United States to possess and use them against all the world was absolute and superior to any possible contingent rights or interests of those Dutch nationals who owned them at the time they were requisitioned. That the United States had at least a special or qualified property in these ships there can be no doubt. They were lawfully in its possession, sailing under its flag, used as it saw fit without regard to the wishes of the former owners and during an emergency the duration of which the United States alone could determine. There never was a time when the Dutch nationals who owned the ships at the time they were requisitioned could, as a matter of right, demand their return or impose any limitation whatsoever upon their operation or control. As the United States had the absolute right against the whole world to possess these ships and use them as it saw fit, conditioned only upon the duty to make adequate compensation for their use and to return them, at a time to be determined by it or in the alternative to make adequate compensation, to the Dutch nationals who owned them at the time they were requisitioned, certain it is that this amounted to a special or qualified property in the ships tantamount to absolute ownership thereof for the time being. The possession of the United States was analagous to that of a grantee having an estate defeasible upon the happening of some event completely within his control.

Where under the terms of a trip or time charter the holder of the legal title delivers to the charterer the whole possession and control of the ship, the

charterer becomes the "owner" thereof during the term of the charter and is designated as such.⁵ The British Merchant Shipping (Salvage) Act, 1916, provides that: "Where salvage services are rendered by any ship *belonging to His Majesty* * * * the Admiralty shall * * * be entitled to claim salvage * * * and shall have the same rights and remedies as if the ship * * * did not belong to His Majesty". The English courts have held that a ship requisitioned and operated by the government under requisition charter "belonged to" His Majesty within the terms of this act and hence was entitled to salvage.⁶ These decisions while helpful are not controlling in construing the phrase "Damage in respect of all property wherever situated *belonging to*" the United States or its nationals. "Belonging to" as here used is not a term of art or a technical legal term. It must be construed in the popular sense in which the word is ordinarily used, as synonymous with appertaining to, connected with, having special relation to. That it was used in this sense is evidenced by reference to this clause of the French text of the Treaty of Versailles, which reads: "Dommages relatifs à toutes propriétés, en quelque lieu qu'elles soient situées, appartenant à". The use of the word "appartenant" is significant. The expression "belonging to" does not necessarily convey the idea that the indefeasible legal title to the property "in respect of" which the damage occurred must have vested in the United States or its nationals. It is sufficient that the United States or its nationals had such control over and interest, general or special, in such property as that injury or damage to it directly resulted in loss to them. Had the draftsmen of the treaty intended to restrict Germany's obligations to pay for damages to property in which the unconditional legal title was vested in the Allied or Associated States or their nationals, they would have used apt and well-recognized terms to express such limitation. On the contrary, it is evident from reading the reparation provisions as a whole that their purpose and intention was to require Germany to pay all losses sustained by the Allied or Associated States or their nationals resulting from "Damage in respect of all property wherever situated" of a non-military character.

While not controlling, it is interesting to note that the Reparation Commission has placed a similar construction on the language in question, and gone a step further than here indicated in holding that "Time chartered neutral vessels in respect of which compensation was paid by the claiming Power might also be included [in computing the amount of Germany's reparation payments under paragraph 9 of Annex 1], though not sailing under the flag of the Power in question."

It follows that the claims for losses resulting from the destruction of the Steamships *Merak* and *Texel* fall within the terms of the Treaty of Berlin and that Germany is obligated to compensate for their loss.

Case No. 546. Steamship John G. McCullough

The Steamship *John G. McCullough*, owned by the United States Steamship Company, an American national, was requisitioned by the United States

⁵ *Sandeman v. Scurr*, (1866) L.R. 2 Q.B. 86; *Marcadier v. Chesapeake Insurance Co.*, (1814) 8 Cranch 39, 49; *Reed v. United States*, (1871) 11 Wallace 591, 600; *Leary v. United States*, (1872) 14 Wallace 607, 610; *Kent's Commentaries*, 14th Edition, vol. III, page *138; *Scrutton, Charterparties and Bills of Lading*, 11th (1923) Edition, Article 2, pages 4-9.

⁶ *Admiralty Commissioners v. Page and Others*, (1918) 2 K.B. 447, affirmed in (1919) 1 K.B. 299. See also *The Sarpen*, Court of Appeal, (1916) Probate Division, 306, 313; *Master of Trinity-House v. Clark*, (1815) 4 M. & S. 288.

through the Shipping Board November 6, 1917, under a bare-boat requisition charter. On the same day she was delivered she was turned over to the War Department of the United States and operated with a British civilian crew 32 in number, employed and paid by and in all things subject to the orders of the United States War Department. Under the requisition charter she thereupon became a public ship.

She was armed with one *French* 90 mm. gun, which was manned by *British* naval crew of two gunners. While en route, May 18, 1918, from London, England, in naval convoy to Rochefort, France, with a general cargo *for the Army of the United States*, she was destroyed, either by a torpedo from a German submarine, as claimed by the American Agent, or by a mine, which may or may not have been of German origin. The German Agent denies that she was torpedoed by a German submarine. The German Admiralty is without information with respect to her destruction. There is, however, evidence supporting the allegation that she was torpedoed; but in view of the disposition which the Commission will make of this case the cause of her destruction is *not material*.

At the time the *McCullough* was destroyed she was a public ship in the possession of and operated by the United States through its War Department, one of the military arms of the Government whose every effort was concentrated on mobilizing and hurling men and munitions against Germany. She had been requisitioned in European waters. America's associates in the war had assisted in manning and equipping her. France had supplied armament and Great Britain had supplied a naval gun crew. She was transporting from England to France supplies for the active fighting forces of the Army of the United States. She possessed every indicia of a military character save that she was not licensed to engage in *offensive* warfare against enemy ships. Offensive operation on the seas was not her function. The fact that the legal title to her had not vested in the United States is wholly immaterial. She was in the possession of the United States. It had the right against all the world to hold, use, and operate her and was in fact operating her through its War Department by a master and crew employed by and subject in every respect to the orders of the War Department. She was actively performing a service for the Army on the fighting front. She possessed none of the indicia of a merchant vessel. The very requisition charter under which she was operating took pains to declare her a "public ship" and not a merchant vessel subject to the laws, regulations, and liabilities as such as was the *Lake Monroe*.⁷ She was at the time of her destruction being utilized for "other * * * military purposes" within the meaning of that phrase as used in section 5 of the Shipping Act. She was impressed with a military character.

The taxicabs privately owned and operated for profit in Paris during September, 1914, were in no sense military materials; but when these same taxicabs were requisitioned by the Military Governor of Paris and used to transport French reserves to meet and repel the oncoming German army, they became military materials, and so remained until redelivered to their owners. The automobile belonging to the United States assigned to its President and constitutional commander-in-chief of its Army for use in Washington is in no sense military materials. But had that same automobile been transported to the battle front in France or Belgium and used by the same President, it would have become a part of the military equipment of the Army and as such impressed with a military character. The steel rails used in the yards of a steel plant in Pittsburgh for shifting war materials from one part of the plant to

⁷ The *Lake Monroe*, (1919) 250 U.S. 246.

another are not impressed with a military character, for they are privately operated for private profit. But if these same rails had been taken up and shipped to the American Army in France and laid by it as a part of its transportation system, used and operated by it for transporting munitions and supplied to the fighting front, they would then have become military materials.

So here the *McCullough*, by the terms of her requisition charter stamped a "public ship," actively engaged in transporting army supplies to the battle front, operated by the War Department of the United States through a crew employed and paid by it and subject in all things to its orders, was at the time of her destruction "military materials" and not property for which Germany is obligated to pay under the provisions of the Treaty of Berlin.

Case No. 547. Steamship Joseph Cudahy—oil tanker

The Steamship *Joseph Cudahy*, an oil tanker, owned by the American Italian Commercial Corporation, of New York, an American national, was requisitioned by the United States through the Shipping Board on October 3, 1917, and on the same day delivered to the War Department and operated by the United States Army Transport Service under a bare-boat charter by a civilian crew employed and paid by and in all things subject to the orders of the army authorities. She was armed with two 3-inch guns. Her armament was manned by a United States naval crew of 21 men. She had carried a cargo of gasoline and naphtha for the United States Army from Bayonne, New Jersey, calling first at La Pollice, France, and then to Le Verdon and discharged her cargo at Furt, Gironde River. She sailed from Le Verdon in ballast on her return trip to New York on August 14, 1918, in convoy with 28 other vessels. The convoy broke up during the night of August 15. She was torpedoed by a German submarine and sunk on the morning of August 17.

The fact that she was in ballast at the time of her destruction is immaterial. Being a tank ship operated by and for the exclusive use of the Army Transport Service of the United States, her return in ballast for additional supplies of gasoline and naphtha for the United States Army on the fighting front was an inseparable part of her military operations.

For the reasons set out in connection with the destruction of the *John G. McCullough* the Commission holds that the *Joseph Cudahy* at the time of her destruction was impressed with the character of "military materials" and that the loss suffered by the United States resulting from her destruction is not one for which Germany is obligated to pay under the terms of the Treaty of Berlin.

Case No. 548. Steamship A. A. Raven

The Steamship *A. A. Raven*, owned by the American Transportation Company, Inc., an American national, was requisitioned by the United States through the Shipping Board, and a bare-boat requisition charter was executed on February 19, 1918. She was delivered to and operated by the War Department with a civilian crew employed and paid by and in all respects subject to the orders of the War Department. She was armed with two 3-inch guns but had no armed guard at the time of her loss. While en route in convoy on March 14, 1918, from Barry, England, to Brest and thence to Bordeaux, France, she was sunk. The German Admiralty has no record of her having been torpedoed by a German submarine as claimed by the American Agent. As pointed out by the German Agent, she may possibly have struck a mine adrift from fields planted by the Netherlands Government along the Dutch coast not far from the point where the *A. A. Raven* was sunk. The evidence that

she was torpedoed, while far from satisfactory, is sufficient to support the allegation. However, in view of the disposition which the Commission will make of this case the cause of her destruction is immaterial.

At the time of her destruction she had a cargo of food, clothing, surgical instruments, hospital supplies, piping, and rails and 400 tons of explosives, all belonging to the United States and all designed for the use of the American Army in France.

For the reasons set forth in connection with the case involving the loss of the *John G. McCullough* the Commission holds that the Steamship *A. A. Raven* was at the time of her destruction impressed with a military character and that the resultant loss to the United States is not one for which Germany is obligated to pay under the terms of the Treaty of Berlin.

From the foregoing the Commission deduces the following general rules with respect to the tests to be applied in determining when hull losses fall within the excepted class of "naval and military works or materials" as that phrase is found in paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles as carried by reference into the Treaty of Berlin:

I. In order to bring a ship within the excepted class she must have been operated by the United States at the time of her destruction for purposes directly in furtherance of a military operation against Germany or her allies.

II. It is immaterial whether the ship was or was not owned by the United States; her possession, either actual or constructive, and her use by the United States in direct furtherance of a military operation against its then enemies constitute the controlling test.

III. So long as a ship is privately operated for private profit she cannot be impressed with a military character, for only the Government can lawfully engage in direct warlike activities.

IV. The fact that a ship was either owned or requisitioned by the Shipping Board or the Fleet Corporation and operated by one of them, either directly or through an agent, does not create even a rebuttable presumption that she was impressed with a military character.

V. When, however, a ship, either owned by or requisitioned by the United States during the period of belligerency, passed into the possession and under the operation of either the War Department or the Navy Department of the United States, thereby becoming a public ship, her master, officers, and crew all being employed and paid by and subject to the orders of the United States, it is to be presumed that such possession, control, and operation by a military arm of a government focusing all of its powers and energies on actively waging war, were directly in furtherance of a military operation. Such control and operation of a ship will be treated by the Commission as *prima facie*, but not conclusive, evidence of her military character.

VI. Neither (a) the arming for defensive purposes of a merchantman, nor (b) the manning of such armament by a naval gun crew, nor (c) her routing by the Navy Department of the United States for the purpose of avoiding the enemy, nor (d) the following by the civilian master of such merchantman of instructions given by the Navy Department for the defense of the ship when attacked by or when in danger of attack by the enemy, nor (e) her seeking the protection of a convoy and submitting herself to naval instructions as to route and operation for the purpose of avoiding the enemy, nor all of these combined, will suffice to impress such merchantman with a military character.

VII. The facts in each case will be carefully examined and weighed and the Commission will determine whether or not the particular ship at the time

of her destruction was operated by the United States directly in furtherance of a military operation against Germany or her allies. If she was so operated she will fall within the excepted class, otherwise she will not.

The preliminary submissions of the thirteen cases specifically dealt with in this opinion will not be held a waiver of the right of either the American Agent or the German Agent to file in any of them additional proofs bearing on the points decided. Such additional proofs if filed will be considered by the Commission on the final submission, when the principles and rules herein announced will be applied and final decisions rendered. In the absence of further evidence, the interlocutory decisions herein rendered in each of these thirteen cases will become final.

Done at Washington March 25, 1924.

Edwin B. PARKER
Umpire

Concurring in the conclusions:

W. KIESELBACH
German Commissioner

DISSENTING OPINION OF AMERICAN COMMISSIONER

I concur in the conclusions generally, but not in the conclusion that on the facts stated with reference to the *Joseph Cudahy* she was impressed with the character of "military and naval works or materials" within the meaning of that phrase as used in the provisions of the Treaty of Versailles under consideration.

One of the conclusions concurred in is that the control and operation of a vessel by the War Department of the United States for army service, as was the case with the *Joseph Cudahy*, constitutes *prima facie* but not conclusive evidence of her military character.

Another conclusion concurred in is that in order to bring a vessel within the excepted class she must have been operated by the United States at the time of her destruction "for purposes directly in furtherance of a military operation against Germany or her allies."

On the facts stated, the *Joseph Cudahy* was returning home from France to the United States in ballast at the time of her destruction, so that she was not being operated at that time "for purposes directly in furtherance of a military operation against Germany or her allies." Accordingly the presumption arising from her control and operation by the War Department is completely rebutted by her actual use and situation at the time of her destruction.

Chandler P. ANDERSON
American Commissioner

PROVIDENT MUTUAL LIFE INSURANCE COMPANY AND OTHERS (UNITED STATES) v. GERMANY

(*Life-Insurance Claims; September 18, 1924, pp. 121-140; Certificate of Disagreement by the Two National Commissioners, April 17, 1924, pp. 103-121.*)

LIFE-INSURANCE.—INTERPRETATION OF CONTRACTS: (1) APPARENT MEANING,
(2) TERMS.—LOSS, PROFIT TO LIFE-INSURANCE COMPANY: NO CAUSAL

CONNEXION WITH CONTEMPLATION OF ACTUAL CAUSE OF DEATH. Claims on behalf of life-insurance companies for losses (unpaid premiums, premature deprivation of use of funds paid to beneficiaries) resulting from payments under life-insurance policies insuring lives of passengers lost on *Lusitania*. Assertion that war-risk, though not expressly excluded, was not contemplated. *Held* that insurer issuing life-insurance policy without expressly excluding any risk apparently takes into account every possible risk, and not only risks at basis of mortality table compiled long ago and still in use, and that provisions of policy, and not contemplation of risks by actuaries, determine risks insured. *Held* also that no relation of cause and effect exists between (a) contemplating or not of risk causing death of insured, and (b) loss or profit to insurer.

DAMAGES IN DEATH CASES: DEPENDENTS, LIFE-INSURERS.—INTERPRETATION OF TREATIES: (1) PURPOSE, (2) POSITION OF PARTY AS PRINCIPAL VICTOR, (3) *expressi unius est exclusio alterius*, (4) LOGIC.—DAMAGE: (1) ACCELERATED MATURITY OF LIFE-INSURANCE POLICY, PROPERTY LOSS, (2) RULE OF PROXIMATE CAUSE, GENERALLY RECOGNIZED PRINCIPLE OF LAW, NATURAL RELATIONS, ARTIFICIAL CONTRACT OBLIGATIONS. *Held* that Germany under Treaty of Berlin not obligated to pay for losses to insurers (reduction of margins of profit) evidently resulting from acceleration in time of payments (reference made to Administrative Decisions Nos. I and II and Opinion in the *Lusitania* cases, see pp. 21, 23, and *supra*): (1) Treaty of Versailles as carried into Treaty of Berlin (Part X, Section IV, Annex, para. 4, purpose of which is to extend Article 232 and Part VIII, Section I, Annex I, para. 1, to period of *neutrality*: position of U.S. as one of principal victors) only once mentions obligation for Germany to make compensation in death cases, namely to dependents of civilians whose death caused by acts of war, and *expressio unius est exclusio alterius* (rule of law and logic); (2) alleged losses are no "property loss" for lack of causal connexion with death of passenger (rule of proximate cause: according to generally recognized principle of law, losses of dependents are normal consequence of Germany's act, but not accelerated maturity of insurance contracts; natural relations contrasted with artificial contract obligations; payments made by companies caused not by Germany, but by contract obligations; obligation of life-insurance not one of indemnity), and because they are no economic loss to nation or nationals as a whole, but losses sustained by one group of American nationals to benefit of another.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 593-609; Annual Digest, 1923-24, pp. 203-207, 340; Kiesselbach, *Probleme*, pp. 264-279 (German text); Witenberg, Vol. I, pp. 120-139 (French text).

Bibliography: Borchard, pp. 142-143; Kersting, p. 1844; Kiesselbach, *Probleme*, pp. 12, 22-35, 67-77, 101, 103-104; Prossinagg, p. 14.

CERTIFICATE OF DISAGREEMENT BY THE TWO NATIONAL COMMISSIONERS

The American Commissioner and the German Commissioner have been unable to agree upon the decision of these ten cases, all of which arose through the sinking of the *Lusitania*, their respective opinions being as follows:

Opinion of Mr. Anderson, the American Commissioner

In determining Germany's financial obligations under the Treaty of Berlin no sound distinction in principle can be drawn between the claims which have been allowed by this Commission for pecuniary losses, resulting from deaths

caused by the sinking of the *Lusitania*, and claims of insurance companies for pecuniary losses, resulting from the premature payment of life-insurance policies on account of the death of the person insured, when caused either by the sinking of the *Lusitania* or by other acts for which Germany is responsible under the Treaty of Berlin.

This Commission has held in the Opinion in the *Lusitania* Cases, dated November 1, 1923, that—¹

Applying the rules laid down in Administrative Decisions Nos. I and II handed down this date, the Commission finds that Germany is financially obligated to pay to the United States all losses suffered by American nationals, stated in terms of dollars, where the claims therefor have continued in American ownership, which losses have resulted from death or from personal injury or from loss of, or damage to, property, sustained in the sinking of the *Lusitania*.

In the *Lusitania* Opinion it was further held that in death cases the right of action is for the loss sustained by the claimant, not by the deceased's estate, and the basis of damage is not the loss to his estate, but the loss resulting to claimants from his death.

It was also held in that opinion that one of the elements to be estimated in fixing the amount of compensation for such loss was the amount "which the decedent, had he not been killed, would probably have contributed to the claimant".

The contributions here contemplated were voluntary contributions, in the form of an allowance in some cases, and, in other cases, the payment of some periodical expenses, such as house rent, or occasional gifts of money.

The *Lusitania* Opinion also decided that in estimating the present cash value of probable contributions prevented by the death of the decedent one of the factors to be considered was—

the probable duration of the life of deceased but for the fatal injury, in arriving at which standard life-expectancy tables and all other pertinent evidence offered will be considered.

Germany's responsibility for the premature death of the probable contributor is the basis for awarding damages, and the amount of the probable contributions, thus prevented, is the basis for determining the amount of damages to be awarded.

This is demonstrated by the following extracts from the decisions of the Umpire in specific *Lusitania* cases. The Umpire held in his decision of February 21, 1924, in the Williamson case, Docket Nos. 218 and 529, as follows:

The decedent was survived by his father, Henry W. Williamson, then 75 years of age, a sister, Ellen Williamson Hodges, a brother, Harry A. Williamson, then 50 and 35 years of age respectively, and a nephew, John Baseman Williamson, son of a deceased brother (Eugene L. Williamson). In 1901 the father, at the instance of the decedent, retired from the office of Clerk of the Circuit Court of Allegany County, Maryland, and has since that time engaged in no employment, the decedent making regular contributions amounting to about \$700 per annum, sufficient to meet the father's modest needs.

The decedent had been unusually devoted to his sister, Ellen Williamson Hodges, whose husband had long been ill and died in 1916. The decedent not only contributed from time to time substantial amounts to his sister's maintenance but promised her that in the event of her husband's death he would take care of and support her. The care of her aged father now rests principally on Mrs. Hodges, who in order to support herself and father is employed in a Government department at Washington. There is no evidence that the other claimants were to any extent dependent upon the decedent or that he made any contributions to them.

¹ Page 17 *supra* (Note by the Secretariat, this volume, p. 33 *supra*.)

It is apparent from the records in these cases and another case before the Commission that the pecuniary demands upon the decedent were quite heavy, and according to the provisions of his will more than one-half of his estate (had it been solvent) was bequeathed outside of the members of his family. While decedent had he lived would doubtless have continued making modest contributions to his father and sister, it is probable that such contributions would not have been very substantial in amount.

Applying the rules announced in the *Lusitania* Opinion and in other decisions of this Commission to the facts in these cases as disclosed by the records, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of (1) Henry W. Williamson the sum of five thousand dollars (\$5,000.00) with interest thereon at the rate of five per cent per annum from November 1, 1923, and (2) Ellen Williamson Hodges the sum of ten thousand dollars (\$10,000.00) with interest thereon at the rate of five per cent per annum from November 1, 1923; and further that the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the other claimants herein.

Again in the Umpire's decision of the same date in the Robinson case, Docket No. 223, he held:

At the time of his death Charles E. H. Robinson was in the employ of the Walkover Shoe Company and en route to take charge of and manage a branch establishment in London at a salary of \$3,000 per annum. He was then 53 years of age and left surviving him a father, Charles Robinson, 81 years of age, two brothers, William R. and James H. Robinson, 54 and 52 years of age respectively, and two married sisters, 43 and 40 years of age respectively. The deceased contributed \$300 per annum to the support of his father but made no contributions to his brothers and sisters, none of whom were dependent upon him.

No claim is made for property lost.

Applying the rules announced in the *Lusitania* Opinion to the facts disclosed by the record, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Charles Robinson the sum of two thousand five hundred dollars (\$2,500.00) with interest thereon at the rate of five per cent per annum from November 1, 1923; and further decrees that the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the other claimants herein.

Again in his decision of the same date in the Allen case, Docket No. 233, the Umpire held:

On their father's death two daughters, Elsie and Ruth, found employment as teachers, while the third daughter, Dorothy, during 1913-1914 was employed by an English family as governess, devoting three hours each afternoon to her duties as such and the remainder of the time to the duties of housekeeper for the domestic establishment maintained by her mother, her sisters, and herself. To her mother she contributed from her earnings \$300 per annum.

She embarked on the *Lusitania* with the English family by whom she was employed as governess and was lost with that ship. At the time of her death she was 28, her mother 58, and her sisters Elsie and Ruth 32 and 23 years of age respectively. The decedent made no contributions toward the support of her sisters.

Decedent had with her on the *Lusitania* property of the value of \$1,267.00.

Applying the rules announced in the *Lusitania* Opinion and in the other decisions of this Commission to the facts in this case as disclosed by the record, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of (1) Hettie D. Allen individually the sum of seven thousand five hundred dollars (\$7,500.00) with interest thereon at the rate of five per cent per annum from November 1, 1923, and (2) Hettie D. Allen, Administratrix of the Estate of Dorothy D. Allen, Deceased, the sum of twelve hundred

sixty-seven dollars (\$1,267.00) with interest thereon at the rate of five per cent per annum from May 7, 1915.

This Commission having decided in the *Lusitania* cases that the expectation of voluntary contributions of this character forms the basis of awards for damages, on account of Germany's responsibility for the premature death of the contributor, it inevitably follows that insurance companies, which were carrying life insurance on those lost on the *Lusitania*, are equally entitled to compensation for the amount of the contributions which, if death had not intervened, they probably would have received in the form of premiums to be paid until the maturity of those policies.

In both cases alike the only pecuniary interest, which the claimants had in the continuation of the decedent's life, was their expectation of receiving the contributions which he probably would have made to them if he had not been killed, and the probability that his contributions, in the form of premiums, would have been continued until the maturity of his life-insurance policy is, by reason of their investment character, even more certain than the probability that he would have continued his voluntary contributions to his or his wife's relatives, which has formed the basis of the awards made by this Commission in the *Lusitania* cases.

The ten life-insurance cases, which have been submitted to the Commission for decision, all arose during the period of neutrality. In each of these cases the claim is for loss resulting from the death of an American citizen whose life was insured by the claimant and whose life was lost by the sinking of the *Lusitania*. In all of these cases the amount of the loss claimed is stated to be exactly equal to the present value, at the time of the decedent's death, of the premiums which he would have paid prior to the maturity of the policy, computed by the standard present-value tables at a 3% interest rate. The same tables, at a 5% interest rate, were used for this computation in determining the *Lusitania* awards.

The German Agent contends that in none of these cases was there a real and substantial loss by the insurance companies, because in writing the policies they took into account the risk which resulted in the premature death of the insured, and that the premiums payable on these policies were fixed at a rate which was calculated to cover that risk. The same argument could be made, even more persuasively, with reference to the other claims in the *Lusitania* cases for the loss of expected contributions, when such losses were counterbalanced by the amount of the decedent's life insurance received by the claimants.

Nevertheless, this argument has already been overruled by the Commission. In the *Lusitania* Opinion it was expressly held:

(h) The amount of insurance on the life of the deceased collected by his estate or by the claimants will not be taken into account in computing the damages which claimants may be entitled to recover.

It is contended, on the part of Germany, that a sound distinction in principle may be drawn between the contributions allowed in the *Lusitania* awards, and the contributions in the form of insurance premiums claimed in these cases. Apparently the argument is that the only lost contributions, for which awards have been made in the *Lusitania* cases, represented the expectations of relatives of the deceased, and therefore were natural consequences of Germany's act which should have been anticipated, while the loss of insurance premiums was a remote and unexpected consequence arising from contractual relations, which can not be considered in estimating the damages for which Germany is responsible.

The objection to this argument is twofold. The treaty obligations of Germany are not limited to such damages only as might have been foreseen, and the claims for expected premium contributions are not dependent on contractual obligations, but can be sustained on the same basis as the others, in which the expected contributions depended wholly on the volition of the deceased, acting in his own interest and discretion. In neither class of cases were the expected contributions legally enforceable.

It is also argued, on the part of Germany, that under the Treaty Germany is only liable for damages resulting from *injury to a person or property*, and that the life-insurance companies have suffered no injury to person or property, because no personal injury was inflicted on the corporate body and the life-insurance policy which was terminated by the death of the deceased did not constitute property in legal contemplation, and the relationship between them and the deceased was not of a character which would justify them in claiming damages for his death. This argument, it will be noted, would apply equally to the claims which have already been allowed, in the *Lusitania* cases above cited, for the loss of voluntary contributions expected from the deceased.

In order to meet this difficulty, it is further contended that those awards were not based on an obligation to compensate for lost contributions, but that those contributions represented merely the measure of damages which the United States had elected to adopt for determining Germany's financial obligation for the death of *Lusitania* passengers. Even if this explanation could be accepted as a correct statement of the basis for those awards, nevertheless, the United States would be at liberty to include these insurance premiums as part of the damages to be measured for the death of the insured, and its election to do so would be established by the fact that it has presented these claims.

The argument is fundamentally unsound, however, because by Administrative Decision No. I this Commission has determined that the liability of Germany is not limited to damages for *injuries to persons or property*. The Commission held, and definitely settled in that decision, that—

The financial obligations of Germany to the United States arising under the Treaty of Berlin on claims other than excepted claims, put forward by the United States on behalf of its nationals, embrace :

(A) All losses, damages, or injuries to them, including losses, damages, or injuries to their property wherever situated, suffered directly or indirectly during the war period, caused by acts of Germany or her agents in the prosecution of the war, etc.

This decision was rendered after full and careful consideration of all the undertakings and stipulations embodied in the Treaty of Berlin, and clearly establishes that the losses, damages, or injuries to the property of American nationals constitute only a part of the losses, damages, or injuries to them for which Germany is obligated to make compensation under the Treaty.

In conclusion, it follows, from the foregoing considerations, that in so far as the life expectancy of the deceased in each of these cases, at the time he was killed, covered the period within which the unpaid premiums under his policy were required to be paid to the claimant, and to the extent of the claimant's loss, computed on the basis of the then present value of the probable future premiums, payment of which was prevented by the untimely death of the insured, these claims are justified and should be allowed in accordance with the decisions of this Commission announced in Administrative Decision No. I and in the *Lusitania* Opinion, of November 1, 1923, and in the awards of February 21, 1924, by the Umpire in the *Lusitania* cases.

Chandler P. ANDERSON

Opinion of Dr. Kiesselbach, the German Commissioner

The argument of the American Agency is based on the contention that the insurance companies by paying insurance sums due as a result of the death of persons insured suffered a loss. The soundness of this contention may be doubtful, but in my opinion its correctness or incorrectness is not the decisive point. The controlling test is whether by the death of the person insured a damage was done to the "*property*" of the claiming insurance companies.

If it be assumed for argument's sake that the life-insurance companies in the cases laid before the Commission have sustained losses, the question is whether such losses are recoverable under the Treaty of Berlin. The losses were sustained during the period of American neutrality.

Germany is liable for "claims growing out of acts committed" during that period "by the German Government or by any German authorities"—§4 Annex to Article 298—or under the Knox-Porter Resolution, incorporated in the Berlin Treaty, for "loss, damage, or injury to their *persons* or *property*, directly or indirectly, whether through the ownership of shares of stock . . . or in consequence of hostilities or of any operations of war, or otherwise".

These provisions are interpreted under Administrative Decision No. I as making Germany liable for "all losses, damages, or injuries to them [to wit, "*American nationals*"], including losses, damages, or injuries to their *property* wherever situated, suffered directly or indirectly during the war period, caused by" all (that is, legal and illegal) "acts of Germany or her agents in the prosecution of the war".

So it is clear that the loss, damage, or injury must have been done either to a *person* (American national) or to *property* (American property).

The contention of American counsel that through the death of a person insured with an—American—insurance company such company sustained a loss, and that such fact suffices to make Germany liable, makes it necessary to come to a clear and full understanding of the basic principles of the Treaty and, as far as it is governed by international law, to an understanding of the applicable principles of such law.

I

1. Under international law it is "the indignity to the nation" which warrants interposition by the state (Borchard, "Diplomatic Protection of Citizens Abroad," page 351, section 134).

The subject of the injury must be a real and existing thing, *id est, either a person or property*.

As it is only the "seriousness of the offense" (Borchard, p. 351, §134, *op. cit.*) which can induce a nation to embrace a claim of its national, it is evident that such national must have sustained a loss to entitle him to his nation's protection. But the loss is nothing but the *consequence* of the injury inflicted; such loss is never the primary basis of the claim. It would lower the standard of the intercourse of nations to an unbearable degree if such protection were extended to every loss suffered by a national without considering the subject-matter of the injury.

2. This principle is by no means altered by the Treaty of Berlin. Section 5 of the Knox-Porter Resolution protects "all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered * * * loss, damage, or injury to their *persons* or *property*".

I cannot assume that anybody could make it a point of argument that the word "their" is not repeated in connection with the word "property" or that

anybody could contend, on the ground of the punctuation, that "loss" and "damage," being separated through a comma, are meant more generally and that only the word "injury" is *confined* to "their persons or property". But if that should be contended, it suffices to point out that the German text, which has been accepted and signed by the representatives of the United States and has the same controlling influence as the English, speaks of *their* person and *their* property ("ihrer Person oder ihrem Eigentum") and that no comma separates the words for "damage" and "injury"; thus it is absolutely clear that under the German text the phrase "Verlust, Nachteil oder Schaden an ihrer Person oder ihrem Eigentum" means "loss or damage or injury done to the *person* or the *property*" of an American national (within the meaning of the Treaty).

My conclusion is therefore that as well under international law as under the Treaty of Berlin it is not sufficient that a national has suffered a *loss*, but the *loss*—or *damage* or *injury*—must have been sustained in the *person* or the *property* of the national.

II

Now, it is obvious that the loss sustained by claimants was not suffered through an injury to their persons.

The only contention possible, and the contention put forward by American counsel, is therefore that the *property* of the claimants has been injured.

This contention makes it necessary to examine and define what is meant by the term "property" in the Treaty.

A. To answer that enquiry it is first necessary to keep in mind certain facts of a rather negative but nevertheless far-reaching importance.

1. It is *not* clause 9 of Annex I to Article 244 of the Treaty of Versailles that we have to deal with here. Clause 9 deals with Germany's liability during the period of *belligerency*; here we deal with the period of neutrality. Therefore the sole source of liability is Section 5 of the Knox-Porter Resolution, plainly speaking of "property"—and nothing else.

2. The framers of that resolution did *not* apply the somewhat broader phrase used in Clause 9 ("property * * * *belonging to*") or the even broader phrase "property, *rights* and *interests*" used in other parts of the Versailles Treaty but the word "property" as such.

The use of such different phrases shows that there are different methods of defining the object protected under the Treaty by expressions of a broader or of a more restricted meaning ("property," "property belonging to," "property, rights and interests"); and the use of the term "property" in the Knox-Porter Resolution shows that this resolution has accepted and *expressed* the most restricted conception.

3. As already pointed out, the Treaty of Berlin proper with the Knox-Porter Resolution as incorporated therein has an English and a German text of equally controlling effect.

Furthermore the Treaty is a contract between the two nations. It is therefore *not* possible to look solely to what *one* party thereto may have contemplated in accepting the Treaty, and it is *not* possible to take the meaning of the treaty exclusively from the English text and, as far as the question at issue here is concerned, from the English word "property" only.

It must be considered what *both* nations meant and what is the identical meaning of "property" and "Eigentum".

B. On the other hand Clause 9 of Annex I to Article 244 of the Versailles Treaty is not wholly immaterial here for the *interpretation* of the meaning of

the word "property" in the sense of Section 5 of the Knox-Porter Resolution, for the following reasons:

1. The Knox-Porter Resolution and the Berlin Treaty do not only deal with the period of neutrality but also with that of belligerency. The resolution cannot have a different meaning in the same word for both periods.

Therefore if and so far as we know what was the attitude of the framers of the Knox-Porter Resolution with regard to the period of belligerency, the framers must have had in mind the same interpretation for the same word for the period of neutrality.

Now, we know from the diplomatic notes that Germany was anxious not to increase the heavy burden laid upon her by the Treaty of Versailles and wanted therefore to be sure that the Berlin Treaty did not go beyond the Treaty of Versailles. And we know that in the so-called Dresel Note Germany received the assurance that "It is the belief of the Department of State that there is no real difference between provisions of the proposed treaty relating to rights under the Peace Resolution and the rights covered by the Treaty of Versailles except in so far as a distinction may be found in that part of Section 5 of the Peace Resolution, which relates to the *enforcement* of claims of United States citizens for *injuries to persons and property*."

This declaration would never have been made to Germany if the authors of the Treaty and the American Government had intentionally and deliberately broadened the corresponding obligations of the Versailles Treaty. That no such intention existed is further proved by the fact that in reality they *restricted* the scope of Clause 9 through the Knox-Porter Resolution by substituting the term "property" for the corresponding phrase "property *belonging to*".

To avoid misunderstanding I may add here that nevertheless *for the period of belligerency* Clause 9 with its broader phrase is of course controlling, the United States having reserved to themselves the respective rights of the Versailles Treaty.

2. It is therefore necessary to examine the meaning of Clause 9. To do that I will briefly consider its history, its wording, and its application.

a. With regard to the *antecedents* of the clause it must be borne in mind that before the conclusion of the Treaty of Versailles the Powers concerned had already *agreed* to terms of peace. To *apply* these terms was the purpose of the Paris Conference (Baruch, "The Making of the Reparation and Economic Sections of the Treaty," page 290); "the object of peace discussions would be only to agree upon the *practical details* of their *application*" (Temperley, "A History of the Peace Conference of Paris," I, page 382).

In applying these terms the Powers stated in a note to Germany that the conditions of peace "have been prepared with *scrupulous regard* for the correspondence leading up to the Armistice of November 11th, 1918, *the final memorandum of which, dated NOVEMBER 5TH, 1918*" (Temperley, II, page 311).

While I will not stop to inquire whether this regard was really so scrupulously taken as contended, still it is clear that, under the rules of legal interpretation as well as under the rules of fairness, there can be no doubt that this formal and solemn declaration requires the application of the principles unanimously accepted by all Powers in the Agreement of November 5, 1918, *at least in so far* as the provisions of such Agreement are not *expressis verbis* altered and changed in the Treaty of Versailles.

It is furthermore within the rules of law and fairness to give in every case the benefit of the doubt to that party to the Treaty which relied on the November terms.

Therefore it is of the utmost importance to remember that the Agreement of November 5, 1918, provided for compensation for damage done to the civilian population and *their property*.

It was the Government of the United States which formulated these terms, and it is therefore furthermore of importance that we know what that Government understood under these terms.

We know that the American delegation which certainly represented the American Government at the Peace Conference prepared and filed with the Reparation Section of the Peace Conference a statement of reparation principles. We know that these principles were understood as binding Germany to "make good her pre-armistice agreement as to compensation for all damage to the civilian population and their property, this being construed * * * to mean direct *physical damage to property* of non-military character and direct *physical injury to civilians*" (Baruch, *op. cit.*, page 19).

We know that the Allied Powers abandoned these principles to a certain degree in framing Annex I designed to define the damages mentioned in Article 232.

But it is important to bear in mind that *as far as "these principles" were not altered they are doubtless maintained.*

b. And this conception is confirmed by the fact that Article 232 covers the Peace Agreement of November 5, 1918, by *repeating its wording*. Moreover the wording of Clause 9 shows again that the draftsmen of the Treaty and of that clause had in mind what was agreed upon in the Peace Agreement of November 5, 1918, and that they understood "property" in the sense of *tangible things*:

"property *wherever situated*": It would at least be unusual to say that a contractual right is "situated" somewhere.

"property * * * which has been *carried off, seized, injured or destroyed* by the acts of Germany or her allies on land, on sea or from the air": While it is possible to carry off, seize, injure, or destroy tangible things "on land, on sea or from the air," it can hardly be contended that that is logically possible with regard, for instance, to the right of a person to demand the payment of an amount of money from another person.

"property * * * *belonging* to any of the Allied or Associated States or their nationals": It would at least be unusual to say that a contractual right "belongs to" a person.

c. And finally we see from the *application* of this clause that nothing else but real *material* and tangible property was to be paid for by Germany.

Nowhere in the voluminous Reparation Accounts, so far as they are specific, is there any mention of claims for contractual rights and especially for rights of life-insurance companies.

Hence it is obvious that the Allied and Associated Powers, which certainly did not intend to release Germany from any obligation laid upon her by the Treaty and which presented large claims for lives lost, did not consider claims of life-insurance companies as falling under the Treaty.

C. Now it is argued that under the *Lusitania* rules Germany's liability is based not on the loss to the estate of the deceased but on the loss resulting to claimants from his death.

This contention is correct in so far as the Commission in measuring the damages in death cases has decided to consider the losses resulting to claimants from such death.

But that does not prove that the right to claim for such losses as allowed by the Commission is "property".

The *Lusitania* decision clearly states therein that "rules applicable to the 'measure' of damages in *death cases* will be considered."

A nation injured through the death of its national has at its election different ways to present the claim for such injury.

It may claim a lump sum for each life lost as such, as is done by many of the Allied Powers in their Reparation Accounts; or it may claim on behalf of the surviving—and dependent—relatives, as the Government of the United States has elected to do here, and as often (*not* always) has been done before international arbitral commissions (see III Moore's Arbitrations, pages 3004, 3005, 3007, 3012, 3138; but see also II Moore's Arbitrations, page 1384).

But in both cases the Governments are free to distribute the amounts so measured and so awarded as they see fit. So, for instance, Great Britain has not distributed the amounts put into the Reparation Account for death cases either to the surviving families or to the estate of the deceased, but has appropriated a certain sum wholly independent from what Germany had to pay and has established a commission to distribute *this* sum as it deems fit.

A further evidence that the amounts granted to the surviving claimants do only constitute items of "measuring" the damages may be derived from the fact that the Commission's decision makes it a rule to estimate—among others—the amounts which the decedent would probably have "contributed" to the claimant. Following this rule the Commission has considered contributions a son had sent to his parents not at all dependent upon him, and a father to his married daughter. In these cases there would be no enforceable "right" of the surviving party against the decedent during his life time.

So it is clear that the Commission did not deal here with the question of defining "property," but, as already said, only with establishing certain principles to *measure* the damage.

An evidence—rather convincing, in my opinion—for this contention is further that in analogy to this construction the framers of the Versailles Treaty in fixing Germany's liability for the period of belligerency speak of rights of the *surviving dependents*, but do *not* mention them in connection with "*property*" loss or damage—clause 9—but in *connection with damage "caused * * * to CIVILIAN VICTIMS"*—(Clauses 2 and 3).

So it is clearly shown that these rights were *not* considered as "property" but merely as a means of measuring the damage in death cases.

The differences in the consequences of the construction are so obvious that I hardly need to point them out: If these "rights" were "property" protected under clause 9, every surviving American dependent of even a slain soldier would have a right to compensation. For it would be *his* property (the property of a national) which sustained the loss. But if it is only a *measure* of damage, such claim can only be raised if the deceased was a "civilian victim."

D. So it is shown that the term "property" as used in the Knox-Porter Resolution is to be presumed to have the same meaning as in clause 9 of Annex I to Article 244, and that in the meaning of this provision "property" comprises only tangible things. It has been furthermore shown that such construction is not at variance with the *Lusitania* Opinion.

The same consequence must be drawn from an examination of the German text of the Knox-Porter Resolution.

As already pointed out, the German text contains the word "Eigentum", a word of a clear and strictly legal meaning comprising only the exclusive power and control over tangible things. As said in "Der Kommentar der Mitglieder des Reichsgerichts" (Comment on the Municipal Law as contained in the Codification of 1900; published by the joint members of the German Supreme Court):

“Es gibt Eigentum nur an Sachen (Sect. 90), nicht an Rechten oder anderen unkoerperlichen Gegenstaenden * * *”.

(“Property is only conceivable with regard to tangible things, *not* to rights or other intangible things.”)

And as said in Simeon, “Recht und Rechtsgang”, 1901, Bd. 1, p. 573:

“Eigentum ist das Recht der Herrschaft ueber eine koerperliche Sache in allen ihren Beziehungen”.

(“Eigentum is the right of absolute control over a tangible thing in every respect”.)

It appears therefore that the term “Eigentum” can under no circumstances cover either the relation between a life insurer and his insured or that between a man and his dependent wife or father.

E. Although according to what is said before a doubt as to the meaning of “property” as used in the Knox-Porter Resolution seems hardly possible, I may finally again refer to the well known rule as acknowledged in the *Lusitania* Opinion, page 31, that in case of doubt “The language * * * will be strictly construed against” the United States, the language “being that of the United States and framed for its benefit”.

III

To avoid misunderstanding I want to make it clear that according to my conception the Treaty does not justify an award for every *loss* suffered by an *American national* but only for those claims which can be based on *provisions* of the Treaty, that is for claims for damage done to *persons* or their *property*.

The obligations laid upon Germany under the Treaty go so far beyond what would be justified under international law, and are so heavy, that, as already shown, they cannot be enlarged by *ignoring* the rules established under the Treaty. Its wording does not only *fix* Germany's liability but also fixes the *limitations* upon it.

If, therefore, some American losses are not recoverable under the law of the Treaty, *such law*, and not the interest of the claimant, must prevail.

Where the Treaty provisions are clear, Germany must bear the consequences, even if they appear to be unsound. However, where the interpretation of a Treaty provision is doubtful and contested, the soundness or unsoundness of the consequences of such interpretation must be taken into account and will have decisive bearing on the interpretation of the provision.

Now here the consequences of the contention of American counsel would be the following:

The relation between the life-insurance company and the insured is, according to his contention, property—that is, *property of the company*.

Every payment to a person insured with an American company and prematurely killed in the war is—according to American counsel's contention—a loss in connection with such property, for which Germany is liable. If such contention were correct, it would necessarily follow that Germany would have to compensate the American insurance companies for all “losses” sustained through the death, not only of every American soldier insured and killed, but also (during the period of belligerency), of every British, French, Italian, and even German soldier insured—Germany being made liable even for the acts of her enemies directly in consequence of hostilities and of any operations of war! No argument can avoid this consequence if the relation between the insured and the life-insurance company is considered as “*property*” of the *life-insurance company*.

Dr. Wilhelm KIESSELBACH

Summary of German Commissioner's opinion

INTRODUCTION: The legal basis for claims may either be loss, damage, or injury to a *person* of American nationality or loss, damage, or injury to American *property*:

I. A "loss" as such is not the basis of claims—

- (1) Either under international law;
- (2) Or under the Berlin Treaty incorporating the Knox-Porter Resolution.

II. The claims of the life-insurance companies being here under consideration (period of neutrality) cannot be based on damage to "property" within the meaning of the Knox-Porter Resolution.

A. Negative circumscription of the term "property" in the above sense:

(1) The source of law is not § 9 of Annex I to Part VIII of the Treaty of Versailles.

(2) The wording of the Knox-Porter Resolution with regard to "property" is not identical with the analogous provisions of Part VIII and Part X of the Treaty of Versailles.

(3) It is not admissible to take into account the English text alone.

B. Conclusions with regard to the meaning of "property" within the meaning of the Knox-Porter Resolution reached by comparison with § 9 of Annex I to Part VIII of the Treaty of Versailles:

(1) Germany's liability with respect to the term "property" has obviously not been intended to be broader for the period of neutrality than it is for the period of belligerency.

(2) "Property" within the meaning of § 9 of Annex I to Part VIII of the Treaty of Versailles—

- (a) Interpretation on the basis of the antecedents of the Treaty.
- (b) Interpretation on the basis of the wording of § 9 of the Annex.
- (c) Interpretation on the basis of the application of § 9 by the Allied Powers.

C. A narrow construction of the term "property" is not at variance with the *Lusitania* rules.

D. Such construction is confirmed by the German text.

E. Any remaining doubts must lead to a construction of the meaning of the Treaty against the United States.

III. The logical consequences of a theory differing from the present interpretation would be absurd.

The two National Commissioners accordingly certify the above-mentioned cases to the Umpire of the Commission for decision.

Done at Washington April 17, 1924.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

Decision

PARKER, *Umpire*, in rendering the decision of the Commission delivered the following opinion:

The Commission is here dealing with a group of ten typical cases put forward by the United States on behalf of certain American life-insurance companies to recover from Germany alleged losses resulting from their being required to make payments under the terms of eighteen policies issued by them insuring the lives of eleven of the passengers lost on the *Lusitania*. The American Commissioner and the German Commissioner have certified their disagreement and these cases are before the Umpire for decision.

The German Agent, admitting that payments were made by the insurers as claimed, denies that any part of such payments represents losses to them. In submitting this issue the nature and history of life insurance have been exhaustively presented in the briefs and arguments of counsel. Those arguments run thus:

The American Agent contends that the life-insurance contracts in question were contracts for life based on mortality tables; that the American Experience Table of Mortality (hereinafter designated "American Table") is the one generally used by American companies in writing insurance contracts;¹ that the American Table is compiled from the policy experience of the Mutual Life Insurance Company of New York based on the number dying each year at given ages out of groups of 100,000; that by applying the law of averages to this actual experience this table was constructed; that this experience is the experience of peace; that the risks of war, which are much greater than the risks of peace, are not a part of the scheme of life insurance; that the cost of insurance, including death losses, is provided for from premiums paid by policyholders improved at interest; that the mortality table determines the amount of the premiums charged; that for each premium paid a portion is set aside for the purpose of retiring that particular policy, a portion goes toward the general expense of operating the company, and the balance goes into a general mortality fund, out of which death losses are paid as they occur; that if a policyholder lives to mature his policy within the assumption as to mortality the premiums which have been paid, improved at interest, are sufficient to pay the policy at maturity: that if a policyholder dies prior to the date of the assumed mortality *and from a cause comprehended in the law of average* the policy is paid from the funds contributed in premiums by other policyholders, *and the insurance company therefore actually suffers no loss*; that in five of the policies here involved the assumption of risk due to the policyholder engaging in the naval or military services was expressly excluded and in the other policies no mention was made of such service risks, which were regarded as nonexistent, so that in none of these cases did the claimants receive a premium to pay for a *war-service risk*; that the premiums charged in the policies which ignored war-service risks were no higher in any instance than the premiums charged in the policies which expressly excluded war-service risks; that *if an insurer is compelled to pay under a policy where death results from a war risk which was not in contemplation and for which no premium to provide for such risk had been specifically exacted the company sustains a loss*; that the sinking of the *Lusitania* was an act of war; that such sinking was in violation of the rules of international law and was not and could not have been in the contemplation of the parties when the policies were issued; that Germany's act in sinking the *Lusitania* forced the premature payment of the face of the policies here involved; that the insurers had not charged or received any premium with which to make such premature payments and therefore in each instance suffered a loss equal to the difference between the face of the policy and the reserve, which amounts are here claimed; and that losses so suffered are property losses.

In its last analysis the argument of American counsel may be stated thus:

If a policyholder dies prior to the date of his life expectancy as evidenced by the mortality table used to determine the amount of the premium paid, and *from causes taken into account* in the compilation of such table and therefore comprehended in the law of averages, payment of the face of the policy in excess of the reserve is made from funds contributed in premiums by other

¹ In these cases it was used save in one instance, and the table used in that instance did not differ substantially from the American Table.

policyholders belonging to the same group, and therefore the insurer suffers no actual loss.

But deaths from causes not contemplated or taken into account in the compilation of the mortality table used are not paid for in premiums received, and hence result in losses to the insurer.

Deaths resulting from risks of war are not included in deaths taken into account in the compilation of the mortality tables used by claimants.

The policyholders whose lives were lost on the *Lusitania* came to their deaths through a risk of war, and hence the insurers, while liable under the terms of the policies, have not been paid for this risk and have consequently suffered losses, which are property losses, equal to the difference between the face of the policies and the reserves.

The German Agent replies that the business of insurance is based upon the average expected death rate among a large group; that such expectation is based upon the previous experience of insurers: that the fact that the death of a single insured individual occurs as a result of causes not in contemplation when the contract of insurance was entered into, standing alone, in no way affects the result or causes loss to the insurer; that the fact that the previous experience of insurers does not furnish data from which the probability of the death rate from certain causes can be approximated is immaterial in determining whether or not it has sustained a loss; that the true test of whether or not an insurer has suffered losses is whether the actual death rate among a given group exceeds the expected death rate from that group; that the American Table, which the American Agent contends was used as a basis for fixing the premiums in the policies involved in these claims, was compiled from the actual experience of the Mutual Life Insurance Company of New York covering a period from 1843 to 1860, inclusive; that since it was compiled society has not remained static, but the average human life has been very greatly lengthened through improved hygienic conditions, notwithstanding there has followed in the wake of the progress of civilization numerous hazards, causing many deaths, unknown at the time the American Table was compiled;² that the possibility of the increase of presently unknown hazards is within the contemplation of insurers and they actually and necessarily take such possibilities into account in fixing premiums; that, in the face of the demonstrated fact that the death rate among their policyholders was actually and increasingly less than the rate indicated as probable by the American Table, the insurers continued to use such table for the reason, among others, that they were thus provided with a safe margin out of which to pay claims arising from hazards which from their very nature are not subject to prognostication with a reasonable degree of certainty; that the insurers, finding that the basis of their operations gave them a very wide margin of profit, under the pressure of competition for new business eliminated from their policies all exceptions of

² From the table of "Death Rate Per Cent of Mean Insurance in Force of 56 Life Insurance Companies, 1903 to 1922, inclusive" appearing in the Insurance Year Book for 1923—Life Insurance, compiled and published by the Spectator Company, it appears that there was, speaking generally, a steady decrease in the death rate (with a few unimportant exceptions) from 1903 to 1918; that in 1915, the year of the *Lusitania* disaster, there was a slight increase over the previous year, but the death rate for 1915 was lower than in any previous year save 1913 and 1914; that in 1918, the year of the influenza epidemic and also the year when the United States had its armies on the fighting front, the rate increased substantially, but beginning with 1919 it decreased steadily, falling to 0.79 in 1921 as against 1.22 in 1903. Eleven of the 12 companies claimants herein were included in the 56 companies from whose actual experience this table was compiled.

war risks and practically all other restrictive clauses;³ that the risks of war—not only the risk of war service but risks to noncombatants incident to war—were known to insurance actuaries and must have been taken into account by them before and at the time the policies here involved were written; that certain insurers, writing both straight life insurance and accident insurance, did recognize the risks of war to noncombatants prior to the sinking of the *Lusitania*, as is evidenced by the accident policies on the lives of Mr. Vanderbilt and Mr. Hopkins, both lost on the *Lusitania*, which provided that “Nor shall this insurance cover * * * death * * * resulting, directly or indirectly, wholly or partly, from * * * war”;⁴ that following the sinking of the *Lusitania* no American insurer expressly excluded from its straight life-insurance policies war risks to noncombatants, nor does any such exclusion appear in the policies which they are now writing, notwithstanding such risks, however remote, must be within their contemplation in the light of the experience of the World War; and, finally, that the actual value of any one isolated risk carried by an insurer is not determinable, because the law of average is fundamental in life insurance, and while a prediction as to the longevity of life based on past experience as applied to the average of a large group of persons may be safely made, such a prediction in the very nature of things cannot be made of a single individual, and hence the only way to determine whether an insurer has or has not sustained a loss is to ascertain whether or not the actual death rate of the group to which the policy belonged exceeds the expected death rate for that group; that there is no claim here made of any group loss, and it is to be inferred that the books of the claimants show profits and safe reserves as applied to the groups to which the policies here under consideration belong, and hence no losses have been suffered by the claimants.⁵

Without undertaking to follow these arguments in detail, it is apparent that in issuing a life-insurance policy without expressly excluding any risk, and in insuring the life of an individual without any restrictions whatsoever, self-protection and sound business policy must have impelled the insurer to take into account every possible risk without limiting itself to those forming the basis of a mortality table used by the insurer compiled more than half a century before the *Lusitania* was sunk. Even if that table be controlling, it is certainly not the only factor taken into account by actuaries in determining what the risk really is and the amount of the premium to be paid. One weakness in the argument of the American Agent is the erroneous assumption of fact that the mortality table absolutely determines the amount of the premium exacted. It may be the only yardstick, however arbitrary, used by the agents

³ The American Table was based on actual experience under policies expressly excluding certain hazardous occupational risks and also travel risks in the Tropics or in the western part of the United States, inhabited by Indians. All these exceptions have long been eliminated from policies; and these risks, to the extent of their existence in fact, are assumed by insurers, as well as innumerable other risks unknown when the American Table was compiled.

⁴ *Vanderbilt et al. v. Travelers' Insurance Company*, 1920, 184 N. Y. Supp. 54, affirmed 1922, 202 N. Y. App. Div. 738; *Hopkins v. Connecticut General Life Insurance Company*, 1918, 225 N.Y. 76.

⁵ The published reports of the claimants herein which are contained in the Insurance Year Book for 1923—Life Insurance, compiled and published by the Spectator Company, far from indicating that any group losses have been sustained by any of the claimants resulting in the impairment of their reserves, indicate exactly the contrary. In fact, the dividends paid to policyholders by mutual companies are constantly increasing, even to the point of exceeding the amount paid on death claims.

in soliciting insurance, but the actuaries, in prescribing a schedule or formula to be applied by such agents and in finally accepting or rejecting each risk at the home office, must of necessity take into account changes wrought in the structures and conditions of civilization since the table was compiled, including the lengthening of the average human life through improved hygienic conditions, as well as increased hazards due to the introduction and use of numerous transportation and industrial devices then unknown, unthought of, and unimagined.

The provisions of the policy, not what risks its actuaries had or should or could have had in contemplation in issuing it, determine what an insurer is paid for. Losses or profits are facts determinable without reference to the independent fact of the cause of death and whether or not such cause was in the contemplation of the insurer when the policy was issued. Profits may flow from policies or groups of policies where deaths result from causes not contemplated, in the sense they could not have been foreseen. Losses may be sustained under policies or groups of policies where deaths result from causes clearly within the contemplation of the insurer when writing them.

Deaths from earthquakes, fires, and contagious and infectious diseases must be within the contemplation of insurers and hence, even according to the American Agent's argument, paid for. And yet such disasters as the San Francisco earthquake and fire, the Galveston storm and tidal wave, the recent disaster of Tokyo and Yokohama, and even the influenza epidemic that swept through the United States in 1918-1919 may well result in group losses to insurers, from deaths far exceeding the expected death rate of such groups. It is significant that the losses suffered by American insurers in 1918-1919 from the deaths due to influenza—clearly within their contemplation—were greater than their war losses, which the American Agent contends were not within their contemplation.

In the sense that unforeseen, and hence un contemplated, causes of death cannot *eo nomine* be taken into account in computations under the law of averages, upon which all insurance is based, such risks have not *eo nomine* been provided against in premiums received. But under sound actuarial practices they have been designedly provided against by the margin of safety which the premiums exacted afford. And in actual practice unusual and unexpected death payments are as likely—perhaps more likely—to result from contemplated as from un contemplated causes of death. In other words, there exists no relation of cause and effect between (1) the contemplating or not by the insurer at the time of issuing a policy of the risk which subsequently causes the death of the insured and (2) the loss or profit, as the case may be, under such policy to the insurer.

The contention of the American Agent that the insurers must necessarily have sustained losses where they were compelled to pay for the deaths of their insured, resulting from a war risk not in contemplation and for which no premium was specifically exacted to cover such risk, is rejected.

But it is evident that the acceleration in the time of payments which the insurers had in their policies contracted to make resulted in losses to them in the sense that their margins of profits actual or prospective were thereby reduced. For the purpose of this opinion it will be assumed that in this sense losses were suffered by the insurers in the amounts claimed,⁶ and the con-

⁶ While American insurers suffered losses caused by the acceleration in the time of payments of death claims, it will be borne in mind that payments made by American insurers to American beneficiaries involved no national loss. The insurers do not complain that Germany's act deprived America of property but only that

tion of the German Agent that the insurers sustained no losses is rejected.

The question remains, Under the terms of the Treaty of Berlin is Germany financially obligated to pay losses of this class? The Umpire decides that she is not.

This decision results from the application of Administrative Decisions Nos. I and II of this Commission ⁷ to the facts in these cases. In view of the opinions of the National Commissioners embraced in their certificate of disagreement herein, the provisions of the Treaty of Berlin upon which these Administrative Decisions and the Opinion in the *Lusitania Cases* ⁸ rest, in so far as they directly affect the decision in this case, will be briefly examined.

The Treaty of Berlin is by its express terms based upon the provisions of sections 2 and 5 of the joint resolution of the Congress of the United States approved by the President July 2, 1921, ⁹ declaring, with stipulated reservations and conditions, the war between Germany and the United States at an end. These *ex parte* reservations were by Article I of the Treaty of Berlin adopted by Germany as its own. By virtue of this article Germany accords and the United States has and enjoys all of the rights, privileges, indemnities, reparations, and advantages specified in the resolution of Congress.

Looking to section 2 of that resolution to ascertain what rights, etc., are therein "specified," we find that there is "expressly reserved" to the United States and its nationals all of the then existing rights, privileges, indemnities, reparations, or advantages of whatsoever nature, together with the right to enforce the same, and that the United States and its nationals shall have and enjoy all of the rights stipulated for its and their benefit under the Treaty of Versailles.

Looking to section 5 of the resolution to ascertain what rights, etc., are therein "specified," we find it stipulated in substance that the United States shall retain (unless otherwise theretofore or thereafter expressly provided by law) all property of Germany or its nationals or the proceeds thereof held by the United States until such time as Germany shall make "suitable provision for the satisfaction of all claims" against Germany of American nationals who have suffered through the acts of Germany or its agents losses, damages, or injuries to their persons or property, directly or indirectly, whether through the ownership of stock in any domestic or foreign corporation, or in consequence of hostilities or of any operations of war, or otherwise.

Through the adoption as her own of the provisions of this resolution of Congress and according that the United States shall have and enjoy all of the rights, privileges, indemnities, reparations, or advantages specified in the said resolution, Germany obligated herself to pay to the United States claims falling within categories embraced within the resolution, including those defined by such of the provisions of the Treaty of Versailles as are incorporated by reference in the Treaty of Berlin. ¹⁰ The financial obligations of Germany are

(Footnote continued from page 107.)

Germany's act resulted in the premature payment of money from one group of American nationals to another group of American nationals in pursuance of inter-contractual relations between them,

⁷ Decisions and Opinions, pages 1-15 inclusive. (*Note by the Secretariat*, this volume pp. 21-32 *supra*.)

⁸ Decisions and Opinions, pages 17-32 inclusive. (*Note by the Secretariat*, this volume, pp. 32-44 *supra*.)

⁹ 42 United States Statutes at Large 105; this joint resolution will hereinafter be designated "resolution of Congress".

¹⁰ This construction of the Treaty of Berlin has been expressly adopted by Germany in a formal declaration presented to this Commission by the German Agent on May 15, 1923, in which it was declared that "Germany is primarily liable with respect to

limited to claims falling within such categories, the amounts of which are to be judicially ascertained and determined by this Commission.

Looking to so much of the Treaty of Versailles as by reference has been carried into the Treaty of Berlin, to ascertain what rights are there stipulated for the benefit of the United States and its nationals with which we are here concerned, and paraphrasing the language to make it applicable to the Treaty of Berlin, we find that in Part VIII, dealing with "Reparation" (Article 232), Germany undertakes to "make compensation for all damage done to the civilian population of the United States and to their property during the period of belligerency, * * * and in general all damage as defined in Annex I hereto."¹¹ The use of the phrase "*and in general all damage as defined in Annex I hereto*" is significant. By it Germany's undertaking is extended beyond the scope of "damage done to the civilian population" to embrace *all* "damage as defined in Annex I." In Article 232 and Annex I is found the basis for Germany's financial obligations to the United States arising under the Treaty of Berlin on claims for all damages suffered by American nationals *during the period of American belligerency*, which obligations are enumerated in the major section (B) and subsections of this Commission's Administrative Decision No. I.¹²

Germany's obligations to pay claims put forward by the United States on behalf of its nationals *during the period of American neutrality* are based (1) on the provisions of section 5 of the resolution of Congress hereinbefore examined and (2) on that provision of the Treaty of Versailles wherein Germany in substance undertakes to pay "claims growing out of acts committed by the German Government or by any German authorities" during such neutrality period.¹³

This provision of the Treaty does not define the "claims" referred to, which are obviously in the nature of reparation claims. But other provisions of this

(Footnote continued from page 108)

all claims and debts coming within the jurisdiction of the Mixed Claims Commission under the Agreement of August 10, 1922." Minutes of Commission, May 15, 1923.

Article I of the Agreement of August 10, 1922, establishing this Commission and defining its powers and jurisdiction provides that:

"The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

"(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

"(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

"(3) Debts owing to American citizens by the German Government or by German nationals."

See also paragraph (e), subdivision (2) of paragraph (h), and paragraph (i) of Article 297 and Article 243 of the Treaty of Versailles.

¹¹ It will be noted that the language of Article 232 is practically identical with that in the Pre-Armistice Memorandum prepared by the Allied Powers and on November 5, 1918, presented by President Wilson to, and accepted by, Germany which provided that "compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea, and from the air".

¹² Decisions and Opinions, pages 2 and 3, (Note by the Secretariat, this volume, p. 22).

¹³ Paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles. See also declaration of German Government through German Agent, note 10 *supra*.

same Treaty do enumerate the categories of reparation claims arising during belligerency which Germany undertakes to pay as a condition of peace, and these may be looked to in determining the nature of the reparation "claims" here dealt with arising during neutrality, which Germany likewise undertakes to pay as a condition of peace. The position of the United States as one of the principal victorious participants in the war¹⁴—a position it has at every step carefully preserved—entitled it to demand that, notwithstanding it might decline to press government claims for reimbursement of the cost of pensions and separation allowances,¹⁵ its nationals should not be penalized for its neutrality, but should, with respect to all damages caused during the period of American neutrality by the acts of Germany, be placed on a parity with the nationals of its Associated Powers suffering damages during that period. This was the purpose of the provision last quoted,¹⁶ the effect of which is to bind Germany to pay reparation "claims" of American nationals for losses suffered by them growing out of Germany's acts during the period of American neutrality and falling within the categories defined in Article 232 and Annex I supplemental thereto, just as Germany is bound to pay all other Allied and Associated Powers for similar losses suffered by their nationals under similar circumstances during the same period and in some instances caused by the same act.

Under the provisions of Article 232 of the Treaty of Versailles Germany is obligated to make compensation for damage done to American civilian nationals and to their property during the period of American belligerency. The annex supplementary to Article 232, and referred to therein, expressly obligated Germany to make compensation (a) for damages suffered by the American surviving dependents of civilians whose deaths were caused by acts of war,¹⁷ and also (b) for damages caused by Germany or her allies in respect of all property wherever situated belonging to the United States or its nationals.¹⁸ These and other obligations embraced in the Treaty of Versailles are by the provision last quoted¹⁹ extended to damage caused to American nationals by Germany's act during the period of American neutrality.²⁰ Under section 5 of the resolution of Congress Germany is obligated to pay all claims against Germany of American nationals who have since July 31, 1914, "suffered, through the acts of the Imperial German Government, or its agents, * * * loss, damage, or injury to their persons or property, directly or indirectly." All of these provisions constitute a part of the Treaty of Berlin. From them this

¹⁴ Section 2, resolution of Congress.

¹⁵ See note 11, Decisions and Opinions, pages 14 and 15. (*Note by the Secretariat*, this volume, p. 31)

¹⁶ See note 13 and concluding clause of next preceding paragraph.

¹⁷ The first category of this Annex I (to Section I of Part VIII, Reparation) reads: "(1) Damage to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war, including bombardments or other attacks on land, on sea, or from the air, and all the direct consequences thereof, and of all operations of war by the two groups of belligerents wherever arising."

¹⁸ The ninth category of this Annex I reads:

"(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war."

¹⁹ See note 13.

²⁰ Paragraph 4 of the Annex to Section IV of Part X, Treaty of Versailles.

Commission deduced the rules embraced in its Administrative Decision No. I ²¹ which, in so far as they apply to the cases here under consideration, read:

“The financial obligations of Germany to the United States arising under the Treaty of Berlin on claims other than excepted claims, put forward by the United States on behalf of its nationals, embrace:

“(A) All losses, damages, or injuries to them, including losses, damages, or injuries to their property wherever situated, suffered directly or indirectly during the war period, caused by acts of Germany or her agents in the prosecution of the war, provided, however, that during the period of belligerency damages with respect to injuries to and death of persons, other than prisoners of war, shall be limited to injuries to and death of civilians”.

This brings us to the enquiry, What claims for damages suffered growing out of losses of life on the *Lusitania* are within the Treaty of Berlin?

As heretofore pointed out that Treaty expressly obligates Germany to make compensation for damages suffered by the American surviving dependents of civilians whose deaths were caused by acts of war occurring at any time during the war period. ²²

Nowhere else in the Treaty is express reference made to compensation for damages sustained by American nationals through injuries resulting in death. Looking, therefore, to the only provision in the Treaty of Berlin which expressly obligates Germany to make compensation in death cases, we find that such obligation is limited to damage suffered by American surviving dependents resulting from deaths to civilians caused by acts of war. Under familiar rules of construction this express mention of surviving dependents who through their respective governments are entitled to be compensated in death cases excludes all other classes, including insurers of life. The maxim *expressio unius est exclusio alterius* is a rule of both law and logic and applicable to the construction of treaties as well as municipal statutes and contracts. ²³

This was the construction placed upon this provision of the Treaty of Versailles by the Allied Powers in presenting their reparation claims against Germany, and all claims of life-insurance companies similar to those here presented were excluded by them. ²⁴

The Commission experienced no difficulty in holding that Germany is financially obligated to pay to the United States all losses suffered by American nationals as surviving dependents resulting from deaths of civilians caused by acts of war. Such claims for losses are embraced in the phrase “all losses, damages, or injuries to them” found in the rule above quoted from Administrative Decision No. I. Germany’s obligation to pay claims of this class was considered by the Commission so clear that it was not deemed necessary to do more than announce it. ²⁵

²¹ While the German Commissioner did not concur in Administrative Decision No. I, he and the German Government have nevertheless accepted it as the law of this case binding both Governments.

²² Paragraph 1 of Annex I to Section I of Part VIII read in connection with paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles and also in connection with the declaration of the German Government set out in note 10 *supra*.

²³ Broom’s Legal Maxims, 8th American (1882) edition, page 650, 7th English (1900) edition page 491. Matter of Connor, 1 N.Y. St. 144 at 148. Opinion of Umpire Ralston in Sambiaggio Case, Venezuelan Arbitrations 1903, pages 666, 679. Van Bokkelen Case, II Moore’s Arbitrations 1807.

²⁴ Exhibits H and I in claim Docket No. 19.

²⁵ As pointed out in the *Opinion in the Lusitania Cases* (page 17) “liability for losses sustained by American nationals was assumed by the Government of Germany

It is contended that the language of Administrative Decision No. I construing all of the provisions of the Treaty of Berlin as applied to the categories of claims there dealt with includes all pecuniary losses, damages, or injuries suffered directly or indirectly by American nationals during the war period caused by acts of Germany or her agents in the prosecution of the war and that the claimants herein have suffered such losses in the nature of property losses and are entitled to be compensated therefor.

But the general language of the definition of Administrative Decision No. I must, of course, be read in connection with fundamental rules of decision announced by this Commission in Administrative Decision No. II and elsewhere. When the scope and limitations of that definition were under consideration by this Commission to ascertain what claims are embraced within its terms it was said: ²⁶

“The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of that act must have been the loss, damage, or injury suffered. * * * This is but an application of the familiar rule of proximate cause—a rule of general application both in private and public law—which clearly the parties to the Treaty had no intention of abrogating. * * * The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany’s act as a proximate cause?”

Applying this test, it is obvious that the members of the families of those who lost their lives on the *Lusitania*, and who were accustomed to receive and could reasonably expect to continue to receive pecuniary contributions from the decedents, suffered losses which, because of the natural relations between the decedents and the members of their families, flowed from Germany’s act as a normal consequence thereof, and hence attributable to Germany’s act as a proximate cause. The usages, customs, and laws of civilized countries have long recognized losses of this character as proximate results of injuries causing death. Had there been any doubt with respect to such losses being proximately attributable to Germany’s act, that doubt would have been removed by their express recognition in the Treaty of Versailles. ²⁷

But the claims for losses here asserted on behalf of life-insurance companies rest on an entirely different basis. Although the act of Germany was the

(Footnote continued from page 111.)

through its note of February 4, 1916” (note by the Secretariat, this volume, p. 33 *supra*), and this assumption of liability was reiterated before this Commission by the German Agent.

²⁶ Administrative Decision No. II, Decisions and Opinions, pages 12 and 13 (Note by the Secretariat, this volume, pp. 29 and 30 *supra*), all three members of the Commission concurring in the conclusions.

²⁷ Paragraph 1 of Annex I to Section I of Part VIII (Reparation), Treaty of Versailles. Great Britain’s reparation claims contain an item of £32,436,256 for damages suffered through the loss of life of civilians. It is interesting to note that in estimating these damages Great Britain applied substantially the same rules as are laid down by this Commission in its *Opinion in the Lusitania Cases*. Another item of £3,054,607 in Great Britain’s reparation claims covered injuries to persons or to health of civilians. France pursued a somewhat different method, probably producing approximately the same result. Prior to the coming into effect of the Versailles Treaty, France had by statute provided for the pensioning of the surviving dependents of civilians whose lives had been lost through acts of war and also the pensioning of civilians invalidated in consequence of acts of war. The aggregate cost—past and prospective—to France of such pensions, when reduced to its present value, amounts to 514,465,000 francs, which was carried into and formed a part of her reparation claim.

immediate cause of maturing the contracts of insurance by which the insurers were bound, *this effect* so produced was a circumstance incidental to, but not flowing from, such act as the normal consequence thereof, and was, therefore, in legal contemplation remote—not in time—but in natural and normal sequence. The payments made by the insurers to other American nationals, beneficiaries under such policies, were based on, required, and caused, not by Germany, but by their contract obligations. To these contracts Germany was not a party, of them she had no notice, and with them she was in no wise connected. These contract obligations formed no part of any life that was taken. They did not inhere in it. They were quite outside and apart from it. They did not operate on or affect it. In striking down the natural man, Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with that man. The accelerated maturity of the insurance contracts was not a natural and normal consequence of Germany's act in taking the lives, and hence not attributable to that act as a proximate cause.

The *Lusitania* was freighted with persons and with personal property. Germany's act in destroying her caused the loss of the ship, some of the lives, and practically all of the property that formed her cargo. The lives that were lost and the property that was destroyed entailed economic losses to the world, to the nations to which they belonged, and to the individuals owning or having an interest in the property or dependent for contributions upon the physical or mental efforts of those whose producing power was destroyed by death.

The aggregate amount of the *property loss* became fixed when the ship sank and is neither increased nor diminished nor in any wise influenced by the amount of the insurance or re-insurance thereon. The insurance becomes material only in determining who really suffered the loss. This is because a contract of marine or war-risk insurance is a contract of indemnity ingrafted on and inhering in the property insured. The extent of the liability thereunder is limited by the economic loss suffered. The insured suffers no loss to the extent of payments made him by the insurer, who is the real loser to the extent of such payments not reimbursed by re-insurance.

But in a contract for life insurance the obligation of the insurer to pay, far from being one of indemnity, has no relation whatsoever to any economic loss which the beneficiary, the nation, or the world may or may not have sustained. It is a contract absolute in its terms for the payment of an amount certain on the happening of an event certain—death—at a time uncertain. The amount of insurance on the life of the insured has no relation to the economic value of that life or to the pecuniary losses resulting from the death. An individual who produces nothing, who earns nothing, who contributes nothing to any other individual or through mental or physical effort or otherwise toward adding to the wealth of the world, may carry insurance for a very large amount. On the happening of his death, the insurers are required to pay the amounts specified in the contracts of insurance to the beneficiaries entitled under such contracts to receive it, not because the latter have suffered any loss or because any loss has resulted from the death, but solely because they have bound themselves by contract to make such payments upon the occurrence of that death. Such losses as the insurers may sustain by reason of such payments are not substituted for and do not stand in the place of losses which would otherwise be suffered by the payee whose losses are reduced to the extent of the payment made, as in fire, marine, and war-risk insurance losses.

The insurers through subrogation or otherwise are not entitled to stand in the shoes of the representatives of the estate of the insured or of the beneficiaries and pursue their rights, if any exist, against the author of the death of the

insured. This Commission in its *Opinion in the Lusitania Cases*²⁸ sustained the contention of the Government of the United States that the amount of losses suffered by American nationals resulting from the death of a *Lusitania* victim who during life contributed to them was not subject to any deduction on account of insurance moneys paid them as beneficiaries under policies of insurance on the life of such victim. In so holding this Commission said that "Such payment of insurance, far from springing from Germany's act, is entirely foreign to it". The fact that Germany's act may have incidentally accelerated the maturity of absolute obligations to the advantage of the beneficiaries in the policies of insurance is not a circumstance of which Germany can take advantage, because she was not a party to, was in no wise interested in, or entitled to claim under, such contracts. Neither can Germany, on the other hand, be held liable for the losses resulting from such acceleration of maturity, because there is in legal contemplation no causal connection between her act and the obligations arising under the insurance contracts, of which she had no notice, and with which she was not even remotely connected.

The rights of the beneficiaries under the insurance contracts existed prior to the commission of Germany's act complained of and prior to the deaths of the insured. Under the terms of the insurance contracts these rights were to be exercised by the beneficiaries upon the happening of a certain event. There was no uncertainty as to the happening of the event but only as to the time of its happening. Sooner or later full payment must be made by the insurers, conditioned on the timely payment of such unpaid premiums, if any, stipulated for in the policies, the present value of which is embraced in these claims. They also embrace losses sustained by the insurers due to the enforced acceleration in the payments caused by the premature death of the insured. But it is obvious that precisely to the extent that the American insurers have sustained losses by reason of being prematurely deprived of the use of funds paid by them to American beneficiaries such American beneficiaries have been correspondingly benefited through the acceleration in the time of such payments to them. The losses here claimed are not economic losses to the American nation but only losses sustained by one group of American nationals to the corresponding benefit of another group of American nationals, growing out of their inter-contractual relations, rather than out of any economic injury inflicted by Germany's act. To hold, as this Commission did in the *Lusitania* cases,²⁹ that in arriving at the net losses suffered by American surviving dependents of *Lusitania* victims no part of the payments received by such survivors as beneficiaries under insurance contracts should be deducted from the present value of contributions which such victims, had they lived, would probably have made to such survivors, and at the same time to hold Germany bound to pay the insurers for all losses sustained by them due to the acceleration in time of payment, would obviously result in Germany's being held liable to the United States for losses which neither the United States as a nation nor its nationals as a whole had suffered but which one group of its nationals had lost to another group of its nationals.

The great diligence and research of American counsel have pointed this Commission to no case decided by any municipal or international tribunal awarding damages to one party to a contract claiming a loss as a result of the killing of the second party to such contract by a third party without any

²⁸ Decisions and Opinions, pages 17-32, inclusive (*note by the Secretariat*, this volume, pp. 32-44 *supra*), all three members concurring in the conclusions.

²⁹ Decisions and Opinions, pages 22-23. (*Note by the Secretariat*, this volume, pp. 37-38 *supra*.)

intent of disturbing or destroying such contractual relations. The ever-increasing complexity of human relations resulting from the tangled network of inter-contractual rights and obligations are such that no one could possibly foresee all the far-reaching consequences, springing solely from contractual relations, of the negligent or wilful taking of a life. There are few deaths caused by human agency that do not peculiarly affect those with whom the deceased had entered into contractual relations; yet through all the ages no system of jurisprudence has essayed the task, no international tribunal or municipal court has essayed the task, and law, which is always practical, will hesitate to essay the task, of tracing the consequences of the death of a human being through all of the ramifications and the tangled web of contractual relations of modern business.

But it is urged that no sound distinction in principle can be drawn between the awards made by this Commission in claims put forward on behalf of surviving dependents of *Lusitania* victims for pecuniary losses sustained by them and these claims of insurers for pecuniary losses sustained by them resulting from the premature payment of insurance on the lives of such victims. The distinction is this:

As this Commission has repeatedly held, the terms of the Treaty of Berlin fix and limit Germany's obligation to pay. That Treaty expressly obligates Germany to make compensation for damages suffered by the surviving dependents of civilians whose deaths were caused by acts of war, and by clear implication negatives any obligation on Germany's part to make compensation in death cases to life insurers or any class other than surviving dependents. But apart from this clearly implied limitation of liability, the losses on which these claims are based are not in legal contemplation attributable to Germany's act as a proximate cause.

There are few classes of losses which have been more generally recognized by all civilized nations as a basis for the recovery of pecuniary damages than that of losses sustained by surviving dependents for injuries resulting in death. The draftsmen of the Treaty of Versailles in putting claims of this class first on the list of ten categories in enumerating those for which compensation may be claimed from Germany³⁰ adopted a rule long recognized by civilized nations. International arbitral tribunals, independent of any express provision in the governing treaties or protocols, have never hesitated to recognize this rule. The statement is frequently encountered in judicial decisions and in the writings of publicists that the civil law permitted such recovery in a civil suit.³¹ Grotius recognized such right.³² For many years past this rule has been recognized by the nations of western Europe.³³ The German Code since 1900 expressly confers a cause of action for the taking of life, which, however, was merely declaratory of the liability as previously established by the German Imperial Court of Civil Jurisdiction. Forty years prior to the annexation of Hawaii to the United States its supreme court held that the natural law and the usages, customs, and laws of civilized countries quite independent of statute permitted a recovery by surviving dependents for injuries resulting in

³⁰ Paragraph 1 of Annex I to Section I of Part VIII, Treaty of Versailles.

³¹ This statement has been challenged: *Hubgh v. New Orleans & Carrollton Railroad Co.*, 1851, 6 Louisiana Annual 495; *Herrmann v. same*, 1856, 11 Louisiana Annual 5.

³² Grotius, Book II, Chapter XVII, Sec. 1, 12, and 13.

³³ *Borrero v. Compania Anonima de la Luz Electrica de Ponce*, 1903, 1 Porto Rico Federal Reporter 144. *Ravary et al. v. Grand Trunk Railway Co.*, 1860, 6 Lower Canada Jurist 49.

death.³⁴ This decision has been followed by the Federal courts since the annexation of Hawaii to the United States.³⁵ England established by statute enacted in 1846 such right of recovery, and her example has long been generally followed throughout the world in common-law jurisdictions.

On the other hand, there is no reported case, international or municipal, in which a claim of a life insurer has been sustained against an individual, a private corporation, or a nation causing death resulting in loss to such insurer. Such claims have been made³⁶ but uniformly denied. History records no instance of any payment by one nation to another based on claims of this nature. There is nothing in the Treaty of Berlin or in the records of these cases before this Commission to indicate that claims of this class could have been within the contemplation of those who negotiated, drafted, and executed that Treaty. The American courts, including the Supreme Court of the United States, have rejected similar claims of insurers as remote consequences of wrongful acts complained of, and hence not cognizable by them, as often as such claims have been presented to them by insurers against American nationals.³⁷ The United States cannot now be heard to assert such claims on behalf of American insurers against Germany.

The American Agent contends that the claims here asserted on behalf of insurers constitute damage to "their property" within the meaning of those words found in the Treaty of Berlin. This is denied by the German Agent and also by the German Commissioner in his opinion herein. The disposition made of these claims renders it unnecessary to consider and decide this issue.

To the extent that the insured had they lived would, through their mental or physical efforts, have contributed to the production of wealth or have accumulated pecuniary gains which they would have passed on to American nationals dependent on them, such nationals have suffered losses flowing as a natural and normal consequence of Germany's act, and attributable to it as a proximate cause, for which Germany is obligated to pay. But the act of Germany in striking down an individual did not in legal contemplation proximately result in damage to all of those who had contract relations, direct or remote, with that individual, which may have been affected by his death. In this latter class the ten claims here under consideration fall. They are not embraced within the terms of the Treaty of Berlin and are therefore ordered dismissed.

Done at Washington September 18, 1924.

Edwin B. PARKER
Umpire

³⁴ *Kake v. Horton*, 1860, 2 Hawaiian Reports 209.

³⁵ *The Schooner Robert Lewers Co. v. Kekauoha*, 114 Federal Reporter 849, decided by the Circuit Court of Appeals in 1902.

³⁶ *Connecticut Mutual Life Insurance Co. v. New York & New Haven R. R. Co.*, 1856, 25 Connecticut 265; *Mobile Life Insurance Co. v. Brame*, 1878, 95 U.S. 754. See also *Sedgwick on Damages*, 9th (1912) edition, vol. I, sec. 120; *Anthony v. Slaid*, 1846, 11 Metcalf (52 Massachusetts) 290; *Rockingham Mutual Fire Insurance Co. v. Boshier*, 1855, 39 Maine 253; *Dale et al. v. Grant et al.*, 1870, 34 New Jersey Law 142; *Ashley v. Dixon*, 1872, 48 New York 430; *Brink v. Wabash R. R. Co.*, 1901, 160 Missouri 87; *Rinneman v. Fox*, 1906, 43 Washington 43; *Thompson v. Seaboard Airline Ry. Co.*, 1914, 165 North Carolina 377; *Taylor v. Neri*, 1795, 1 Espinasse Nisi Prius Cases 386; *Cattle v. Stockton Waterworks Co.*, 10 Law Reports Q.B.D. (1874-1875) 453; *Simpson & Co. et al. v. Thomson, Burrell et al.*, 1877, Law Reports 3 Appeals Cases 279, opinion of Lord Penzance; *Anglo-Algerian Steamship Co., Ltd., v. The Houlder Line, Ltd.*, 1907, I (1908) Law Reports K.B.D. 659, 24 Times Law Reports 235; *La Société Anonyme, etc., v. Bennetts*, 1910, I (1911) Law Reports K.B.D. 243, 27 Times Law Reports 77.

³⁷ See authorities cited in note 36.

ADMINISTRATIVE DECISION No. IV

(October 2, 1924, pp. 141-144.)

PROCEDURE: APPROVAL BY COMMISSION OF AGREEMENT BETWEEN AGENTS.—ESTATE CLAIMS: EXCEPTIONAL WAR MEASURES.—DAMAGE: RULES FOR DETERMINATION. Claims for damage resulting from prevention by German exceptional war measures of transmission of money or securities to American heirs in German estates. Agreement between American and German Agents that under Treaty of Versailles, Article 297 (e) and (h), carried into Treaty of Berlin, Germany liable for damage, and that, in order to determine damage, value of money and securities as of date of repeal of exceptional war measures shall be deducted from value when measures applied (evidence submitted of rate of exchange for German mark between August 9, 1917, and January 11, 1920). Agreement approved by Commission.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 609-612; Kiesselbach, *Probleme*, pp. 280-282 (German text); Witenberg, Vol. I, pp. 140-143 (French text).

Bibliography: Borchard, p. 138; Kiesselbach, *Probleme*, p. 13; Prossinagg, p. 14.

ANDERSON, *American Commissioner*, delivered the opinion of the Commission, the Umpire and the German Commissioner concurring—

The Agents of the two Governments have agreed upon and submitted for the approval of the Commission a basis for adjusting claims filed on behalf of American nationals for damages resulting from the prevention by exceptional war measures in Germany of the transmission of their share of decedents' estates in Germany to which they became entitled prior to or during the war. This proposed basis is embodied in a Memorandum signed by the two Agents and filed September 16, 1924.

This Memorandum states that "A large number of claims have been filed with the American Agent by heirs to German estates, in most of which the facts and records upon which their validity depended were only to be found in Germany, and all of the claims of this character in which any proof whatever had been filed by American claimants were sent to Germany last spring for the purpose of perfecting the proofs and agreeing upon the facts in each particular claim", and that "in order to progress this work it was necessary for the American and German Agents to consider the nature and extent of the liability of Germany upon claims of this character".

It appears from the Memorandum that the two Agents are both of the opinion that Section 296 of the Treaty of Versailles does not deal with the estate claims as such, but that Section 297 (e) and under some circumstances Section 297 (h) apply to such claims. They accordingly agree that when "an obligation arose from an heir, administrator, or executor to transmit money or securities to an American national and he was prevented from so doing by an exceptional war measure, liability on the part of Germany for the resulting damages would seem to be established".

It further appears from this Memorandum that the Decree adopted by the German Government on August 9, 1917, provides in Article 1 "The enactments of the Decree prohibiting payments to England of September 30, 1914, are applicable against the United States of America" and that consequently thereafter the payment of cash to American nationals by an executor, administrator, or heirs was prohibited. Evidence is presented with the Memorandum showing that the rate of exchange for the German mark on August 9, 1917, was 14.2 cents to the mark.

It further appears from the Memorandum that the Decree adopted by the German Government on November 10, 1917, recites that—

“The enactments of the paragraphs 5 to 11 and 13 of the Decree relating to the report of property in Germany of nationals of enemy states of October 7, 1915, are applicable to the property of American nationals,”

and that paragraph 10 of the Decree of October 7, 1915, which is the material paragraph in this connection, reads as follows:

“It shall until further notice be unlawful to remove abroad, either directly or indirectly, property belonging to nationals of enemy states, in particular securities and money without the authority of the Imperial Chancellor.”

It further appears that “By this Decree an executor, administrator or heir was prevented from sending to American heirs securities which had come into his possession and to which they were entitled upon the distribution of an estate” and that “the American heirs * * * were, therefore, entitled at such time to the value of such securities which they were thus prevented from receiving by the Statute enacted by the German Government”.

It is also shown by this Memorandum that “These two Decrees, the first on August 9, 1917, as to cash, and the second on November 10, 1917, as to securities, were repealed on January 11, 1920.” Evidence is submitted with the Memorandum showing that the rate of exchange as of January 11, 1920, was approximately 2 cents to the mark and this rate has been accepted by the two Agents as being applicable for purposes of computation in these cases.

The Memorandum points out that “The repeal of these two Statutes ended any statutory interference by the German Government with the sending of money and securities by executors, administrators and heirs to American nationals entitled to them”, and the Agents have therefore agreed that it was proper to deduct from the value of securities and money, ascertained as of the date of the application of these statutes, their value when these statutes were repealed, in order to determine the loss caused by the application of these exceptional war measures.

The Agents call attention to paragraph 1 of the German law of August 31, 1919, relating to the execution of the Treaty of Versailles, which paragraph reads:

“With regard to debts to enemies, the payment and the acceptance of payments, and also all communications between the interested parties with regard to the settlement of such debts, is prohibited otherwise than through the Clearing House.”

The Agents point out, however, that this law was enacted by Germany in view of the clearing-house system, as provided in Article 296 of the Treaty of Versailles, which provision reads as follows:

“Each of the High Contracting Parties shall prohibit, as from the coming into force of the present Treaty, both the payment and the acceptance of payment of such debts, and also all communications between the interested parties with regard to the settlement of the said debts otherwise than through the Clearing Offices.”

The two Agents, therefore, consider and agree that “these provisions refer exclusively to debts and have no reference to the claims of American citizens for payments from estates” inasmuch as “the obligation of a German executor, administrator, heir or legatee to an American heir was not a debt obligation within the provisions of the Treaty.”

After full examination and consideration of the questions presented and the provisions applicable thereto of the Treaty of Berlin, the Commission hereby decides that the above-stated basis for ascertaining Germany's financial

obligations with respect to the estate claims referred to in that Memorandum and the method of computing the amount of such obligations conform to and are sustained by the provisions of the Treaty of Berlin. The Commission accordingly adopts and will apply in such claims the above-stated basis of liability and method for determining the amounts to be awarded.

Done at Washington October 2, 1924.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

ADMINISTRATIVE DECISION No. V

(October 31, 1924, pp. 175-194; Certificate of Disagreement by the Two National Commissioners, October 21, 1924, pp. 145-175.)

NATIONALITY OF CLAIMS: AT ORIGIN, CONTINUOUS NATIONALITY, INFLUENCE OF CHANGE ON RIGHTS.—ESPOUSAL, JURISDICTION AND NATIONALITY OF CLAIMS: PRACTICE AND LAW.—NATURALIZATION: EFFECT ON STATE OBLIGATIONS.—INTERPRETATION OF TREATIES: (1) VALUE OF CUSTOM, PRACTICE, (2) FUNDAMENTAL RULE.—LAW AND JUSTICE.—WAR: RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN.—LAW OF TREATIES: EXCHANGED RATIFICATION INSTRUMENTS PART OF TREATY. *Held* (1) that there is no established rule of international law that State is entitled to assert, and international arbitral tribunal to exercise jurisdiction over claim of private nature only if claim is impressed with State's nationality from origin to presentation or even final adjudication: (a) *nationality at origin*: there certainly is general *practice* not to espouse private claims unless in point of origin they possess nationality of claimant State (reasons of practice: State injured through injury to national, it alone may demand reparation; naturalization transfers allegiance, not existing State obligations; possibility of abuse), but it is doubtful whether practice universally recognized as rule of *law*; practice, moreover, suffers exceptions from agreements defining jurisdiction of international arbitral tribunals, and for the interpretation of which, unless their meaning is obscure, custom and practice are irrelevant; (b) *continuous nationality*: implied injustice (deprivation of private claimant of remedy, and practically of right itself, through change of nationality) raises doubts as to character as rule of *law*; rule rejected by some tribunals, recognized by others, but as mere rule of *practice*, jurisdiction, agreed upon between parties; and (2) that under Agreement of August 10, 1922, all claims based on rights fixed by Treaty of Berlin, and from origin to November 11, 1921 (coming into force of Treaty of Berlin), impressed with American nationality, are within Commission's jurisdiction: (a) definite and clear language of Agreement makes custom and practice irrelevant: fundamental rule governing interpretation of treaties and international conventions that "it is not permissible to interpret what has no need of interpretation"; (b) Commission not concerned with question of conformity to general international law of German acts causing damage, but only with Treaty of Berlin, which merges obligations already existing under international law with obligations imposed by victor and existing since November 11, 1921;

(c) "nationals of the United States" (expression used in Resolution of United States Senate of October 18, 1921, embodied in United States ratification instrument, and made part of Treaty through exchange of ratifications), therefore, means nationals *on November 11, 1921*; (d) Germany agreed to make compensation for losses, etc. *suffered by* American nationals, that is American *at time of loss, etc.* (Treaty of Versailles, Article 232, carried into Treaty of Berlin; Agreement of August 10, 1922); (e) rights are *contract* rights and, therefore, not affected (destroyed) by change in nationality after November 11, 1921: under Treaty, claims which are American from origin to November 11, 1921, are *indelibly* American, so far as Germany is concerned, the United States being the only nation entitled to assert them, also in case of voluntary transfer of allegiance by American national to other nation, or of purchase of claim by alien (precedents), though United States then free to decline to press claim (question of political policy, distribution).

NATIONALITY, AMERICAN NATIONAL: DEFINITIONS, DETERMINATION BY MUNICIPAL LAW.—INTERPRETATION OF TREATIES: INTENTION OF PARTIES, TERMS. Definition of "American national" (reference made to Administrative Decision No. 1, see p. 21 *supra*), and of "nationality" (broader concept than "citizenship"). *Held* that nationality determined by municipal law and that expression "national (of the United States)" used in Joint Resolution of Congress, approved by President, July 2, 1921, carried into Treaty of Berlin, unlike same expression elsewhere in that Treaty, embraces not only citizens of United States, but also Indians and members of other aboriginal tribes or native peoples of the United States and its territories and possessions: clear intention, terms of Joint Resolution (Treaty).

ESPOUSAL OF CLAIMS: EFFECT. *Held* that espousal of claims by United States does not prevent inquiry with respect to its private ownership: espoused claim does not become national claim though espousing nation has absolute control over it (presentation, withdrawal, compromising; distribution of fund paid in pursuance of award) and private owner is bound by action; Treaty of Berlin and Agreement distinguish between government-owned and privately owned claims (importance of distinction appears from decision in *United States, Garland Steamship Corporation, and Others v. Germany*, see p. 73 *supra*: impossibility for vessel privately operated for private profit to be impressed with military character).

NATIONALITY OF CLAIMS: EVIDENCE, NOMINAL NATIONALITY. Merely nominal or colourable American nationality of claim: Commission will examine facts *subsequent* to November 11, 1921, if such evidence material to true nationality of claim in its origin or on November 11, 1921 (circumstances connected with transfer subsequent to November 11, 1921, and conditions under which claim thereafter held).

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 612-630; Annual Digest, 1923-24, pp. 185-189, 191-192; Kiesselbach, *Probleme*, pp. 305-321 (German text); Witenberg, Vol. II, pp. 31-51 (French text).

Bibliography: Borchard, pp. 138-140; Kiesselbach, *Probleme*, pp. 12, 36-55; Prossinagg, pp. 14-15.

CERTIFICATE OF DISAGREEMENT BY THE TWO NATIONAL COMMISSIONERS

On the question of the nationality of claims with reference to the jurisdiction of this Commission, the American Commissioner and the German Commissioner have agreed as to certain classes of claims, and have disagreed as to certain other classes of claims, as appears in their respective opinions, which are as follows:

OPINION OF MR. ANDERSON, THE AMERICAN COMMISSIONER

The Commission has been asked by the Agents of the two Governments to announce the principles and rules of decision which will be applied in determining the jurisdiction of the Commission in groups of cases in which the claimant did not acquire American citizenship until after the date of the loss or injury for which damages are claimed, or in which the claimant lost American citizenship subsequent to the date of such loss or injury, or in which the loss or injury for which the claim arose was sustained by an American citizen but the claim has since been transferred, in whole or in part, to foreign nationals, through assignment, succession, or otherwise.

The generally accepted basis for diplomatic intervention in presenting claims internationally is that the claims should be of the nationality of the government presenting them, and in order to establish such nationality it is, as a rule, necessary to show that the original claimants were at the time the claim accrued either citizens of the nationality of that government or were otherwise entitled to its protection, and that they, or their successors in interest, have had the same status continuously thereafter until the claims were espoused by their government.

It has been the custom of the Government of the United States to observe these requirements in dealing with claims through diplomatic channels, as will appear from the instructions issued by the Department of State for the information of American claimants. These instructions are understood to embody the general policy and position of the Government of the United States in regard to all such claims and are contained in a printed form which the Department of State prepared for the use of claimants in making application to the Department for its support for claims against foreign governments.

In many of the claims presented to this Commission an application made by the claimants on this State Department form constitutes part of the record. In this form of application, which was issued January 30, 1920, will be found the following "General Instructions for Claimants":

"5. Nationality of Claim.—The Government of the United States can interpose effectively through diplomatic channels only on behalf of itself, or of claimants (1) who have American nationality (such as citizens of the United States, including companies and corporations, Indians and members of other aboriginal tribes or native peoples of the United States or its territories or possessions, etc.), or (2) who are otherwise entitled to American protection in certain cases (such as certain classes of seamen on American vessels, members of the military or naval forces of the United States, etc.). Unless, therefore, the claimant can bring himself within one of these classes of claimants, the Government cannot undertake to present his claim to a foreign Government. For example, the declaration of intention to become a citizen of the United States is insufficient to establish the right to protection by the United States except in case of American seamen.

"6. Moreover, the Government of the United States, as a rule, declines to support claims that have not belonged to claimants of one of these classes from the date the claim arose to the date of its settlement. Consequently, claims of foreigners who, *after* the claims accrued, became Americans or became entitled to American protection, or claims of Americans or persons entitled to American protection who, *after* the claims accrued, assumed foreign nationality or protection and lost their American nationality or right to American protection, or claims which Americans or persons entitled to American protection have received from aliens by assignment, purchase, succession, or otherwise, or *vice versa*, can not be espoused by the United States. For example, a claim for a loss or injury which occurred *before* the claimant obtained final naturalization as a citizen of the United States (except in case of an American seaman who has made a declaration of intention) will not, by reason of his subsequent naturalization, be supported by the United States."

It is recognized that these Instructions are issued by the Department of State merely for the information of claimants and as a statement of its general policy with reference to the espousal of claims. It is, therefore, understood that the issuing of these Instructions by the Department of State does not preclude the United States Government from asserting any broader rights to which it may be entitled in respect to the claims before this Commission, unless, in negotiating the Treaty of Berlin, Germany relied on this statement as defining the character of claims covered by that Treaty, and it has been definitely stated on the part of Germany that this was not the case. Consequently, so far as concerns the definition of claims to be submitted under the Treaty of Berlin, these Instructions neither add to nor detract from the rights and obligations of either party in dealing with these claims.

It is also recognized that any of the requirements of international law with respect to the nationality status of claims may be changed by mutual agreement in a claims treaty between the governments concerned.

It follows from these considerations that in presenting claims before this Commission the requirements imposed by the general rule stated at the outset for establishing the American nationality of claims must be observed unless it can be shown that some modification thereof has resulted from the contractual obligations undertaken by Germany in the Treaty of Berlin, or unless exceptional circumstances justify exceptional treatment.

The effect of these requirements when applied to claims under the Treaty of Berlin remains to be considered.

It is contended by the United States that the Congressional Peace Resolution of July 2, 1921, has an important effect upon the determination of the date when the claim accrued, as of which date the American nationality of the claim must be established. The contention is that this resolution constitutes the real origin of all of these claims, and that its date is the date upon which they actually accrued, inasmuch as all claims defined in that resolution were established by the Treaty of Berlin, irrespective of whether or not they could be sustained by the law of nations independently of that Treaty.

The conclusion is accordingly drawn that if the American citizenship of the claimant, or his right to the protection of the United States Government, is established as of the date of that resolution, it is immaterial what the status of the claimant was, with respect to American nationality, at the date when the actual loss or injury occurred.

In support of this contention the American Agent calls attention to an extract from the report of the Secretary of State, dated March 2, 1921, to the President, which was transmitted by him to the Senate on March 3, 1921. This report was made by the Secretary of State in response to a resolution of the Senate, dated December 30, 1920, requesting that he transmit to the Senate "a full and complete statement of all claims, and the amount of each, filed with the State Department by American citizens against the German Government since August, 1914". The extract from this report to which the American Agent calls attention appears in the report under the heading "Diverse Nationality Cases" and reads as follows.

"* * * In some instances an American citizen has endeavored to claim for the death of British relatives; British subjects have endeavored to claim for the deaths of Americans; naturalized citizens have sought to claim for losses or damages suffered while declarants; declarants have undertaken to claim as such.

"These cases do not possess the element of continuous American nationality which is usually regarded as essential to the support of a diplomatic claim. Record has been made of these cases in the Department of State for use in the event that the department may be able to assist the claimants hereafter."

It is pointed out by the American Agent that Congress subsequently passed the joint resolution of July 2, 1921, sometimes called the Knox-Porter Resolution, which provides for the satisfaction of "all claims" against Germany "of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered", through the acts of Germany or its agents "since July 31, 1914, loss, damage, or injury to their persons or property". etc.

From these premises the American Brief argues—

"The Congress in passing the Joint Resolution of July 2, 1921, it is submitted, in using the particular and unusual phraseology it did in designating the class of persons whose claims were to be protected, must have had in mind the purpose of affording the Department of State as broad powers as consistent with the public interest in its duty of assisting American citizens in the presentation of their claims against Germany. Accordingly, the Resolution in effect served notice on Germany that the United States would expect her, as one of the prerequisites for the restoration of friendly relations, to satisfy all claims, of the character embraced in the treaty, of all persons who, on the second day of July, 1921, owed permanent allegiance to the United States. This, regardless of the fact that the claimants, in some instances, were not American citizens at the date of the commitment by Germany of the acts resulting in the loss, damage, or injury complained of."

It is undoubtedly true that, as here stated, the resolution, in effect, gave notice that Germany was expected to make compensation for all claims of the character embraced in the resolution. The real question to be determined, however, is what was the character of those claims, and the difficulty about adopting the American argument, as to the effect of the resolution with reference to claims for losses which occurred before the claimant became an American citizen or otherwise was entitled to the protection of the United States, is that it rests upon too many uncertainties.

The phrase upon which the argument turns is, "all claims * * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States". The primary effect of that phrase is to include claims of a certain class of persons who are not American citizens, as, for instance, Filipinos and Indians,¹ but who were entitled to the protection of the United States. As stated in the above-quoted extract from the Instructions to claimants, issued by the State Department, claims of this class are entitled to be treated as claims of American nationality.

On the other hand, the phrase "all claims * * * of all persons * * * who owe permanent allegiance to the United States" is wholly inadequate to express the intention that persons who did not owe permanent allegiance or were not otherwise entitled to the protection of the United States when the damage occurred should be entitled to present claims for such damages if they became nationals of the United States before the Congressional resolution was adopted.

It can not be presumed that if Congress had intended its resolution to cover claims which would not be presented under the usual policy of the Department of State and are not generally regarded as presentable under international law and practice it would have used words which did not make that purpose clear.

Moreover, in order to sustain the conclusions reached in the American Brief it is not sufficient to show that this resolution is susceptible of the meaning attributed to it, or even that Congress intended that it should have that

¹ By the Act of June 2, 1924 (43 Statutes at Large 253), "all non-citizen Indians born within the territorial limits of the United States" were "declared to be citizens of the United States".

meaning. The present question is much more far-reaching than merely the interpretation of a Congressional resolution from the American point of view. What we are now called upon to determine is what contractual obligations Germany assumed by entering into the Treaty of Berlin. In other words, the question is not merely whether it is possible to find in the resolution the meaning and effect attributed to it in the argument for the United States, but whether this meaning and effect were understood and accepted by Germany in making the Treaty of Berlin.

Germany asserts that the meaning now attributed to this resolution is so obscure and uncertain that it could not be understood without explanation, and that this meaning was not even suggested in the negotiations resulting in the Treaty of Berlin. Germany also asserts that, although she accepted liability under the Treaty of Berlin for many claims for which, apart from that Treaty, she would not have been liable, nevertheless this liability is limited by the terms of the Treaty and obscure and uncertain meanings should not be read into the Treaty for the purpose of enlarging that liability.

In view of all these considerations the burden rests upon the United States of affirmatively establishing its contentions, which has not been done.

Inasmuch, therefore, as the United States has failed to show that Germany has agreed, under the Treaty of Berlin, to make compensation for claims presented on behalf of persons who were not American citizens, or otherwise entitled to the protection of the United States, at the time the damage complained of occurred, the Commission has no jurisdiction over claims of this character, unless exceptional circumstances justify exceptional treatment.

There remains to be considered the nationality of claims in which the loss or injury was suffered by an American national, but all or part of the interest in which has since been transferred to foreign nationals, through assignment, succession, or otherwise.

These claims are all of American nationality in their origin, so that there can be no question about the right of the United States to present them before this Commission, for consideration on their merits, unless some change has occurred since they originated which destroys that right.

The only change now under consideration, in this connection, is the introduction of a foreign interest in such claims, and the discussion of the effect of this change in interest upon the status of these claims will be simplified if the claims which had not been espoused by the United States before the change occurred are considered separately from those in which this change in interest occurred after such espousal.

The reason for this subdivision of these claims is because the espousal by the United States of claims against a foreign government has important legal consequences, which are discussed below under the second branch of this question. Claims of the Government of the United States on its own behalf are not under consideration here.

Taking up first the branch of this question which concerns the introduction of a foreign interest in claims of American nationals before the United States had assumed protection of them, it must be noted at the outset that governments generally are unwilling to espouse a claim if the claimant to whom the injury was done has become, or the claim itself has been transferred to, a foreign national.

The objections to espousing such a claim would seem to arise from considerations of policy or practical expediency, rather than from lack of legitimate authority, because the right of a government to espouse a claim arises on the general principle that the injury to a national is an injury to the nation and

the change of nationality of the claimant or the claim does not affect the original injury to the nation for which it is entitled to claim compensation.

In principle, therefore, the right to espouse a claim may continue notwithstanding the change of the nationality of the claim or of the claimant, but in practice, as above stated, governments do not as a rule espouse claims in those circumstances.

It may be that a distinction could properly be made in favor of claims in which the foreign interest was the result of death, or process of law, or other causes, through which the interest of the national was involuntarily transferred to a foreigner, in distinction from claims in which the foreign interest was introduced by voluntary act of the claimant.

This distinction is not generally drawn, however, and it will be noted that the above-quoted Instructions by the Department of State ignore any such distinction and state explicitly that—

“ . . . claims of Americans or persons entitled to American protection who, after the claims accrued, assumed foreign nationality or protection and lost their American nationality or right to American protection, or claims which Americans or persons entitled to American protection have received from aliens by assignment, purchase, succession, or otherwise, or *vice versa*, can not be espoused by the United States.”

It is stated on the part of Germany that the practice of Germany with reference to such claims is entirely in accord with the practice of the Department of State as set forth in these Instructions.

It is sufficient for the purposes of the present discussion that at the time the Treaty of Berlin was entered into it was the common practice of both the United States and Germany to refuse to espouse claims after the claimant had become, or the claim itself had been transferred to, a foreign national. This having been their common practice at the time the Treaty was made, and the Treaty being silent on the subject, it must be assumed that in entering into that Treaty both Governments understood and expected that this practice would be applied with respect to claims under that Treaty.

It follows, therefore, that under the terms of the Treaty of Berlin, if the entire interest in a claim, which had not been espoused by the United States, has been completely transferred to foreigners, so that the sole beneficiaries of the claim are aliens, it has not the status of American nationality which is essential to bring it within the jurisdiction of this Commission.

It appears, however, that there are a number of claims pending before this Commission in which only a share or part interest in the claim has been transferred to foreign nationals, and some American interest therein remains, as for example in cases in which by the death of an American claimant a share or beneficial interest in the claim, or its proceeds, has passed by succession to a foreign national but the claim forms part of the decedent's estate held in trust or under the administration of American nationals, or in cases in which an American national has a beneficial interest in or lien upon a claim which has passed by assignment or otherwise to a foreigner.

In these or other cases in which aliens are not the sole beneficiaries of the claim there is nothing in the applicable rules and principles of international law which would prevent the espousal by the United States of whatever American interest remains in such claims.

Under the Treaty of Berlin, as already interpreted, therefore, claims of American nationality in their origin in which only a share or part interest has passed to foreign nationals before the claim is espoused by the United States come within the jurisdiction of this Commission to the extent of whatever American interest remains therein.

The question of what American interest remains in any of these cases, and the extent of such interest, is reserved for decision on the facts in each case.

Turning now to the other branch of this subject, it remains to consider whether a claim of American nationality which has been espoused by the Government will thereafter lose its American status because the interest of the private and subordinate claimant passes to a foreigner.

It is the settled law of the United States² that by espousing a claim of an American national, and seeking redress on his behalf against a foreign government, the United States makes the claim its own. The United States has thereafter complete possession and control of the claim, and in prosecuting the claim it acts in its own right and not as the agent or trustee of the subordinate claimant, and is not accountable to him for the proceeds of the claim, except as may be directed by Act of Congress of the United States.

Furthermore, a claim has no international status until it is espoused by the Government, and the right to present a claim internationally is the exclusive right of the Government, but when the Government espouses a claim all private interests therein are merged in the public claim, so far as the foreign Government is concerned, even though the claimant Government presents its claim on behalf of a private claimant.

As the use of the word "espousal" indicates, the espousal of a claim by the Government establishes somewhat the same legal relationship as marriage in the days when the property of the wife became the property of the husband and the wife took the name of the husband. So also if an alien interest enters into the claim after espousal it rests only with the Government to determine whether or not to abandon the claim.

These consequences of the espousal of a claim by the Government of the United States are in conformity with, and give practical application to, the principle of international law above mentioned, that the basis of the right of the Government to present a claim internationally is that the injury to the national is an injury to the nation, for which it is entitled to claim reparation. Accordingly, when the claim of an American national is espoused by the Government, it acquires internationally the same status as a claim by the nation for an injury to itself, and thereafter, so far as Germany is concerned, must be treated as a claim of American nationality.

Independently, however, of any laws of the United States governing the relationship between the Government and the claimants, but entirely in accordance with the effect of those laws, the Treaty of Berlin places the United States Government in exactly the same relationship to all American claims covered by that Treaty as the United States Government places itself in by espousing those claims. In either case, so far as Germany is concerned, the United States becomes the only claimant; no claims can be presented except by the United States Government; only the claims so presented have an international status against Germany, and at the same time the United States alone, and in its own right, to the exclusion of the private claimants, is entitled to demand compensation from Germany for these claims and Germany is not concerned with what disposition the Government of the United States makes of the proceeds.

In other words, not only has the United States espoused all these claims by including them in the Treaty of Berlin, but their inclusion in that Treaty has

² *Great Western Insurance Company v. United States*, 19 Ct. Claims 206. *Boynton v. Blaine*, 139 U. S. 306, 323. *United States v. La Abra Silver Mining Company*, 29 Ct. Claims 432. Opinion of Secretary of State Olney, Moore's International Law Digest, Vol. VI, pp. 1021, 1034. See also Opinion of J. R. Clark, American Journal of International Law, Vol. VII, pages 382-420.

the same effect as their espousal by the United States has upon their subsequent nationality status.

These consequences result from the Treaty because it establishes the liability of Germany to the United States for all the damages, therein defined, which were suffered by American nationals between August 1, 1914, and July 2, 1921, and if claims for such damages were claims of American nationality at the time the Treaty was made Germany has thereby admitted her liability to make compensation for them and they come within the jurisdiction of this Commission, irrespective of any subsequent changes in the subordinate private interests therein.

The jurisdiction of this Commission differs from that of claims commissions under other forms of claims conventions, because the terms of submission are different, and it must be noted that the terms of submission generally differ in each convention with respect to the jurisdiction conferred upon the commission thereby established.

It is because of these differences in the jurisdiction of claims commissions that their decisions as to their own jurisdiction over claims presented, or judicial decisions with reference thereto, are of little value as precedents in determining the jurisdiction of this Commission.

For the reasons above stated, and unless an earlier date can be established on the particular facts in any exceptional case, the date of the ratification of the Treaty of Berlin, November 11, 1921, is fixed as the date of the espousal by the United States Government of all claims under that Treaty. The date of the ratification of the Treaty, rather than the date of the Treaty itself, is adopted for this purpose because Article III of the Treaty provides that it "shall take effect immediately upon the exchange of ratifications", so that in this case ratification did not confirm the Treaty retroactively as of the date of its signature.

Since the ratification of the Treaty of Berlin, therefore, all private interests in these claims have disappeared from an international point of view. Accordingly, all claims, or interests in claims, under the Treaty of Berlin, which at the date of its ratification were of American nationality must be treated as having thereafter a continuing American nationality, because the Government of the United States thereupon became the sole owner thereof internationally and sole party in interest against Germany, and they must be so treated by this Commission so long as the United States elects to support them, regardless of any subsequent changes in the nationality of the contingent beneficial interest pertaining to the private subordinate claimant.

Doctor Kiesselbach, the German Commissioner, disagrees with the conclusion above stated that a claim of American nationality when the Treaty of Berlin became effective cannot thereafter lose that status. Although it may not affect his general conclusions, his argument seems to rest in part at least upon a misapprehension of the position of the American Commissioner as to the importance to be attached to paragraph 6 of the Instructions to Claimants issued by the Department of State.

He states in his conclusions that—

" . . . *under the mutual and binding understanding* of both Governments with respect to the application of the rule under clause 6 of the General Instructions, the American nationality of the claimant must continue from the time the claim arose to the date of its settlement, as the last essential moment of the activities of this Commission."

This conclusion seems to be based on the assumption that both Governments have agreed that these Instructions would be applied to claims under the Treaty of Berlin. He says further on this point:

"Both Governments understood and expected, as I agree with the American Commissioner, that the practice of the Department of State as set forth in the Instructions '*would be applied with respect to claims under that Treaty*'. That means an agreement reached by *mutuo consensu* and making the practice of the Department of State as to the continuous ownership of American claims the *contractual* basis between the two Governments.

"Now, this practice provides, under clause 6 of the Instructions, that the 'Government of the United States, as a rule, *declines* to support claims that have not belonged to claimants of one of these classes from the date the claim arose *to the date of its settlement*'.

"So it is clear beyond doubt that the practice as set forth by the Instructions and as agreed upon by both Governments does *not* establish the date of espousal as decisive."

The American Commissioner does not concur in these statements. In the early part of this opinion it is explicitly stated that these Instructions of the Department of State were not intended to be, or understood as, a statement of a settled rule of international law, but merely as a statement of the policy which "as a rule" the Department would follow in dealing with international claims. The expression "as a rule" does not mean as a rule of international law but as the usual practice of the Department of State, which was subject to changes and exceptions in its discretion.

It was also pointed out in the same connection that inasmuch as it has been definitely stated on the part of Germany that in negotiating the Treaty of Berlin these Instructions were not relied upon as defining the character of claims covered by that Treaty they consequently do not either add to or detract from the rights and obligations of either party in dealing with these claims.

It cannot be said, therefore, that these Instructions form a "contractual basis" between the two Governments or had been "agreed upon by both Governments", or that both Governments had a "mutual and binding understanding * * * with respect to the application of the rule under clause 6 of the General Instructions". The two National Commissioners are in distinct disagreement on this point.

In so far as concerns the nationality of claims after the ratification of the Treaty of Berlin, the opinion of the American Commissioner is, as already stated, that in entering into that Treaty a contractual obligation was established on the part of Germany to make compensation to the Government of the United States for all the damages, therein defined, which were suffered by American nationals during the entire period of the war, namely, from August 1, 1914, to July 2, 1921, and that this obligation can not be affected by any change which has taken place in the private, subordinate, beneficial interest in those claims after the Treaty of Berlin became effective.

The German Commissioner also differs with the American Commissioner as to the use of the phrase "American nationals, or otherwise entitled to the protection of the United States at the time the claim accrued" in describing claimants of American nationality whose claims come within the jurisdiction of this Commission. In place of this phrase the German Commissioner proposes to substitute the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America", which phrase is found in Section 5 of the Knox-Porter Resolution.

The American Commissioner has not discussed this question in his Opinion and it is understood that the only claims pending before the Commission which might be included by the use of the one phrase and excluded by the use of the other are claims of alien seamen employed on American vessels at the time the damages claimed for occurred.

It seems advisable to the American Commissioner, in discussing the general principles to be adopted with reference to the American nationality of claims, to reserve the discussion of the nationality of claims presented on behalf of such seamen for consideration in connection with the facts in each particular case. The American Commissioner, therefore, does not at this time express any opinion on the question of which one of these phrases should be used in cases in which a different result would follow from the application of one or the other.

Conclusion:

It follows from the foregoing considerations that, in order to bring a claim within the jurisdiction of this Commission, the American nationality of the claim must be established by showing—

(1) That the original claimants who suffered the loss or injury, for which the damages are claimed, were American nationals, or otherwise entitled to the protection of the United States, at the time the claim accrued, which is the time when, or during which, the loss or injury occurred.

(2) That the original claimants, or their successors in interest, have been American nationals, or otherwise entitled to the protection of the United States, since the claim accrued and at the date of its espousal by the United States.

The question of the status of a claimant who was originally an American national when the claim arose and has since lost but subsequently regained American nationality is reserved for consideration on the facts of the case in which that question is presented.

(3) That in cases where only a share or part interest in a claim of American nationality has been transferred to foreign nationals, through assignment, purchase, succession, or otherwise, before the claim was espoused by the United States, the Commission has jurisdiction over such claim to the extent of whatever American interest therein remained at the time of its espousal by the United States.

The question of what American interest remained in any case, and the extent of such interest, will be determined by the facts in each case when presented for decision on the merits.

Unless an earlier date can be established on the particular facts in any case, the date of the ratification of the Treaty of Berlin, November 11, 1921, was the date of the espousal by the Government of the United States of all claims under that Treaty.

In the foregoing Opinion all questions of exceptional treatment of claims, where such treatment may be justified by exceptional circumstances, are reserved for consideration in dealing with the specific cases in which such questions are raised.

Chandler P. ANDERSON

OPINION OF DR. KIESSELBACH, THE GERMAN COMMISSIONER

I. Test of "nationality".

II. Continuity of "nationality".

I

Test of "nationality"

I agree with the American Commissioner that claims presented by one government to another for injuries done to persons must have a certain status with respect to the person on whose behalf the claim is being presented. There is no disagreement between us that such status must be that of the "nationality"

of the person in question ("claimant"). I disagree, however, with the American Commissioner as to the question of what constitutes "nationality" with reference to the jurisdiction of this Commission.

Since this jurisdiction rests on an Agreement of Arbitration between two Governments it is evident that the first and principal source for determining the meaning of "nationality" must be the recognized rules of international law as applied in proceedings of this kind. I agree, however, with the American Commissioner that "the requirements of international law with respect to the nationality status of claims may be changed by mutual agreement . . . between the governments concerned".

The Government of the United States has laid down its conception of the general rules of international law covering this subject in the "General Instructions for Claimants" as cited by the American Commissioner. I agree with him that these "Instructions" are not "binding upon Germany"; but this does not say that they are meaningless "and may be disregarded" here. On the contrary, they are of considerable value as showing not only the principles and requirements of international law elaborated by the responsible authorities of the claimant government and applied by it in general, but as also showing that the American Government, having revised its rules January 30, 1920, did intend to apply and applied them especially for the preparation of the claims against Germany. It may be fairly assumed that the rules laid down in these "General Instructions" were in the mind of the Government when negotiating with Germany one year later, and that while continuing to use the same formula after the Treaty of Berlin the Government did not intend to inform its nationals of principles which had in the meantime become meaningless because changed through Treaty.

Now the "Instructions", which cannot therefore be disregarded, show that they distinguish between two classes of possible claimants. One class—those "who have American nationality (such as citizens of the United States, including companies and corporations, Indians and members of other aboriginal tribes or native peoples of the United States or its territories or possessions, etc.)"—and the other—those "who are otherwise entitled to American protection in *certain* cases (such as certain classes of seamen on American vessels, members of the military or naval forces of the United States, etc.)". It is obvious that the circumscription of the first class squares with the term used in the Treaty of Berlin, "claims . . . of all persons, wheresoever domiciled, who owe permanent allegiance to the United States" and that class two comprises claimants who manifestly do *not* owe *permanent* allegiance to the United States—not being *nationals* of the United States.

In framing the Treaty of Berlin the United States followed the principle laid down in the Treaty of Versailles providing for the indemnification of the *nationals* of the Powers concerned, and has restricted the scope of its possible protection to class one, using instead of the term "nationals" the broader phrase—persons "who owe permanent allegiance to the United States"—to cover the rights of the "native peoples" of its territories and possessions.

The contractual basis between the two Governments comprises therefore class one of the "General Instructions" as defined more accurately in the Knox-Porter Resolution incorporated in the Treaty of Berlin, and this class only.

The status of claims essential to secure their standing before this Commission once being established—either in accordance with the conception of the American Commissioner or with my conception—there is no disagreement between the National Commissioners that this status must have existed at the time when the damage complained of occurred. In this respect I fully agree

with the opinion of the American Commissioner rejecting the contention of the American Agent according to which not the date of the injury but the date of the enactment of the Knox-Porter Resolution should be decisive.

Therefore in concurring in principle with the American Commissioner on point one of the decision proposed by him I disagree in so far as he applies the words "American nationals, or otherwise entitled to the protection of the United States" instead of the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America".

Point one should read, therefore, as follows:

(1) That the original claimants who suffered the loss or injury, for which damages are claimed, were persons, wheresoever domiciled, who owed permanent allegiance to the United States of America at the time the claim accrued, which is the time when, or during which, the loss or injury occurred.

II

Continuity of "nationality"

For the reason pointed out in part one, I think that point two of the decision as proposed by the American Commissioner should read "persons, wheresoever domiciled, who owed permanent allegiance to the United States of America since the time the claim accrued" instead of "American nationals, or otherwise entitled to the protection of the United States", etc.

In the second part of his opinion the American Commissioner does not approve of the principle of continuity of American ownership of a claim, stating that "the right of a government to espouse a claim arises on the general principle that the injury to a national is an injury to the nation and the change of nationality of the claimant or the claim does not affect the original injury to the nation for which it is entitled to claim compensation".

Though I do not agree therein, the question may be left in abeyance *here* as I agree that "It is sufficient for the purposes of the present discussion that at the time the Treaty of Berlin was entered into it was the common practice of both the United States and Germany to refuse to espouse claims after the claimant had become, or the claim itself had been transferred to, a foreign national." So both National Commissioners agree "that in entering into that Treaty both Governments understood and expected that this practice would be applied with respect to claims under that Treaty".

The American Commissioner is, however, of the opinion that this *original test* must only continue until it is replaced by the "national ownership" resulting from the "espousal" of the claim by the Government of the United States.

He is furthermore of the opinion that such "espousal" was effected by the conclusion of the Treaty of Berlin.

From these conclusions I differ in two points:

- (a) I cannot agree that the original test of American nationality in the person who suffered the loss or injury becomes immaterial by reason of the "espousal" of the claim by the United States Government.
- (b) Assuming for argument's sake that the "espousal" by the United States has such an effect, I cannot agree that the conclusion of the Treaty of Berlin can be called such an "espousal" of the claims now before this Commission.

(a) In using the term "espousal" the American Commissioner does not apply—so far as I am aware—a legal term of a common and recognized meaning. As I take it, he means by that term the act of a government in taking the complaint of one of its nationals against a foreign government into its own

hands with the purpose of seeking satisfaction on behalf of such national. To make my position clear at the outset, I do not deny that an action of this description is well known and recognized in the intercourse of nations and that it has certain effects of an internal and also of an external nature if it is *communicated* in the proper way to the foreign government concerned, by way of "*presentation*" of the claim (the term commonly used for such action in international law: see Borchard, section 139, page 356).

The contention of the American Commissioner, however, is that the act of espousal, under the law of nations as well as under the provisions of the Treaty of Berlin, makes a claim which originally arose in the person of a national a government-owned claim and that from that time on such claim must be treated as having a continuing American nationality.

The consequence of this theory would be, for instance, that claims arising out of injuries to persons who lost their American citizenship after the date of the injury, by naturalization in a foreign country or by marriage to a foreigner, would be within the jurisdiction of this Commission if the change of nationality occurred after the time of "espousal" or "presentation". Thus the Commission would under its rules be obliged to render awards on behalf of aliens, even of former alien enemies. The same would be true if an American citizen in whose person a claim arose had died after the espousal, leaving only German nationals as his heirs (a case which is actually before the Commission).

I am of the opinion that such a result is neither justified by international law nor by the provisions of the Treaty of Berlin.

So far as international law is concerned the opinion of the American Commissioner is based on the legal effect such "espousal" has under the "law of the United States" on the claim of the national. I am not sure, however, whether this effect is really so sweeping as claimed by the American Commissioner, and whether really "all private interests in these claims have disappeared from an international point of view". At least such consequence would be surprising in the case of claims growing out of debts owing to American creditors as well as in the case of all claims of American nationals growing out of exceptional war measures, which claims can be settled—at least to a certain extent—between the parties concerned even while pending before this Commission.

At all events the effect of merging the claim of a national into a claim of the nation would be derived, as justly said, from the "law of the United States" and could therefore be altered by altering such law.

An international claim accrues through the wrong done to a *nation* through the wrong to its national. Its international character is based only on the wrong caused to the *nation*. Therefore, it is not feasible to make this legal character of an *international* claim dependent on how the claimant government regulates at its discretion its own relation toward its national. Even if "Germany is not concerned with what disposition the Government of the United States makes of the proceeds"—the correctness of which opinion I rather doubt so far as the payment of German private debts and of claims against the Treuhaender are concerned—I do not see how this can affect the legal requirements of claims made against Germany before this Commission.

So the argument taken from the legal domestic relation between the United States and its nationals does not seem convincing.

But even assuming that the statement of the American Commissioner as to the internal effect of an "espousal" is correct, it has, in my opinion, no bearing on the question at issue. As pointed out by the American Commissioner himself, the purpose of espousing (and presenting) the claim of an American national is to seek redress on his behalf. The United States in doing this does

not seek revenge for an injury inflicted upon the nation as such; it seeks financial compensation for the individual who has suffered the loss or damage. The result to be achieved thereby is not to satisfy the nation but to indemnify a specific person. It follows from the very nature of the proceedings before this Commission that, to secure continuous American nationality of a claim, it is not sufficient that this claim was "American-owned" at the time it arose and at the time it was presented but that—so to speak—the redress to be awarded must also be and remain "American-owned". In other words, up to the last moment of its activities the Commission remains concerned with the question on whose behalf the claim is prosecuted and to whom the proceeds of an award will flow. If the facts, whenever they arose or became known to the Commission before rendering judgment, show that the beneficiary of the award is not an American national but a foreigner, the claim would not, in my opinion, be within the jurisdiction of the Commission.

That this conclusion conforms with the general principles of international law is evidenced by various rulings of international tribunals.

Before the French-American Commission of 1880 in the case of Wiltz,¹ public administrator of the parish of Orleans, Louisiana, acting for the estate of one Delrieu, citizen of France, the American Agent demurred upon the ground that the memorial did not aver that the beneficial owners were citizens of France. That commission dealt with claims under the convention of 1880 concluded between the United States and France, whereby "all claims on the part of . . . citizens of France, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of France" between the 13th day of April, 1861, and the 20th day of August, 1866, should "be referred to three Commissioners". The commission dismissed the claim, saying *inter alia*:

"We think it was not enough that the deceased was a French citizen when he suffered the loss and when he died, and that his administrator presents the claim. It should further appear that the *real* and *beneficial claimants*, WHO WILL ULTIMATELY RECEIVE THE AMOUNT that may be allowed, are French citizens; and *they* must *appear* and *present* their claims."

Another ruling of that commission, incidentally disclosed in the decision of a United States Court in *Bodemueller v. United States*, 39 Federal Reporter 437 (digested in II Moore's Arbitrations at page 1150), is based on the same principle. In that case the plaintiff, Mrs. Bodemueller, was the American daughter of the French citizen Prevot. She, together with the other heirs who were French citizens, under the American-French Convention of 1880 claimed for a loss suffered by the decedent. The commission deducted from the sum claimed one-sixth (the share of Mrs. Bodemueller) on the ground that Mrs. Bodemueller was an American citizen. The decision does not state when Mr. Prevot died, but apparently his death occurred after the signing of the convention (1880), his widow being appointed administratrix in 1884. But though at all events the claim had been "espoused and presented" by that time, the Commission nevertheless regarded the change of nationality in the person of the claimant as material.

In the case of *Burthe v. Denis*, 133 U. S. 514 (1890), concerning another claim before the same commission, the Supreme Court of the United States accepted the same theory. Said the court: "*It matters not by whom the claim may have been presented to the Commission. That body possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their presentation and of judgment thereon, by*

¹ Wiltz v. U. S. (1882), III Moore's Arbitrations, page 2243.

citizens of the other country." So well founded was this rule, in the opinion of the court, that it expressly stated that "Any award to their co-legatees [i. e., French heirs] would have been *invalid and void*."

In my opinion it follows from these decisions of international courts as quoted above and maintained by the Supreme Court that the doctrine of continuity of the national ownership of a claim is more than a question of expediency left to the discretion of the claimant state but that it is a recognized and binding principle of international law, against which "*no authority*" exists, as the Supreme Court of the United States expresses it, "to consider any claims . . . except as held, both at the time of their presentation and of judgment thereon, by citizens of the other country".

This rule is acknowledged under Administrative Decision No. II, page 8, where it is said, "the claim for such loss must have since *continued* in American ownership", and it is maintained by the Agent of the American Government not only before this Commission² but also before the American-French Claims Commission³ and before the American-British Claims Commission.⁴

And the same principle is stated by Ralston, International Arbitral Law and Procedure, section 220, saying: "With extremely rare exceptions, and such exceptions based upon the particular language of treaties . . . the language of commissions has been . . . that the title to such claim must have *remained continuously* in the hands of citizens of such government until the time of its presentation for filing before the commission." See also Borchard, section 134, page 352.

The same principle seems to me to be accepted by the Government of the United States declaring that "claims of foreigners who, *after* the claims accrued, became Americans . . . or *vice versa*, can *not* be espoused by the United States".

But the question remains whether this rule is altered by the Treaty of Berlin.

Although I fully agree with the American Commissioner that even independently of any laws of the United States governing the relationship between the Government and the claimants the United States under that Treaty becomes the only claimant and that no claims can be presented except by the United States Government. I cannot follow his conclusion that a change of nationality after the "espousal" has been made immaterial by the terms of the Treaty. There is nothing therein to indicate such a departure from the general principles of international law. The opposite is true. The Treaty distinguishes clearly between claims of the Government of the United States and claims of persons who owe permanent allegiance to the United States. Nowhere is it even suggested that the United States were from a certain time to prosecute claims practically owned by aliens not entitled in any way to protection by the United States.

That the United States in fact never took such a position appears from the wording of the "General Instructions" quoted above. When that Government states that "as a rule" it "declines to support claims that have not belonged

² See Claim 8, American Brief, page 125: "the rule that claims presented against one Government by another Government . . . must in point of origin be owned by nationals of the latter Government and *continue* in such ownership".

³ See pages 164-165 *supra*. (Note by the Secretariat, this volume, p. 133 *supra*.)

⁴ See American and British Claims Arbitration, Claim No. 32 (Adolph G. Studer), Memorandum of the Oral Argument of the United States, page 3: "In construing the language of general claims conventions of the ordinary type . . . several claims commissions have laid down a rule restricting recovery to claims . . . belonging at the time of their origin, to nationals of the claimant country, and *remaining* the property of nationals of the claimant country *until the time of their presentation* to the commission."

to claimants of one of these classes from the date the claim arose to the *date of its settlement*" such language is irreconcilable with the contention that the act of the espousal could be considered as essential in connection with the nationality of the claimant.

If, under these circumstances and under further consideration of the fact that the decisions of the highest American court as well as of international tribunals were in absolute opposition to such a position, the United States had intended to change these rules to the detriment of Germany, they most certainly would have said so in plain and clear words.

And the United States would have had the more reason for so doing as the argument now urged fails to have a logical foundation in the wording of the Treaty; which, though not dealing directly with the question at issue here, touches it indirectly in Section 5 of the Knox-Porter Resolution, and for this reason:

The Treaty speaks of claims of "all persons . . . who *owe* permanent allegiance". Nevertheless both Commissioners as well as the Umpire in Administrative Decision No. II, page 8, agree that, contrary to the contention of American counsel, such clause does *not* constitute the real origin of these claims, but either intentionally or through lack of sufficient clearness leaves the question of the origin of the claims to the general rule that the claim must in its origin be national at the time the wrong was suffered. Now, how can the same clause at the same time be nevertheless construed as establishing a special date as regards the element of continuity? There can be no logical evasion; either the clause has constitutional force—in which case Administrative Decision No. II and the opinions of both Commissioners are wrong—or the clause has no constitutional force at all—in which case it cannot be used to justify the acceptance of the date of the Treaty as decisive for American ownership of the claims presented.

I reach, therefore, the conclusion that the American nationality of a claim must continue beyond the time of the espousal.⁵

(b) The American Commissioner is of the opinion that the date of the "espousal", the effect of which according to his theory has been pointed out above, is the date of the Treaty of Berlin.

Even assuming, for argument's sake, that the act of "espousal" has the effect of rendering loss of American nationality immaterial, I cannot agree with the American Commissioner as to this date. His standpoint is that the Treaty of Berlin places the United States Government in exactly the same relationship to all American claims covered by that Treaty as the United States Government places itself in by espousing these claims, and that the United States has espoused all these claims by including them in the Treaty.

This conception is, so far as I can see, not sustained by any precedent in international law.

The decisions quoted above show that neither the French-American Commission nor the Supreme Court attributed to the conclusion of a treaty regarding the adjudication and settlement of claims the effect of an "espousal" as construed by the American Commissioner. The reason for this attitude undoubtedly is that the conclusion of a treaty establishing the legal basis for certain general categories of claims cannot be identified with the act of espousing a special claim by the government. A government cannot "espouse" categories of claims the underlying facts of which are wholly unknown to it, but only individual claims as submitted to it by the national and after examination as to its merits.

⁵ The time up to which this requirement is necessary is dealt with under the division (c), *post*.

Even the decisions of the Mexican Claims Commissions as cited by Borchard, pages 665-666, do not bear out the proposition of the American Commissioner.

They concern Mexican claims which were not decided by an international tribunal but by a domestic commission established by the United States to distribute a certain fund received from Mexico among the respective nationals under the *peculiar provisions* of a treaty made with Mexico which provided for the assumption by the United States of "all claims of citizens of the United States * * * which may have arisen *previously to the date* of the signature of this treaty". Therefore all that the cases stand for on their facts is that the claim must have been both American in origin and American at the time of the signature of the treaty. The decisions are based on the wording of the treaty the language of which was considered as explicit. But the controversy in all cases was whether the American citizenship *at the time of the loss* was *sufficient* or *not*, and did not deal at all with the question at issue here, whether the American ownership has to continue up to the time of the signing of a treaty or to what other date. So it was not a general principle but a special agreement which caused that commission to lay stress on the date of the treaty, and the commission did do so only with regard to a question wholly different from that at issue here.

I do not dispute the possibility of embodying as decisive in a treaty between two governments *expressis verbis* the act of "espousal" of claims the adjudication and settlement of which form the object of that treaty. This has not been done, however, as between the United States and Germany. The opposite is true, and for three reasons:

(1) The Treaty is admittedly "silent" on this question.

(2) Both Governments understood and expected, as I agree with the American Commissioner, that the practice of the Department of State as set forth in the Instructions "*would be applied with respect to claims under that Treaty*". That means an *agreement* reached by *mutuo consensu* and making the practice of the Department of State as to the continuous ownership of American claims the *contractual* basis between the two Governments.

Now, this practice provides, under clause 6 of the Instructions, that the "Government of the United States, as a rule, *declines* to support claims that have not belonged to claimants of one of these classes from the date the claim arose *to the date of its settlement*".

So it is clear beyond doubt that the practice as set forth by the Instructions and as agreed upon by both Governments does *not* establish the date of espousal as decisive.

(3) The Treaty of Berlin states in very general terms the financial obligations of Germany in consequence of the war. In doing this it distinguishes, as already said above, clearly between claims of the United States and claims of American nationals. No indication is given that the United States by concluding the Treaty are "espousing" the claims of the latter class. On the contrary, it appears from the wording of Article II that the question of "espousal" was left open intentionally and deliberately. For this article provides that *if* the United States should avail itself of the rights and advantages (as contained in the Treaty of Versailles and "reserved" by the Knox-Porter Resolution) it would do it in a certain manner. If the English text should be considered doubtful in this respect such doubts are wholly removed by the German text, which is entitled to equal force and which reads as follows: "*Wenn die Vereinigten Staaten die * * * Rechte und Vorteile für sich in Anspruch nehmen*" ("If the United States avails itself of the rights and advantages"). Article II, far from "espousing" for the United States all claims which might possibly be

raised under the Treaty, leaves it to the discretion of the American Government whether and how far it will make use of the rights reserved by the Treaty. The United States may avail itself of such rights, or it may not—as for instance, in the case of pensions. But if it does avail itself of them it must do so in such a manner as to make it clear to the other party. This can only be done by a special act or declaration addressed to that party through the proper channels specifying the claims which the United States chooses to take up against Germany. Only such action, not the legal basis on which it is founded, could be considered as an “espousal”. It is a requirement indispensable to the dignity and comity of intercourse between nations that a respondent nation must have full knowledge of the essential facts of a claim which another nation deems sufficiently important to raise against the respondent state.

Therefore, if any action of a government can be considered as important enough to have a bearing on another government, it can only be the act of a formal presentation.

Only such presentation of a claim could be considered as its espousal.⁶

As already pointed out the presentation of a claim must comprise a sufficient statement of its facts and merits in order to enable the respondent government to take its position and if necessary to formulate its defense.

The question remains as to what constitutes the presentation of a claim in the present proceeding.

The only acts which come into question after the conclusion of the Treaty itself are the conclusion of the Agreement of August 10, 1922, the delivery of the list of claims transmitted pursuant to Rule IV by the American Agent to the German Agent, and the filing with the Commission of a claim by the American Agent or of an agreed statement by both Agents.

The Agreement of August 10, 1922, is limited to the creation of a tribunal for the adjudication of claims arising under the Treaty. In defining these claims it does not go beyond the terms of the Treaty itself. No indication is given as to which claims in particular the United States intended to submit to the tribunal or in what manner. Nothing is said in the Agreement or in the Notes accompanying it regarding an “espousal” of claims by the United States Government. On the contrary, the Agreement again clearly distinguishes between claims of the United States and claims of American nationals, showing thereby that no act of espousing the latter class was contemplated in framing the Agreement.

The delivery of the Claim List might under ordinary circumstances be considered as a notification sufficiently distinct to be called an espousal and presentation of the claims enumerated therein.

It seems to me, however, to be a rule well established in international law that if two governments create an arbitral tribunal for the adjustment of claims raised by one against the other the act of presentation of such claims is their filing with the tribunal itself. Ralston (International Arbitral Law and Procedure, page 105) holds that the “claim must have remained continuously in the hands of citizens of such government until the time of its *presentation for filing* before the commission”, which was also the viewpoint of the American Agent in the American and British Claims Arbitration in Claim 32 (Adolph G. Studer, Memorandum of the Oral Argument of the United States, page 3): “remaining the property of nationals of the claimant country until the time of their

⁶ See Borchard, section 139, page 356: The claim “becomes international in character when the government espouses it *and presents it* diplomatically to the debtor government”.

presentation to the commission". And it also seems to be the opinion of Hyde (Volume I, page 475) and Borchard (page 664, section 308).⁷

If in addition to the date of the presentation of a claim Borchard mentions the time of the signature of the protocol as an alternative such time is obviously not the time of the signature of a treaty *creating* the rights to be pursued afterwards, such as the American Commissioner has in mind, but a date *later* than the presentation of the claims to the respondent *government* though earlier than the date of presenting it to the *commission* itself. The "protocol" is not a treaty—as for instance the Treaty of Berlin—but an agreement for the arbitration of claims already "presented previously to the other government", that is, presented with all details necessary to enable the respondent government to examine each claim on its *particular merits*.

That this is the meaning of the term "protocol" as used by Borchard in the instance cited is shown by his phraseology in speaking of a treaty as "providing for the adjudication of claims".

But even in the few cases cited by Borchard in support of this rule the decisions *nowhere* deal with the question at issue here, but—exactly as in the decision already mentioned of the Mexican Claims Commission—only with the question whether the American citizenship *at the time of the loss* is sufficient or not. The decisions do *not* pass upon the question at issue here and do not state that the ownership is *not* required to continue beyond the date of the signing of the protocol.

My conclusion, therefore, is that the act by which the United States could "espouse" a claim before this Commission could only be the act of filing such claim (by way of petition, memorial, or agreed statement) with the Commission.

As the American Commissioner considers the date of the Treaty of Berlin only in so far as the date of "espousal" at "an earlier date" cannot "be established on the particular facts in any case", I may fairly assume that it is meant thereby to reserve those cases in which the Government of the United States had already presented a claim before the date of the Treaty of Berlin. I frankly admit that either under international law or under the provisions of a treaty the date of the signing or of the coming into force of such treaty could be established as decisive as to the question of continuity of ownership. But I cannot think of a "rule" and especially not of a treaty agreement which would restrict the rights of the defendant state as to the date of such continuity but at the same time give the claimant state full power to recur to another and earlier date if more favorable. Is it possible to assume that such could have been the meaning of an "agreement" except where expressly and plainly provided for?

And how can any "espousal" or even any presentation of a claim *before* the date of the Treaty have a bearing on this Commission which has to pass upon the claims based only on the *special* provisions of such *Treaty*?

(c) After having tried to show under (a) that the "espousal" of a claim is not decisive as to the time up to which the American ownership of the claim must continue, and under (b) that assuming that the espousal of claims should be material the date of it would be the time of filing a claim before this Commission, I reach the conclusion that, under the principle of continuous ownership and moreover *under the mutual and binding understanding* of both Governments with respect to the application of the rule under clause 6 of the General Instructions, the American nationality of the claimant must continue from

⁷ In accordance herewith Administrative Decision No. II of this Commission speaks of claims "*presented to this Commission . . . on behalf of one or more of its nationals*".

the time the claim arose to the date of judgment, as the last essential moment of the activities of this Commission.

This conclusion is in accordance with the principle laid down by the Supreme Court of the United States (the date of "judgment" being, in a legal sense and for the purpose of this Commission, the date of settlement).

(d) As regards claims, whether "espoused" by the United States or not, in which only a share or part interest of a claim which had accrued under American ownership has been transferred to foreign nationals, and in which therefore "some American interest therein remains", I concur with the American Commissioner that such claims have in so far a standing before this Commission and should be reserved for special consideration.

Summary

To summarize, my conclusions are:

I agree with the American Commissioner

(1) That the original claimants who suffered the loss must have been American nationals at the time of the loss and

(2) That the claim must have since continued in American ownership.

I disagree with the American Commissioner

(1) As to the definition of who is entitled to the protection of the American Government under the Treaty of Berlin, substituting for the words "American nationals, or otherwise entitled to the protection of the United States" as applied by the American Commissioner the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America"; and

(2) As to the time to which the American ownership must continue, substituting for the time of "espousal", as proposed by the American Commissioner, the date of judgment passed by this Commission, and defining as the time of "espousal", if material, the time of the filing of a claim before this Commission, contrary to the opinion of the American Commissioner, who defines the date of the taking effect of the Treaty of Berlin (November 11, 1921) as in principle the time of espousal, leaving the particular facts of a special case to establish an earlier date.

I agree further

That where a share or a part interest of a claim which had accrued under American ownership has been transferred to foreign nationals such claim may have a standing before this Commission so far as an American interest remains therein and that such cases may be reserved for special consideration by the Commission.

Dr. W. KIESSELBACH

The two National Commissioners accordingly certify to the Umpire of the Commission for decision the points of difference which have arisen between them as shown by their respective opinions above set forth.

Done at Washington October 21, 1924.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

Decision

PARKER, *Umpire*, in rendering the decision of the Commission delivered the following opinion:

No government-owned claims are dealt with in this opinion but only those put forward by the United States on behalf of private owners. It is in this sense that the term "claim" or "claims" is used, unless it otherwise appears from the context.¹

The answer to the basic question presented by the Certificate of Disagreement of the Two National Commissioners calls for a definition of the jurisdiction of this Commission as determined by the nationality of claims. But the rule invoked by the German Agent and the application sought to be made of it, when analyzed, strike deeper than a mere question of jurisdiction. The jurisdictional form of presentation but serves to obscure the real issue, which is, Shall the property rights which have vested under the Treaty of Berlin be preserved, or shall they be destroyed through a change in their nationality? It is in this latter aspect that the question assumes its true importance.

It is contended by the German Agent that it is an established rule of international law that no nation will assert a claim of a private nature against another nation unless such claim possesses the nationality of the nation asserting it continuously from its origin to the time of its presentation and even of its final adjudication by the authorized tribunal. This is but another way of saying that a change in the nationality of a right, through its voluntary or involuntary transfer, deprives it of the remedy of enforcement through diplomatic intervention. He further contends that this rule must be read into and constitutes a part of the Treaty of Berlin, so that a right once vested in an American national under that Treaty will be destroyed, and Germany released from her obligation thereunder, upon the transfer of that right, by succession, assignment, or otherwise, to alien ownership. That the reasons underlying the Umpire's decision on the points of difference certified by the National Commissioners may be clearly understood, it is necessary to examine these contentions put forward by the German Agent to ascertain whether or not such an established rule of international practice as he invokes exists, and if it exists, its applicability, if any, to the Treaty of Berlin.

Statements will be found in some decisions of international tribunals and in some treatises dealing with international law and international arbitral procedure supporting the contention of the German Agent with respect to the existence of the rule as stated. But it may well be doubted whether the alleged rule has received such universal recognition as to justify the broad statement that it is an established rule of international law. It is no doubt the general practice of nations not to espouse a private claim against another nation unless in point of origin it possesses the nationality of the claimant nation. The reason of the rule is that the nation is injured through injury to its national and it alone may demand reparation as no other nation is injured.² As between nations the one inflicting the injury will ordinarily listen to the complaint only

¹ Reference is made to Administrative Decision No. I for the definition of other terms used herein.

² This proposition was formulated by Vattel (Book II, Chapter VI, Section 71, translation of edition of 1758 published by the Carnegie Institution of Washington, 1916):

"* * * Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection."

of the nation injured. A third nation is not injured through the assignment of the claim to one of its nationals or through the claimant becoming its national by naturalization. While naturalization transfers allegiance, it does not carry with it existing state obligations. Only the injured nation will be heard to assert a claim against another nation. Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims.

But even this practice of nations may be changed by mutual agreement between the two governments parties to a particular protocol creating a tribunal for the adjudication of claims and defining its jurisdiction. The National Commissioners are in agreement on this point. Such jurisdiction is purely a matter of agreement between the interested nations. It is not one of general concern to all members of the family of nations. It does not declare any international *principle* but is only a rule of *practice*, to be followed or not as may be stipulated between the interested nations. It pertains to the course and form of the procedure agreed upon between the two nations to enforce rights but not to the rights themselves. In other words, it pertains to the *remedy*, not to the *right*. It affects only the question of the jurisdiction of an international arbitral tribunal, which in turn is fixed and defined by the particular agreement creating it. Where the meaning of such an agreement is obscure, custom and established practice may be looked to in arriving at the intention of the parties. But where the agreement creating the tribunal and defining its jurisdiction is clear it is not competent to look beyond the terms of the agreement in determining its jurisdiction. Such an agreement creating the forum to adjudicate claims and defining its jurisdiction in no wise affects the existing rights and obligations which are to be adjudicated by it.

The general practice of nations not to espouse a private claim against another nation that does not in point of origin possess the nationality of the claimant nation has not always been followed.³ And that phase of the alleged rule invoked by the German Agent which requires the claim to possess continuously the nationality of the nation asserting it, from its origin to the time of its presentation or even to the time of its final adjudication by the authorized tribunal, is by no means so clearly established as that which deals with its original nationality. Some tribunals have declined to follow it.⁴ Others, while following it, have challenged its soundness.⁵ The application in all of its parts of the rule invoked by the German Agent to a privately-owned claim in which

³ See opinion of Barge, Umpire, American-Venezuelan Commission, in Orinoco Steamship Company case, Ralston's Venezuelan Arbitrations of 1903 (hereinafter cited as "Venezuelan Arbitrations 1903"), at pages 84-85.

⁴ See case of Phelps, Assignee, v. McDonald, cited in note 23 *post*, where under the convention of 1871 Great Britain espoused a claim against the United States and a substantial award was rendered against the United States on a claim which in point of origin was British but which, prior to the making of the convention and to the presentation of the claim and to the making of the award, had lost its British nationality and vested in the assignee in bankruptcy for the benefit of American creditors.

The rule contended for by the German Agent was invoked by Chile in challenging the right of the arbitrator to make an award in the well-known Alsop Case espoused by the United States. Chile's contention was summarily rejected by King George V of Great Britain as "Amiable Compositeur" in an award handed down July 5, 1911 (V American Journal of International Law 1085). The original partners of Alsop & Co. were all American nationals. But at the time this arbitral convention was entered into, when the claim was presented to the arbitrator, and

the nationality has changed by voluntary or involuntary transfer since the right accrued would deprive the claimant of all remedy for its enforcement through diplomatic intervention. The practical effect would frequently be to

(Footnote continued from page 141.)

when the award was made, all of the original partners were dead and the claim was being prosecuted by the United States on behalf of their heirs and creditors. It was made to appear that at least some of these heirs and creditors were citizens of Chile but the arbitrator treated the claim as a unit and as possessing complete American nationality and made the award accordingly.

In the Daniel (or Piton) Case (Venezuelan Arbitrations 1903, page 507; also Ralston and Doyle's Report of French-Venezuelan Mixed Claims Commission of 1902, page 462) under the French-Venezuelan Convention of 1902 an award was made against Venezuela to the Venezuelan heirs of a deceased Frenchman (as stated in the additional opinion of the French Commissioner in the Massiani Case at page 234 of the volume last cited), where it appeared that the claim possessed original French nationality and was espoused by France.

The Petit Case (No. 255, French and American Claims Commission of 1880, Boutwell's Report, page 84) was espoused by France against the United States and an award made in claimant's favor. It was made to appear that after Petit's property was wrongfully seized by the United States he became a naturalized citizen of the United States and so remained for a period of 13 years, when he was formally reinstated as a citizen of France.

The Estate of William E. Willet *v.* Venezuela (No. 21, United States and Venezuela Claims Commission, Convention of December 5, 1885, III Moore's International Arbitrations (hereinafter cited as "Moore's Arbitrations") 2254 and IV *ibid.* 3743) involved a claim against the Government of Venezuela originally owned by Willet, an American citizen, which he held until his death. The claim was first presented to a commission by his widow as administratrix. The Government of Venezuela claimed that Mrs. Willet and her children were Venezuelan citizens and that as they were the beneficial owners of this claim the commission had no jurisdiction over it. An award was made in favor of the estate, the commission holding that the claim, being American in its origin, could be presented by the administratrix "whatever may have been her own personal status". The fact that the beneficial owners of the claim were of Venezuelan nationality does not appear to have given the commission any concern.

⁵ Ralston, Umpire of the Italian-Venezuelan Mixed Claims Commission, in the Corvaia Case (Venezuelan Arbitrations 1903, at page 809) reluctantly adopted the rule contended for here by the German Agent but protested that its effect was to "perpetrate an injustice" and added that "If the proposition now presented were one of first impression" the umpire would probably have reached a different conclusion.

Here it will be observed that the umpire was careful in dismissing the claims in question for want of jurisdiction of the commission over them to provide that the dismissal was "*without prejudice to the rights* of any of the claimants to claim against Venezuela before any court or commission which may have suitable jurisdiction, or to take such other action as they may be advised". The *rights* continued to exist notwithstanding the lack of jurisdiction of the commission to enforce them.

In discussing this rule Borchard in his "Diplomatic Protection of Citizens Abroad" (1915) uses this language (section 285, at page 630, and section 310, at page 666):

"* * * If it is the injury to the state in the person of its citizen which justifies diplomatic interposition, the mere fact that the claim subsequently by operation of law passes into the hands of alien heirs would not seem to modify the injury to the state. * * *"

"* * * It is not so clear in theory why a claim, which, having originally accrued in favor of a citizen, has passed into the hands of an alien, should necessarily forfeit the protection of its original government, especially where it passes not by voluntary assignment but by operation of law. If the state has been injured by the original wrong done to its citizen, the mere transfer of the claim hardly seems to purge the national injury to the state. * * *"

deprive the owner of his property. As the rule in its application necessarily works injustice, it may well be doubted whether it has or should have a place among the established rules of international law. Those decisions which have adopted it as a whole have recognized it as a mere rule of practice. Usually they have been rendered by divided commissions, with one member vigorously dissenting.⁶ When the majority decisions in these cases come to be analyzed, it is clear that they were in each case controlled by the language of the particular protocol governing the tribunal deciding them, which language limited their jurisdiction to claims possessing the nationality of the nation asserting them not only in origin but continuously—in some instances to the date of the *filing* of the claim, in others to the date of its *presentation* to the tribunal, in others to the date of the *judgment* rendered, and in still others to the date of the *settlement*.⁷ This lack of uniformity with respect to the period of continuity of nationality required for jurisdictional purposes results from each case being controlled by the language of the particular convention governing. In each case it is clear that the question presented was purely one of *jurisdiction* and did not touch an existing *right* further than to deny the jurisdiction of the tribunal to enforce it. They do no more than decide that the tribunal in question has not, under the protocol creating it, the jurisdiction to consider and adjudicate the rights of the claimants. The very cases cited by the German Commissioner aptly illustrate this.⁸ Numerous other cases could be cited in further illustration, a

⁶ *Miliani Case* (decided by umpire), Italian-Venezuelan Commission (Venezuelan Arbitrations 1903, pages 754-762), see additional opinion of Italian Commissioner Agnoli at page 758. See also opinion of Commissioner Agnoli in the *Brignone Case* (decided by umpire) at pages 710-712 *ibid.*; dissenting opinion of French Commissioner L. de Geofroy in the *Wiltz Case* as reported in III Moore's Arbitrations at pages 2250-2253. See also contention of British agent in *Stevenson Case*, British-Venezuelan Commission, Venezuelan Arbitration 1903, at page 439.

⁷ The *Stevenson Case* (British-Venezuelan Commission, Venezuelan Arbitrations, 1903, at pages 451-455) is cited as one of the leading cases sustaining the rule invoked by the German Agent. It is clear from the opinion of Umpire Plumley that his decision denying jurisdiction of the commission to decide a portion of the claim espoused by Great Britain against Venezuela was controlled by the language of the protocol creating the commission (see pages 446 and 451). It is interesting to note that in that opinion two different periods were fixed for determining the nationality of a claim for jurisdictional purposes in addition to its original nationality, viz:

(1) Its nationality "up to and at the time of the treaty authorizing and providing for the international tribunal before which the claim is to appear" (page 451) and

(2) Its nationality "at the time of the presentation of the claim before the Commission" (page 455).

It was held by the Supreme Court of the United States that under the convention between the United States and France of January 15, 1880, the nationality of the espousing government must exist both at the time the claim was presented and at the time judgment was rendered thereon (*Burthe v. Denis* (1890), 133 United States Supreme Court Reports (hereinafter cited as "U. S.") 514).

⁸ The decision of the Supreme Court of the United States in *Burthe v. Denis* (1890) 133 U. S. 514, is cited by the German Commissioner. A claim, French in origin, was presented by France on behalf of the executor of the estate of a French national for the value of property damaged through occupation by the military authorities of the United States. Some of the heirs of the French national who had a beneficial interest in the claim were French citizens, others American citizens. Without undertaking to adjudicate the rights of the American heirs, the court held that the commission, under the express terms of the convention of January 15, 1880, between the United States and France creating it, was without jurisdiction to consider their claims and make an award in their favor. This is made clear by the following excerpt from the opinion:

"* * * the express language of the Treaty here limits the jurisdiction of the

few of which are noted in the margin.⁹ Many of them recognized the existence, and the continued existence, of the right but either held that the claimant had mistaken his forum or that no remedy had been provided for the enforcement of the right. In some instances the commissions have been at pains, in dismissing a case for want of jurisdiction, expressly to declare that the dismissal was

(Footnote continued from page 143.)

Commission to claims by citizens of one country against the government of the other. It matters not by whom the claim may have been presented to the Commission. That body possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their presentation and of judgment thereon, by citizens of the other country."

The Wiltz Case (III Moore's Arbitrations 2243), also cited by the German Commissioner, also arose under the convention between the United States and France of January 15, 1880. Here, as above pointed out, the *express language* of the convention limited the jurisdiction of the commission to claims possessing the nationality of the espousing nation at the time of their presentation and judgment thereon. The presiding commissioner in his opinion (page 2246) expressly states that "This is a question of jurisdiction. In deciding it we must be governed by the language and meaning of the convention." After deciding that the real and beneficial ownership of the claims espoused by France must be in French citizens to give the commission jurisdiction, he added "This appears to us to be the plain meaning of the first and second articles of the convention. They do not, in our judgment, admit of any other construction."

The third and only other case cited in this connection by the German Commissioner is that of the administratrix of the estate of Jean Prevot, which was also decided by the commission created under the convention of January 15, 1880, between the United States and France. As already noted, the *express terms* of this convention precluded the commission from rendering an award against the United States in a claim or any part of a claim espoused by France where the beneficial ownership was not in a French citizen. The commission therefore found that, while Jean Prevot had at the time of his death a valid claim against the United States for the sum of \$2,425.15, Mrs. Bodemüller, one of the children of Prevot, was an American citizen, and as she would receive one-sixth of her father's estate and therefore had a one-sixth interest in this claim the commission deducted from the amount which it found was due Prevot by the United States at the time of his death one-sixth thereof and allowed the claim for the balance, \$2,020.94. Thereupon Mrs. Bodemüller filed suit against the United States in the United States District Court for the Western District of Louisiana to recover \$404.18, the amount *which the commission found was due her* but which it was without jurisdiction to award to her (*Bodemüller v. United States* (1899), 39 Federal Reporter 437). The district judge held that the court had jurisdiction but that the suit should have been brought by the administratrix of the succession of Prevot. Later such a suit was brought against the United States by the administratrix but was defeated on a plea of the statute of limitations (II Moore's Arbitrations 1152). This case expressly recognized the existence of the *right* of the American heir of the French citizen Prevot but denied the *jurisdiction* of the commission created under the convention of January 15, 1880, to declare that right.

⁹ *Hargous v. Mexico*, III Moore's Arbitrations 2327-2331, where Thornton, Umpire, under the convention of July 4, 1868, between the United States and Mexico held that the claim put forward by the United States was in *origin a German claim; that it was not divested of the quality of German nationality by its transfer to an American citizen; that the claim constituted a valid indebtedness of the Mexican Government and that Germany (the nation injured through injury of her national) "might remonstrate against the refusal of the Mexican Government to pay the claim" but under the terms of the convention between the United States and Mexico creating the commission it was without jurisdiction to hear the claim.*

Wm. Dudley Foulke, Administrator, *v. Spain*, No. 105, United States and Spanish Claims Commission of 1871, also reported in III Moore's Arbitrations 2334, where Baron Lederer, Umpire, held that *under the terms of the convention* constituting the commission a claim of a deceased Spanish citizen (Eduardo Cisneros) against Spain

without prejudice to the *rights* of the claimants.¹⁰ This was in recognition of the established rule that a right may exist internationally where a remedy is lacking.¹¹ The rights dealt with in the cases cited in support of the alleged rule

(Footnote continued from page 144.)

which had passed by succession to his American heir was not within the jurisdiction of the commission, notwithstanding Spain might be indebted to the claimant. The umpire while conceding the existence of the right held that the commission lacked jurisdiction to declare it. At the same time he held that if the father of the heir on whose behalf the administrator was asserting the claim had been a citizen of the United States instead of a Spanish subject and if he "by a last will had conferred his property on a Spanish subject, the claim of this Spanish subject, being an heir of a United States citizen, would have been within the jurisdiction of the American-Spanish commission". This holding is significant, clearly indicating that the umpire found no obstacle in the form of any rule of international law which would prevent the United States from asserting against Spain a claim American in origin, even though by will or otherwise it had vested in a Spanish subject and was owned by a Spanish subject at the time of its espousal and presentation by the United States.

The Sandoval, Francisco and Clement Saracina, and Jarrero cases (III Moore's Arbitrations 2323-2325) all arose under the Treaty of Guadalupe Hidalgo between the United States and Mexico of February 2, 1848, and the Act of the Congress of the United States approved March 3, 1849, passed in pursuance of the provisions of Article XV of that treaty. The Board of Commissioners, constituted as provided by the treaty and act of Congress, held that *under the express language of the treaty* it was not sufficient in order to confer *jurisdiction* on the commission that the claim was American in its origin but that it must have been American-owned *at the time the treaty was signed*. These decisions were controlled by the express language of the treaty. The commission, however, took pains to say in the first three of these cases that "The treaty does not discharge the Mexican republic from claims of this character" and in the fourth case the commission held that "There can be no doubt of the validity of the claim against the Government of Mexico". In all of these cases it is clear that the commission, while recognizing the continued existence of *rights* in the claimants with a corresponding obligation on the part of the Government of Mexico, simply held that these rights and obligations were not within the terms of the treaty.

¹⁰ See opinion of Ralston, Umpire of the Italian-Venezuelan Mixed Claims Commission, in the Corvaia Case, Venezuelan Arbitrations 1903, at page 810.

The claim of the heirs of Massiani submitted to the French-Venezuelan Mixed Claims Commission of 1902 (Report of Ralston and Doyle, Senate Document No. 533, 59th Congress 1st Session, at pages 211 and 242, 243) was one in which the Government of Venezuela became indebted to Thomas Massiani, a citizen of France. After this indebtedness accrued Massiani died leaving a widow and children surviving him. Thereafter the claims convention of February 19, 1902, between France and Venezuela was entered into. The claim, which was French in origin, was put forward by France in behalf of the widow and children. It appeared that Thomas Massiani, the original claimant, had for years been domiciled in Venezuela. There he married a Venezuelan woman and there his children had been born. There death overtook him. There he was buried, and there his widow and children continued to reside. Umpire Plumley held that the widow and children were "*under the terms of the protocol*" nationals of Venezuela. In a headnote prepared by the umpire it was held:

"*The indebtedness of Venezuela to the estate of Thomas Massiani may still remain, but the forum is certainly changed. The present forum is the one constituted for Venezuelans. This forum is the result of the selection of their paternal ancestor and their own selection after attaining majority.*"

The umpire concludes his opinion thus:

"This claim is to be therefore entered dismissed for want of jurisdiction, but clearly and distinctly *without prejudice to the rights* of the claimants elsewhere, to whom is *especially reserved every right* which would have been theirs had this claim not been presented before this mixed commission."

¹¹ As was said by Mr. Justice Story of the Supreme Court of the United States in *Comegys v. Vasse* (1828), 1 Peters 183, at page 216, in dealing with the nature of the claim of an American citizen against a foreign nation:

were not created by, but existed quite independent of, the protocols governing the tribunals in determining their respective jurisdictions.

But even if the rule invoked by the German Agent be conceded to exist as a rule of international practice, it remains to consider what, if any, application it has to the questions presented by the certificate of disagreement of the National Commissioners.

The Agreement of August 10, 1922, between the United States and Germany establishing this Commission clothes it with the jurisdiction and power of "determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty" of Berlin.¹² All claims put forward by the United States falling within the provisions of that Treaty, based on rights and obligations fixed and defined by that Treaty, are within the jurisdiction of this Commission. The language of the Agreement defining that jurisdiction is definite and clear. It is not admissible to look beyond that language for its meaning or to have resort to custom and practice to determine the extent of that jurisdiction. A fundamental rule governing the interpretation of treaties and international conventions that "it is not permissible to interpret what has no need of interpretation" applies.¹³ If a claim is one for which Germany is liable under the Treaty, the jurisdiction of this Commission attaches. Therefore the basic question presented by the certificate of disagreement of the National Commissioners is, What are "Germany's financial obligations under the Treaty" as that liability is determined by the nationality of claims put forward by the United States? When that liability is determined the jurisdictional problem, which is purely incidental thereto, is solved.

Claims for damages accruing during the entire war period as defined in this Commission's Administrative Decision No. 1¹⁴ are embraced within the Treaty. Neutrality claims as well as belligerency claims are covered. All of these claims were in the contemplation of the Congress of the United States when it enacted the joint resolution approved by the President July 2, 1921,¹⁵ declaring, with

(Footnote continued from page 145)

"* * * With reference to mere municipal law he may be without remedy; but with reference to principles of international law he has a right both to the justice of his own and the foreign sovereign. * * *"

Again, the Supreme Court of the United States in *Williams v. Heard* (1891), 140 U. S. 529, in holding that a claim of an American national against Great Britain was "property," used this significant language (pages 540-541 and 545):

"* * * while the claimant was remediless with respect to any proceedings by which he might be able to retrench his losses, nevertheless there was at all times a moral obligation on the part of the government to do justice to those who had suffered in property. * * * But the Act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. * * * the claim must be regarded as growing out of the Act [of Congress] of 1882, because that Act furnished the remedy by which the rights of the claimant might be enforced * * *"

See also note 23 *post*.

¹² See Agreement between the United States and Germany signed at Berlin August 10, 1922, the preamble of which recites that

"The United States of America and Germany, being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decisions to a mixed commission", etc.

¹³ Vattel, Book II, Chapter XVII, Section 263.

¹⁴ Decisions and Opinions, pages 1-3.

¹⁵ 42 United States Statutes at Large 105; this joint resolution will hereafter be designated "resolution of Congress".

stipulated reservations and conditions, the war between Germany and the United States at an end.

The contention is made by the American Agent that this resolution was notice to Germany of the espousal by the United States of all claims embraced within its terms, and that "the United States would expect her, as one of the prerequisites for the restoration of friendly relations, to satisfy all claims, of the character embraced in the treaty, of all persons who, on the second day of July, 1921, owed permanent allegiance to the United States" although some of such claims were not American in origin. But this *ex parte* notice and espousal, or any other notice or espousal, could not have the effect of creating and fastening on Germany an obligation to pay the claims espoused. Not until the coming into effect, on November 11, 1921,¹⁶ of the Treaty of Berlin, wherein by Article I Germany adopted as her own sections 2 and 5 of that resolution of the Congress and agreed that the United States should have and enjoy all of the rights, privileges, indemnities, reparations, and advantages specified therein, was Germany obligated to pay these claims.¹⁷ Then and not until then was she bound. The "rights and advantages which the United States is entitled to have and enjoy under this Treaty embrace the rights and advantages of *nationals of the United States* specified in the Joint Resolution or in the provisions of the Treaty of Versailles to which this Treaty refers".¹⁸ The Treaty embodies in its terms a contract by which Germany accorded to the United States, as one of the conditions of peace, rights in behalf of American nationals which

¹⁶ Article III of the Treaty of Berlin provides that "The present Treaty shall be ratified in accordance with the constitutional forms of the High Contracting Parties and shall take effect immediately on the exchange of ratifications which shall take place as soon as possible at Berlin." The proclamation of President Harding which bears date of November 14, 1921, recites that "the said treaty has been duly ratified on both parts, and the ratifications of the two countries were exchanged at Berlin on November 11, 1921". See also subdivision 5 of Article II of the Treaty of Berlin in connection with Article 440 of the Treaty of Versailles.

¹⁷ This construction of the Treaty of Berlin has been expressly adopted by Germany in a formal declaration presented to this Commission by the German Agent on May 15, 1923, in which it was declared that "Germany is primarily liable with respect to all claims and debts coming within the jurisdiction of the Mixed Claims Commission under the Agreement of August 10, 1922". Minutes of Commission, May 15, 1923.

Article I of the Agreement of August 10, 1922, establishing this Commission and defining its powers and jurisdiction, provides that

"The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

"(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

"(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

"(3) Debts owing to American citizens by the German Government or by German nationals."

See also paragraph (e), subdivision (2) of paragraph (h), and paragraph (i) of Article 297 and Article 243 of the Treaty of Versailles.

¹⁸ The quotation is from the resolution of the Senate of the United States of October 18, 1921, embodied in the ratification of the Treaty by President Harding of October 21, 1921, and made a part of the Treaty through the exchange of ratifications at Berlin on November 11, 1921.

had no prior existence but which were created by the Treaty. While these treaty terms doubtless include obligations of Germany arising from the violation of rules of international law or otherwise and existing prior to and independent of the Treaty, they also include obligations of Germany which were created and fixed by the terms of the Treaty.¹⁹ All of these obligations, whatever their nature, are merged in and fixed by the Treaty. The Commission's inquiry is confined solely to determining whether or not Germany by the terms of the Treaty accepted responsibility for the act causing the damage claimed and it is not concerned with the quality of that act or whether it was legal or illegal as measured by rules of international law.²⁰ Germany has agreed to make compensation for losses, damages, or injuries *suffered by American nationals* embraced within the categories of claims enumerated in this Commission's Administrative Decision No. I.²¹ It results that no claim belonging to any of the classes dealt with in that decision falls within the Treaty unless it is based on a loss, damage, or injury *suffered by* an American national—that is, it must be American in its origin. The National Commissioners agree that under the terms of the Treaty Germany's contractual obligations are limited to such claims as are American in their origin. The contention of the American Agent that the Treaty embraces all claims possessing American nationality on the second day of July, 1921, when the resolution of Congress became effective, whether or not they were American in origin, must be rejected.

The Treaty speaks as of November 11, 1921,²² the date on which it became effective. Through it the United States acquired rights, American in origin, on behalf of its nationals—not those who had been or those who might become its nationals, but those who were *then* its nationals—and Germany assumed corresponding obligations. These contractual obligations, which are in no sense conditional or contingent, became absolute when, but not until, the Treaty became effective. They embrace all claims which were impressed with American nationality both on the date when the loss, damage, or injury occurred and at the time the Treaty became effective and also possessed the other prerequisites to bring them within the Treaty provisions. By this agreement Germany is bound. The rights thus fixed constitute property the title whereof passes by

¹⁹ A large proportion of the financial obligations fixed by paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles as carried by reference into the Treaty of Berlin did not arise under the rules of international law but are terms imposed by the victor as one of the conditions of peace.

²⁰ Decisions and Opinions, page 76. (*Note by the Secretariat*, this volume, p. 75).

²¹ Article 232 of the Treaty of Versailles, which is read into and forms a part of the Treaty of Berlin, provides that Germany "will make compensation for all damage done to the civilian population of the United States", etc.

The Agreement of August 10, 1922, establishing this Commission and defining its powers and jurisdiction, provides that

"The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles

"(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, *their* property, rights and interests * * *;

"(2) Other claims for loss or damage to which the United States *or its nationals* have been subjected * * *".

This language clearly indicates that the parties to the Agreement construed the Treaty of Berlin as embracing only such private claims as are American in their origin.

²² See note 16 *supra*.

succession, assignment, or other form of transfer.²³ They were expressly accorded by Germany to the United States²⁴ and to its nationals.²⁵ They may be asserted against Germany by the United States and by *no other nation*, for they are contract rights, American in their origin, arising under a Treaty to which Germany and the United States are the only parties. The American nationals who acquired *rights* under this Treaty are without a *remedy* to enforce them save through the United States. As a part of the means of supplying that remedy this Commission was by Agreement created as the forum for determining the amount of Germany's obligations under the Treaty. That Agreement neither added to nor subtracted from the rights or the obligations fixed by the Treaty but clothed this Commission with jurisdiction over all claims based on such rights and obligations. The Treaty does not attempt to deal with rules of procedure or of practice or with the forum for determining or the remedy to be pursued in enforcing the rights and obligations arising thereunder. Into this Treaty, under and by virtue of which exist the rights of the United States and its nationals and the correlative obligations of Germany, the German Agent would read a rule which is at most a rule of practice affecting the remedy and the jurisdiction to adjudicate those rights. While admitting that the Commission has jurisdiction over all claims falling within the terms of the Treaty, he would so apply that rule as to take out of the Treaty and destroy substantive rights called into being by it. He contends that the transfer of American rights to alien ownership, by whatever means, subsequent to the Treaty becoming effective destroys those rights. So long as the right and the correlative obligation of Germany exist under the Treaty of Berlin the jurisdiction of the Commission unquestionably attaches, but he would use the rule of practice, affecting merely

²³ The case of *Phelps, Assignee, v. McDonald et al.* (1879), 99 U. S. (9 Otto) 298, was one in which McDonald, a British subject, had a valid claim against the Government of the United States for wrongful seizure of his property in 1865. McDonald became bankrupt in 1869, and the title to his claim passed to his American assignee in bankruptcy, who brought suit against him in a court of the United States and procured personal service on him. The Supreme Court of the United States held that the title to the claim passed to the assignee in bankruptcy and that he and not McDonald was entitled to receive payment from the United States. Mr. Justice Swayne in delivering the opinion of the Supreme Court of the United States said:

"* * * Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. * * * It is enough that the *right* exists when the transfer is made, no matter how *remote or uncertain the time of payment*. * * *

"If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. *Vested rights ad rem and in re*—possibilities coupled with an interest and claims growing out of property—pass to the assignee. The *right to indemnity* for the unjust capture or destruction of property, whether the wrongdoer be a government or an individual, is clearly within this category."

See also note 11 *supra*.

²⁴ Article I of the Treaty of Berlin provides that

"Germany *undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy*", etc.

²⁵ See note 18 *supra* and the quotation from the resolution of the Senate of the United States of October 18, 1921.

the jurisdiction, to strike down the right, that there may be nothing left over which to exercise jurisdiction. The Umpire has no hesitancy in holding that there is no warrant for reading into this Treaty the rule of practice invoked and so applying it as to destroy substantive rights which have vested thereunder.

Claims to fall within the Treaty must have possessed the status of American nationality both in origin and at the time the Treaty became effective. Claims possessing such status on both those dates are under the contract American claims and the contract right of the United States to demand their payment inheres in them. Upon Germany's contract obligations attaching they become, so far as Germany is concerned, indelibly impressed with American nationality. A subsequent change in their nationality, through succession, assignment, or otherwise, can not operate to discharge those obligations. The rule invoked, if applicable, would make the continued existence of a right which had vested under the Treaty dependent upon such uncertain factors as the life, death, or marriage or the business success or failure of the private owner of the claim, any one of which factors might result in its devolution in whole or in part to alien private ownership pending the setting up by the two nations parties to the Treaty of machinery to adjudicate the claims arising thereunder, or pending the time consumed in hearing them and in rendering judgment thereon, or pending the discharge by Germany of the awards made. Under the rule propounded and its proposed application, and notwithstanding the greatest diligence on the part of both Governments in finally disposing of all claims, unavoidable delays might well result in releasing Germany from obligations which she has solemnly bound herself to pay.

The United States in its discretion may decline to press a claim in favor of one who has voluntarily transferred his allegiance from it to another nation, or in favor of an alien who has acquired a claim by purchase. This, however, involves a question of political policy rather than the exercise of a legal right. The fact that under the Treaty the United States alone has a contract right to demand payment of Germany, and that American nationals may realize on their property in American claims through sale and assignment to aliens relying on the United States making such demand, may well influence its action. As already noted, it has in the past asserted and received payment for American claims which had passed into alien ownership.²⁶ But certainly it does not lie with Germany to challenge the right of the United States to assert a claim which Germany has contracted to pay, and which under the Treaty may be asserted by the United States and by no other nation.

The Umpire decides that the devolution of claims from American nationals to aliens subsequent to the coming into effect of the Treaty on November 11, 1921, can not affect (1) the contract obligation of Germany to pay them, (2) the right of the United States at its election to demand their payment, or (3) the jurisdiction of this Commission to determine the amount of the obligation.

It follows that with respect to all private claims asserted by the United States this Commission has the power, and it is its duty, to determine their ownership (1) on the date when the loss, damage, or injury occurred and (2) on November 11, 1921, when the Treaty of Berlin became effective. If it finds that such claims, or a fixed and definite interest therein, asserted by the United States before this Commission were impressed with American nationality on both of these dates, then so far as concerns the nationality of such claims, or the fixed and definite American interest therein, they fall within the terms of the Treaty of Berlin and this Commission's jurisdiction attaches. It need not concern itself with any subsequent devolution of interest either voluntary or involuntary.

²⁶ See Also Case and Willet Case cited in note 4 *supra*.

These are matters to be dealt with by the United States in making distribution of such amounts as may be paid by Germany in pursuance of this Commission's awards.²⁷

The term "American national" has been defined by this Commission in its Administrative Decision No. I²⁸ as "a person wheresoever domiciled owing permanent allegiance to the United States of America". "National" and "nationality" are broader and apter terms than their accepted synonyms "citizen" and "citizenship." Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation. That status is fixed by the municipal law of that nation. Hence the existence or nonexistence of American nationality at a particular time must be determined by the law of the United States. As pointed out by the German Commissioner in his opinion, the use in the Treaty of Berlin of the broad term "nationals" and of the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States" was clearly intended to embrace, and does embrace, not only citizens of the United States but Indians²⁹ and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions. The use of the words "permanent allegiance" as part of the phrase "all persons, wheresoever domiciled, who owe permanent allegiance to the United States", far from limiting or restricting the meaning of the term "nationals" as used elsewhere in the Treaty, makes it clear that that term is used in its broadest possible sense.

The decision already announced on the questions certified renders unnecessary any expression of opinion by the Umpire on the points of difference between the National Commissioners with respect to what constitutes an "espousal" by a nation of the existing rights and claims of its nationals and the effect of such an "espousal". But it may be profitable briefly to refer to one further point of difference as reflected by the opinions of the National Commissioners, to guard against a possible misunderstanding in the future presentation of claims.

The American Commissioner, after announcing the sound rule that "the right to present a claim internationally is the exclusive right of the Government", adds *inter alia*: "when the Government espouses a claim all private interests therein are merged in the public claim, so far as the foreign Government is concerned", and "it acquires internationally the same status as a claim by the nation for an injury to itself"; "the United States makes the claim its own. * * * in prosecuting the claim it * * * is not accountable to him [the claimant] for the proceeds of the claim, except as may be directed by Act of Congress of the United States"; "the United States alone, and *in its own right*, to the exclusion of the private claimants, is entitled to demand com-

²⁷ It would seem that under the *existing statute*, enacted February 26, 1896 (29 United States Statutes at Large 28, 32), the duty devolves upon the Secretary of State in the first instance to distribute such fund as may be paid by Germany to the United States in satisfaction of the awards of this Commission, but in the event of a contest as to ownership to refer contesting parties to the municipal tribunals where the contest will be determined according to local jurisprudence.

See also Part of Opinion by the Hon. Joshua Reuben Clark, Jr., Solicitor for the Department of State, August 14, 1912, *in re* Distribution of Alsop Award, VII (1913) American Journal of International Law 382.

²⁸ While the German Commissioner did not concur in Administrative Decision No. 1, he and the German Government have nevertheless accepted it as the law of this case, binding both Governments.

²⁹ Not until June 2, 1924 (43 Statutes at Large 253), were all non-citizen Indians born within its territorial limits made citizens of the United States.

pensation from Germany for these claims"; "Since the ratification of the Treaty of Berlin, therefore, all private interests in these claims *have disappeared* from an international point of view."

The German Commissioner denies that the espousal of a claim by the United States makes it government-owned and that thenceforward no inquiry can be made with respect to its private ownership.

Ordinarily a nation will not espouse a claim on behalf of its national against another nation unless requested so to do by such national. When on such request a claim is espoused, the nation's absolute right to control it is necessarily exclusive. In exercising such control it is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. Even if payment is made to the espousing nation in pursuance of an award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake, or protect the national honor, at its election return the fund to the nation paying it or otherwise dispose of it.³⁰ But where a demand is made on behalf of a designated national, and an award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. Broad and misleading statements susceptible of this construction are found in cases where lump-sum awards and payments have been made to the demanding nation covering numerous claims put forward by it and where the tribunal making the award did not undertake to adjudicate each claim or to allocate any specified amount to any designated claim.³¹ It is not believed that any case can be cited in which an award has been made by an international tribunal in favor of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has, in the absence of fraud or mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received. So far as the United States is concerned it would seem that the Congress has treated funds paid the nation in satisfaction of specific claims as held "in trust for citizens of the United States or others".³²

³⁰ *Frelinghuysen v. United States ex rel. Key* (1884), 110 U. S. 63 *et seq.* *United States ex rel. Boynton v. Blaine* (1891), 139 U. S. 306.

³¹ This distinction between lump-sum awards made in favor of the demanding government *as such*, in which the fund paid must be distributed by the nation receiving it, and awards made on specific claims put forward on behalf of designated claimants is clearly drawn in the case of *United States v. Weld* (1888), 127 U. S. at pages 55-56. A case frequently cited in support of the contention that the fund paid *belongs* to the nation receiving it is that of *The Great Western Insurance Company v. United States* (1884), 19 Court of Claims Reports 206 *et seq.*, where the court was dealing with the Geneva lump-sum award made in favor of the Government of the United States *as such* without any attempt on the part of the arbitral tribunal to make an award in favor of any specified claim. But this case can have no weight as a precedent inasmuch as the Supreme Court of the United States held that the Court of Claims was without jurisdiction, and expressly declined to consider the capacity in which the United States acted in presenting claims on behalf of its nationals and its right to deal with and dispose of this fund when paid (112 U. S. 193).

³² The provision in the Act of February 26, 1896, 29 United States Statutes at Large 28, 32, reads as follows:

"Hereafter all moneys received by the Secretary of State from foreign govern-

The Umpire agrees with the American Commissioner that the *control* of the United States over claims espoused by it before this Commission is complete. But the generally accepted theory formulated by Vattel, which makes the injury to the national an injury to the nation and internationally therefore the claim a national claim which may and should be espoused by the nation injured, must not be permitted to obscure the realities or blind us to the fact that the ultimate object of asserting the claim is to provide reparation for the private claimant, whose rights have at every step been zealously safeguarded by the United States³³ and who under the Treaty of Berlin is entitled through his Government to receive compensation. Both that Treaty and the Agreement constituting this Commission clearly distinguish throughout between government-owned claims and privately-owned claims. Internationally the distinction is important in determining Germany's obligations under the Treaty of Berlin as illustrated by the decision of this Commission in its opinion construing the phrase "naval and military works or materials" where it was held that "So long as a ship is privately operated for private profit she cannot be impressed with a military character, for only the Government can lawfully engage in direct warlike activities".³⁴ While, as pointed out by the American Commissioner, Germany recognizes only the United States, which has complete control over these claims, for the purpose of presenting them internationally and collecting the awards made, and while the private claimant is in all things bound by the action taken by his Government, still, such a claim is not a national claim, nor the fund collected a national fund, in the sense that its private nature no longer inheres in it but is lost and merged into its national character and becomes the property of the nation.

Cases may be presented where the American nationality of a claim in its origin, or on November 11, 1921, may be challenged as merely nominal or colorable. In such cases the circumstances connected with the transfer of such claim subsequent to November 11, 1921, and the conditions under which it is thereafter held may have important evidentiary value in determining its true ownership on either of the dates requisite to bring it within the Treaty of

(Footnote continued from page 152.)

ments and other sources, *in trust for citizens of the United States or others*, shall be deposited and covered into the Treasury.

"The Secretary of State shall determine the *amounts due claimants*, respectively, from each of such *trust funds*, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.

"Each of the *trust funds* covered into the Treasury as aforesaid is hereby appropriated for the payment to the *ascertained beneficiaries* thereof of the certificates herein provided for."

The Chairman of the Appropriations Committee of the House of Representatives in reporting this measure to the House said (Congressional Record, Volume 28, Part 2, page 1058; VII (1913) American Journal of International Law 420):

"* * * The *trust funds* in the custody of the State Department have heretofore, by the officer having them in charge, been deposited where he pleased, deposited generally in banks. The Secretary of State has suggested, and the Committee on Expenditures in the State Department of the House of Representatives have presented to the Committee on Foreign Affairs, the draft of an amendment to the existing law. By it we have provided that these funds shall be deposited and covered into the Treasury and paid out on certificates of the Secretary of State; a reform which I think will meet the approval of every member of the House."

³³ See note 18 *supra* and the quotation from the resolution of the Senate of the United States of October 18, 1921.

³⁴ See Decisions and Opinions, page 99. (*Note by the Secretariat*, this volume, p. 90 *supra*.)

Berlin. In such a case not only would Germany have a direct interest in exposing all the facts pertaining to the nationality *at any time* of the private interest in the claim, but the Government of the United States, on the honor and good faith of which Germany relies and has a right to rely for protection against frauds and impositions by individual claimants,⁸⁵ should not permit any technical rules or juristical theories to prevent a full disclosure of all of the facts in each case and the impartial application of the Treaty terms thereto. This Commission will not hesitate at any stage of a proceeding to examine the facts with respect to the nationality of the private interest in any claim subsequent to November 11, 1921, should it be made to appear that such evidence is material to an issue made with respect to Germany's obligations and the jurisdiction of this Commission as determined by the true nationality of the claim in its origin, or on November 11, 1921; or material to any other issue presented to the Commission in the exercise of its jurisdiction.

From the foregoing and from the points of agreement as expressed in the opinions of the National Commissioners, the Umpire deduces the following rules with respect to Germany's obligations and the jurisdiction of this Commission as determined by the nationality of claims:

I. The term "American national" means a person wheresoever domiciled owing permanent allegiance to the United States of America, and embraces not only citizens of the United States but Indians and members of other aboriginal tribes or native peoples of the United States and of its territories and possessions.

II. Such claims, or a fixed and definite interest therein, as are asserted by the United States before this Commission and which were impressed with American nationality both (a) on the date when the loss, damage, or injury occurred and (b) on November 11, 1921, when the Treaty of Berlin became effective, are, so far as concerns the nationality of such claims or the fixed and definite American interest therein, within the terms of the Treaty of Berlin and within the jurisdiction of this Commission.

III. In any case where a fixed and definite interest less than the whole amount of the loss or damage complained of is so impressed with American nationality as to fall within the terms of the Treaty of Berlin and this Commission's jurisdiction as defined in the preceding paragraph, all the facts with respect to the nationality of each interest in the claim will be fully developed by the Agents and called to the attention of the Commission when that case is presented for decision on its merits.

IV. It is competent for Germany or for this Commission to develop or cause to be developed all facts relating to the nationality at any time of the private interest in any claim, should it be made to appear that such evidence is material to an issue made with respect to Germany's obligations and the jurisdiction of this Commission as determined by the true nationality of the claim in its origin, or on November 11, 1921; or material to any other issue presented to the Commission in the exercise of its jurisdiction.

This decision, in so far as applicable, will control the preparation, presentation, and decision of all claims submitted to the Commission falling within its scope. Whenever either Agent is of the opinion that the peculiar facts of any case take it out of the rules here announced, such facts, with the differen-

⁸⁵ *Frelinghuysen v. United States ex rel. Key* (1884), 110 U. S. 63 *et seq.* *United States ex rel. Boynton v. Blaine* (1891). 139 U. S. 306.

tiation believed to exist, will be called to the attention of the Commission in the presentation of that case.

Done at Washington October 31, 1924.

Edwin B. PARKER
Umpire

ADMINISTRATIVE DECISION No. VI

(*January 30, 1925, pp. 208-211; Certificate of Disagreement by the Two National Commissioners, January 5, 1925, pp. 195-207.*)

DAMAGES IN DEATH CASES: VALUE OF LIFE LOST, LOSS TO DECEDENT'S ESTATE, LOSS TO SURVIVORS; SURVIVORS' ORIGINAL, NOT DERIVATIVE, RIGHT TO RECOVER DAMAGE, RECOGNITION IN CIVILIZED NATIONS; RIGHT TO ESPOUSE SURVIVORS' CLAIMS.—INTERPRETATION OF TREATIES: TERMS. Claims on behalf of American nationals for damage through death of British passengers lost on *Lusitania* on May 7, 1915 (see Opinion in the *Lusitania* Cases, p. 32 *supra*). Held that Treaty of Versailles (Part VIII. Section I, Annex I, para. 1), as carried into Treaty of Berlin, like statutes and judicial decisions of civilized nations, expressly recognizes right of survivors to recover damage sustained by them resulting from death of a person, a right *directly* vested in survivors, and thus original, not derivative, and that in cases under consideration United States may espouse claims, though damage was inflicted through taking of *British* life: since Great Britain, under Treaty of Versailles, can only claim damage suffered by British nationals as surviving dependents, the reverse would make Germany not liable for damage suffered by American nationals during war period and attributable to Germany's act as proximate cause, which is repugnant to terms of Treaty of Berlin.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 630-633; Annual Digest, 1925-26, pp. 239-240; Kiesselbach, *Probleme*, pp. 332-334 (German text); Witenberg, Vol. II, pp. 64-68 (French text).

Bibliography: Annual Digest, 1925-26, p. 240; Kiesselbach, *Probleme*, pp. 11, 56-66, 92.

CERTIFICATE OF DISAGREEMENT BY THE TWO NATIONAL COMMISSIONERS

The American Commissioner and the German Commissioner have been unable to agree upon the jurisdiction of the Commission over claims growing out of the death of an alien, their respective Opinions being as follows:

Opinion of Mr. Anderson, the American Commissioner

The question here presented is whether or not, under the terms of the Treaty of Berlin, Germany is obligated to make compensation for losses suffered by an American national on account of the death of an alien through the sinking of the *Lusitania*, assuming that the claim is of American nationality as defined in Administrative Decision No. V.

The German Commissioner holds that neither the terms of the Treaty of Berlin nor the rules of international law impose any liability upon Germany to make compensation in such cases. The American Commissioner, on the other hand, holds that by the terms of the Treaty of Berlin, as interpreted by this Commission, Germany is clearly obligated to make compensation for losses

suffered by American nationals in such cases, estimated in accordance with the rules laid down by this Commission in the Lusitania Opinion.

This Commission held in Administrative Decision No. I:

The financial obligations of Germany to the United States arising under the Treaty of Berlin on claims other than excepted claims, put forward by the United States on behalf of its nationals, embrace:

(A) All losses, damages, or injuries to them, including losses, damages, or injuries to their property wherever situated, suffered directly or indirectly during the war period, caused by acts of Germany or her agents in the prosecution of the war, *etc.*

In Administrative Decision No. II this Commission held:

Claims growing out of injuries resulting in death are not asserted on behalf of the *estate* of the deceased, the award to be distributed according to the provisions of a will or any other fixed or arbitrary basis. The right to recover rests on the direct personal loss, if any, suffered by each of the claimants. * * * The problem in such cases is, not to distribute a given amount assessed against Germany amongst several persons, but to assess separately the damages suffered by each of such persons who jointly present independent claims.

Applying the rules laid down in Administrative Decision Nos. I and II this Commission held in its Lusitania Opinion that:

Germany is financially obligated to pay to the United States all losses suffered by American nationals, stated in terms of dollars, where the claims therefor have continued in American ownership, which losses have resulted from death or from personal injury or from loss of, or damage to, property, sustained in the sinking of the *Lusitania*.

This Commission further held in its Lusitania Opinion that:

In death cases the right of action is for the loss sustained by the *claimants* not by the estate. The basis of damages is not the physical or mental suffering of deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death. The enquiry then is: What amount will compensate claimants for such losses?

Bearing in mind that we are not concerned with any problems involving the punishment of a wrongdoer but only with the naked question of fixing the amount which will compensate for the wrong done, our formula expressed in general terms for reaching that end is: Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates, reduced to its present cash value, will generally represent the loss sustained by claimant.

The German Commissioner does not agree with the American Commissioner as to the effect of the foregoing decisions because, as appears from his Opinion, he considers that the basis of the claim is the death of the person who was lost and not the loss suffered by the surviving dependents, which resulted from such death. In other words, he considers that the loss suffered by the survivors is merely the measure of the damage caused by the death.

The same question was discussed, with a slightly different application, in the Opinions of the National Commissioners in the Life-Insurance Claims. There the German Commissioner reached the conclusion that:

As well under international law as under the Treaty of Berlin it is not sufficient that a national has suffered a *loss*, but the loss—or damage or injury—must have been sustained in the *person* or the *property* of the national.

The American Commissioner, on the other hand, pointed out in his Opinion that the Commission had definitely decided in Administrative Decision No. I, as shown by the extract therefrom above quoted, that the losses, damages, or injuries to the person or property of American nationals constitute only a part of the losses, damages, or injuries to them for which Germany is obligated to make compensation under the Treaty.

By the Decision of the Umpire, to whom this difference of opinion between the two National Commissioners was referred for decision, it was definitely settled that Administrative Decision No. I meant—

Germany is financially obligated to pay to the United States all losses suffered by American nationals as surviving dependents resulting from deaths of civilians caused by acts of war. Such claims for losses are embraced in the phrase "all losses, damages, or injuries to them" found in the rule above quoted from Administrative Decision No. I.

The Umpire further held in that Decision that:

Applying this test, it is obvious that the members of the families of those who lost their lives on the *Lusitania*, and who were accustomed to receive and could reasonably expect to continue to receive pecuniary contributions from the decedents, suffered losses which, because of the natural relations between the decedents and the members of their families, flowed from Germany's act as a normal consequence thereof, and hence attributable to Germany's act as a proximate cause. The usages, customs, and laws of civilized countries have long recognized losses of this character as proximate results of injuries causing death. Had there been any doubt with respect to such losses being proximately attributable to Germany's act, that doubt would have been removed by their express recognition in the Treaty of Versailles.

The American Commissioner considers that these rules as laid down by the Umpire in his Decision in the Life-Insurance Claims correctly interpret the rule laid down in Administrative Decision No. I and apply to the question here under discussion and that consequently Germany is liable under the Treaty of Berlin for all losses, damages, or injuries, which American claimants have suffered in consequence of the loss on the *Lusitania* of persons upon whom they were dependent, or from whom they received contributions, or whose loss caused them any other damages, which can be measured on a pecuniary basis, whether or not the persons lost were aliens or citizens of the United States.

Inasmuch, therefore, as these claims come within the terms of the Treaty of Berlin, it is unnecessary to consider whether or not Germany would be liable for them under any principles of international law independently of that Treaty, because Germany's liability under that Treaty is not limited to claims which can be supported by international law independently of that Treaty.

The Opinion of the German Commissioner refers to some discussions of the Commissioners during the winter of 1922-1923 for the purpose of explaining his understanding of the meaning of the *Lusitania* Opinion. The American Commissioner is not in a position to comment on these discussions, because he was not a member of the Commission at that time, and such explanations were not brought to his attention at the time that he participated in the Commission's decision on the *Lusitania* cases.

Chandler P. ANDERSON

Opinion of Dr. Kiesselbach, the German Commissioner

The question here to be decided is whether or not a claim on behalf of an American national who has suffered a pecuniary loss as a result of the death of a non-American relative as the proximate result of an act of Germany is a valid claim under the Treaty of Berlin.

The question thus presented is from the scientific viewpoint of international law one of the most important questions to be laid before this Commission, touching as it does the primary and leading principles governing the intercourse of nations.

The facts in the specific case in which the question is raised show that the petitioner, born a British subject, in 1909 became an American national as a result of her marriage to an American citizen; that after her marriage, her father, a subject of the British crown resident in the United States, gave her a monthly allowance of \$200, and that her father was killed in the *Lusitania* disaster as the result of an act of Germany (Claim Docket No. 93).

In presenting the case in his memorial the American Agent stated that the United States claimed "not as indemnity for the death" of the father killed in the disaster "but as pecuniary losses resulting to" the daughter on account of the "killing of her father".

The American Agent in his printed brief (pages 3-4) bases his argument solely on the language of this Commission in Administrative Decision No. II and in the Opinion in the *Lusitania* Cases:

Original and continuous ownership of claim.—In order to bring a claim (other than a Government claim) within the jurisdiction of this Commission, the loss must have been suffered by an American national, and the claim for such loss must have since continued in American ownership. (Administrative Decision No. II, page 8.)^a

In death cases the right of action is for the loss sustained by the *claimants*, not by the estate. The basis of damages is, not the physical or mental suffering of deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death. The enquiry then is: What amount will compensate claimants for such losses? (Opinion in the *Lusitania* Cases, page 19.)^b

The American Agent argues that inasmuch as the claim is not made for the death of the decedent but for the losses resulting to the American national from such death the United States is entitled to claim on behalf of such national.

This argument is in my opinion not justified, since it does not follow that because "in death cases the right of action is for the loss sustained by the *claimants*, not by the estate" of the deceased, a valid claim may therefore be presented on behalf of an American dependent who has suffered losses as a result of the killing of a British subject.

The conception under which I concurred in that part of the conclusions of the *Lusitania* Opinion is the following:

The genesis of this part of the *Lusitania* rules goes back to discussions of the Commissioners during the winter of 1922-1923. The question then arose how far the Commission is entitled and/or bound to apportion sums awarded in claims where two or more claimants are joined in one case, especially in death cases.

Both Commissioners at first believed Germany to be without interest in the question of such apportionment, but even under this assumption hesitated how to deal with it. They agreed that it was governed by international law, as contained in the provisions of the Treaty; and both Commissioners agreed further that for *measuring the damage* they had to consider "the circumstances and conditions, not only of the deceased but of each claimant as well" (Administrative Decision No. II, page 9).^c

Now, it was obvious that if the Commission should nevertheless award lump sums and leave their apportionment to other bodies (Government or court),

^a Note by the Secretariat, this volume, p. 26 *supra*.

^b Note by the Secretariat, this volume, p. 35 *supra*.

^c Note by the Secretariat, this volume, p. 27 *supra*.

the result would in many cases be very unjust and wholly in disregard of what the Commission had intended to adjudicate. For instance, the Commission might have made an award after carefully considering the circumstances and conditions of each claimant in the sums of a, b, c, d dollars to a dependent father, mother, wife, and child of the decedent, afterwards adding such sums together to make a lump-sum award of dollars. How could another body be able to redistribute the single findings of the Commission?

In discussing this problem the Commissioners found a useful analogy in the decision cited in Administrative Decision No. II, page 9, *Spokane and Inland Empire Railroad Co. v. Whitley* (237 U. S. 487). The leading principles of this decision were the following:

(1) The *liability* for a death occurring in a certain State (Idaho) is to be determined by the law of that State, the domicile of the deceased being immaterial.

(2) The *measure* of damage is to be controlled by the same law.¹

Therefore in analogous application of these principles it followed that as the liability for death cases brought before the Commission was determined by international law, the rules governing the *measuring* of damage had to be taken from the same source.

Now, all questions of international law being within the Commission's jurisdiction, it followed further that it was the Commission which had to "determine how much *each* claimant is entitled to recover" (Administrative Decision No. II, page 9). So it was this *international* law character of this part of the claims which made their apportionment fall within the province of the Commission. And the corollary of this principle was, that every legal issue governed by *municipal* law is *outside* the Commission's² jurisdiction.

The apportionment of claims belonging to the estate of a deceased, as for instance, for property lost, being controlled by municipal law, was therefore excluded.

This was—at least as I understand it—the reasoning by which the conclusion was reached under the *Lusitania* Opinion. And the rules show this origin in that they are headed by the term "Apportionment of awards" and are established "to arrive at the *quantum* of damages suffered by each claimant" (Administrative Decision No. II, page 9), and in that they provide that it is the loss of the single claimant and *not of the estate* which is to be *measured*.

It is obvious that this question of measuring the damages is wholly different from the question of determining the liability.

And as I have to deal here with the question of Germany's liability, recurrence must be made to the Treaty of Berlin by the terms of which the adjudications of this Commission are controlled, to decide whether a claim of an American national suffering a pecuniary loss through the death of an alien relative comes within the jurisdiction of the Commission.

But as the *Lusitania* rules are taken from the principles of the law of nations and as the principles of international law may further be helpful for the interpretation of the Treaty, I may consider first the problem from the viewpoint of international law.

Under international law it is the *nation* which must be injured, to justify the state's interposition on behalf of a claim. A nation can not be injured save

¹ "We must look to the Idaho statute to determine what the obligation is, to whom it runs, and the persons by whom or for whose benefit recovery may be had." (Spokane case, p. 495.)

² To avoid misunderstandings I may remark here that this argument of course does not apply to private debts.

through one of its nationals. Therefore it follows that one of its nationals must have suffered the injury. Although this principle is so indisputable that it seems scarcely necessary to state it, doubt has arisen as to its meaning.

A national can be injured either by an invasion of rights in relation to his person, as health, life, liberty, or honor, or by an invasion of rights in relation to things, that is, in his property rights. But in *both* cases it is the *national himself* who is wronged.³

The question at issue here therefore is: In death cases is the wrong inflicted not only an *original* injury to the *deceased*, but also and *in its origin an original injury to his survivors?*

This question is not identical with the question: Has the survivor suffered a *loss?* As already pointed out in my opinion on the life-insurance question, a "loss"⁴ is nothing but a *consequence* of an injury. A "loss" must be the consequence of the "injury to a national" to make a nation embrace a claim—but the injury to the *national* always remains the decisive criterion. And the whole doctrine of proximate cause serves only to establish the scope of liability growing out of an act committed against a *person*. And since, as already said, the term "national" comprises the *personal* and the *property* relations, the act must have been committed against his *person* or *property* to establish liability.

"*Injury to person or property,*" not "*loss* suffered by a national," is therefore the premise and criterion for an international claim, and "injury to person or property" is the term used in international treaties.⁵

Therefore, as the survivors are certainly not injured in their own *persons* they could only have been injured in their *property*.

Now, assuming for argument's sake that rights of a survivor could be pronounced property, it would remain to define what kind of rights could be considered as "property." Is it the right to support in case of dependency, the "right" to contributions (including the "right" to voluntary gifts), or even the right to compensation for mental suffering?

If these "rights", though varying in every country and recognized by this Commission only under the principles of international law, were of such moral and pecuniary weight as to be considered as deserving independent and direct diplomatic protection, where then is the difference between these "rights" and the "rights" of an indigent mother in relation to her son, disabled through a wrongful act? Her mental suffering may be even greater through being ever renewed by the sad sight of her injured son, and her right to support is exactly the same in legal conception as in the case of a son killed. Nevertheless no government would think of embracing such a claim if the son were an alien. The clear and simple reason is because the injury is considered as committed against the *person* of the injured as such only, and that the incidents of the case serve only to *measure* the damage.

And further if the "rights" of the survivors are property in the sense discussed here, then a claim would be justified on behalf of the American relatives of a

³ See also Administrative Decision No. II, page 8: "The enquiry is: Was the United States * * * injured through injury to its national?" (*Note by the Secretariat*, this volume, p. 26 *supra*.)

⁴ See Opinions and Decisions in Life-Insurance Claims, page 111. (*Note by the Secretariat*, this volume, p. 97 *supra*.)

⁵ See Claims Convention of August 7, 1892, between the United States and Chile: "claims . . . arising out of acts committed against the persons or property of citizens".

Treaty of Washington, May 8, 1871, between the United States and Great Britain (Alabama Claims): "arising out of acts committed against the persons or property". And the same wording, for instance, in the Claims Convention of July 4, 1868, between the United States and Mexico.

neutral or even a German national. And if under the existing complexity of human relations a naturalized American citizen were survived by parents of British nationality and perhaps by a wife retaining her French nationality, all the nations concerned would be entitled to claim, because their own nationals were injured in their "property" rights.

In my opinion these consequences show that the premise can not be sound.

And though I am not dealing at this moment with the Treaty of Berlin and its provisions, but with international law only, it is nevertheless significant that the makers of the Treaty, who certainly were conversant with international law, do not mention the rights of survivors under the *property* clause (clause 9) but under clauses 2 and 3 of Annex I following Article 244, dealing with death cases. The reason therefor is that it is not the "property" of the *survivors*, but the death of the *national* that should be compensated for.

It is of further significance that the Secretary of State expressly mentions cases like that at issue here in his report to the Senate, dated March 2, 1921, saying:

In some instances an American citizen has endeavored to claim *for the death of British relatives*; . . . naturalized citizens have sought to claim for losses or damages suffered while declarants; declarants have undertaken to claim as such.

These cases do not possess the element of continuous American nationality. . . . Record has been made of these cases in the Department of State for use in the event that the department may be able to *assist* the claimants hereafter.

This statement clearly shows that the Secretary of State did *not* consider the survivors of British relatives as originally injured in their own "property". And it is nowhere shown that the United States nevertheless tried to protect these claims through provisions of the Treaty.

A sound and leading principle of international law gives a nation the right to claim satisfaction for the death of *its own national* only. Such claim being a national one, the government injured may choose the method of measuring the damage, either by claiming a lump sum as frequently is done⁶ under international arbitrations or by computing the damage from the specific items of the single case.

But under both methods the only object is the *measure* of damage accrued through the *death* of the *person*.⁷

Thus under international law it is the *nationality* of the *deceased* which gives a nation the right to compensation.

There remains the question of whether the Treaty of Berlin and especially Annex I following Article 244 *changes* this principle. There is no possible doubt that that could have been done. But if so, the provision must then show in clear and unambiguous language that the Treaty really intended to establish an independent and original right of the survivors in their own behalf.

Now, clauses 2 and 3 of Annex I following Article 244 deal with "damage . . . to civilian victims * * * and to the *surviving dependents of such victims*".

But does that mean to create original rights in the dependents capable of protection even in the case of the death of an alien?

⁶ For instance, Ralston's International Arbitral Law and Procedure, section 362, page 176.

⁷ It is significant, for instance, that Ralston in his book on International Arbitral Law and Procedure deals with the question at issue under the heading "*Measure of Damages in Case of Death*" (page 175).

The interpretation given to it through the Secretary of State in his statement⁸ mentioned above of March 2, 1921, shows clearly that he at least did *not* understand this provision in that way.

But even if there would be a doubt as to the interpretation of the clauses 2 and 3, it must be borne in mind that following the rules of interpretation under international law as repeated in the *Lusitania* Opinion, page 31, the language of the clauses must be "strictly construed" against their framers and further that they "must be so construed as to best conform to accepted principles of international law rather than in derogation of them."

Therefore as no serious dissension is possible in the question at issue here as far as international law is concerned, the clauses must be read and interpreted as in accordance with such law.

But if the clauses were to be understood as giving independent contractual rights to the survivors, they would clearly give such rights to the surviving *dependents* only.

Therefore such rights would be conditional on the *dependency*, so that a survivor, being dependent on the deceased, could be entitled either to *all* rights allowed under the principles of international law, including the right to compensation for mental suffering, or his rights could be considered as restricted to rights growing out of *dependency*. Under the first interpretation it would be rather surprising that a person because of his dependency should be so privileged. But in both alternatives a person not being *dependent* would have *no rights* at all, and especially no right to compensation for *mental suffering*.

This consequence, though perfectly logical, is not in accordance with the *Lusitania* Opinion of the Commission.

It is not the establishment of new and detailed principles of original rights of the survivors, but it is the simple basis of *measuring* the damage in death cases, that is meant by the treaty clauses and established in the *Lusitania* Opinion.

That this is the correct interpretation is clearly shown by the way the Allies themselves have applied the provisions. *No* nation has presented claims on behalf of surviving dependents as such, though doubtless many nationals of the Allied and Associated Powers were afflicted through the death of relatives not of their own nationality. On the contrary, the way the damages have been assessed makes it clear that no State has claimed special compensation for the surviving dependents of aliens. The reparation account of Great Britain shows that Great Britain *measured* the damage caused through the death of her civilians by examining a "considerable number of cases" on lines, substantially

⁸ The statement shows clearly that the Government of the United States was well aware that some claims might not be protected by the Treaty of Versailles. Nevertheless, it certainly has not been its intention to bring all those claims under the terms of the Treaty of Berlin. Otherwise the Government of the United States would not have informed the German Government before the conclusion of the Treaty of Berlin through the Dresel Note that "it is the belief of the Department of State" (the same which made the statement of March, 1921) "that there is no difference between provisions of the proposed treaty relating to rights under the Peace Resolution and the rights covered by the Treaty of Versailles except in so far as a dictinction may be found . . . which relates to the *enforcement* of claims . . .".

And otherwise the United States would have included, for instance, the claims of declarants—expressly mentioned in the statement of March, 1921—in the provisions of the Treaty of Berlin.

Therefore, there is no room for the argument that a claimant must have a standing before this Commission because otherwise he would have no right to recover.

the same as established by this Commission as to rights growing out of dependency merely, and that by thus reaching an *average* amount they valued the life of each civilian national on that basis *regardless* of whether the deceased left surviving dependents or not.

The French and Belgian method deviates in so far as they take as a basis the amounts actually paid to surviving dependents under domestic law, whilst other Powers simply take an arbitrary valuation of lives lost—as, for instance, Italy, Greece, Portugal. So the result is that the compensation claimed in death cases is measured on an average valuation which is considerably less than under the rules of this Commission.⁹ Great Britain claims an average damage of £1,699 in respect of the loss of the life of each passenger, £1,237 in respect of the loss of the life of each seaman, £1,462 in respect of the loss of life through air raid; while France claims Frs. 16,593, Belgium Frs. 12,450, Italy Lire 40,000, Greece Drachmen 30,000, Portugal M. 20,000, Japan M. 34,000, etc., for each life.

So it is obvious that all Powers concerned have understood the respective provisions of the Treaty as a rule to *measure* the damage, and that they did not intend to establish special and original rights in the survivors.

If it were otherwise, the right to compensation would rest *solely* on the provision in behalf of the surviving *dependents*. An unavoidable consequence under the maxim “*expressio unius est exclusio alterius*” would be that the damage due under the Treaty would *exclude* compensation for mental suffering, as indeed no Power has made an allowance for such suffering or even mentioned it.

On the other hand, if the rights of the surviving dependents are *only* an item to be taken into account in *measuring* the damage caused through a death case, nothing would prevent the Commission from considering other items as well. Mental suffering could then be adjudicated upon under the general principles of international law. But then the alternative consequence would be that the Treaty has *not* established specific and original rights in surviving dependents and that therefore, in the case of the death of an alien, American surviving nationals have no original rights of their own.

Therefore, to accept the Treaty provisions as constituting independent and original rights on behalf of the *surviving dependents* means to deny their right to compensation for mental suffering.

On the other hand, to consider those provisions as intending only to establish items for measuring the damage accrued *in the person of the deceased* means to leave the question of measuring such damage to international law.

Mental suffering may then be taken into account as a further item, but the right to compensation is restricted to the case of the death of a *national*.

And this is the more sound and reasonable as otherwise Germany could be made to pay twice or three and fourfold in the same death case, if the surviving dependents happened to be of different nationalities.

Dr. W. KIESSELBACH

⁹ For instance, the amount awarded in the first 55 *Lusitania* death cases is \$17,890 on the average.

The two National Commissioners accordingly certify to the Umpire of the Commission for decision the question of the jurisdiction of the Commission over claims for the death of an alien.

Done at Washington January 5, 1925.

Chandler P. ANDERSON
American Commissioner
 W. KIESSELBACH
German Commissioner

Decision

PARKER, *Umpire*, in rendering the decision of the Commission delivered the following opinion:

The question here certified by the National Commissioners has its source in a small group of cases in which the United States seeks awards on behalf of certain of its nationals who have been damaged through the deaths of British passengers lost with the *Lusitana*. The answer will be found in a brief consideration of the nature of damages resulting from death, in connection with the applicable provisions of the Treaty of Berlin as construed by the previous decisions of this Commission.

A right to recover damages resulting from death accrues when, but not until, the death occurs. Manifestly a decedent can not recover for his own death, nor can his estate, in a representative capacity, recover what the decedent could not have recovered had he lived. No system of jurisprudence has ever undertaken to measure by pecuniary standards the value to a man of his own life. But an enlightened public opinion, expressed in the statutes and judicial decisions of civilized nations, has recognized the right of survivors to recover pecuniary damages sustained *by them* resulting from the death of another. This is a rule declaratory of rights and corresponding liabilities and not one merely for measuring damages. It is expressly recognized by the Treaty of Versailles in the first of ten categories enumerating Germany's obligations to make reparation payments¹ and is incorporated in the Treaty of Berlin. By virtue of this provision Germany is expressly obligated to make compensation for damages suffered by the nationals of the Allied and Associated Powers resulting from the deaths of civilians caused by acts of war.

It is competent for a nation to exact reparation from another nation for the economic loss that the former may have sustained through the wrongful taking of the lives of its nationals by the latter. Such exactions sometimes take the form of demands for the payment of indemnities on a per capita basis for the lives lost, without any attempt to measure by pecuniary standards the value of such lives. The United States has not elected to make such demands on Germany.² But it has, under the Treaty of Berlin, including the provision above referred to of the Treaty of Versailles incorporated therein, put forward numerous demands on behalf of its nationals for damages suffered *by them* resulting from deaths caused by Germany's acts. The right to such compensation does not vest in the claimant through the decedent, for such right was never lodged in the decedent. On his death the initial right to demand compensation for damages suffered vests in the survivor. The basis of the liability to respond in damages is not the loss sustained by the nation, or by the estate of the deceased, or the value to them of the life lost, but rather the damages resulting

¹ See paragraph I of Annex I to Section I of Part VIII, Treaty of Versailles.

² See Opinion in the *Lusitania* Cases, Decisions and Opinions, pages 29-31. (*Note by the Secretariat*, this volume, pp. 42-43 *supra*).

to the survivor from the death. The claim of such survivor is original and not derivative.

In the group of cases here presented, Germany's obligation, as fixed by the Treaty of Berlin, is to make compensation and reparation, measured by pecuniary standards, for damages suffered by American survivors of civilians whose deaths were caused by Germany's acts in the prosecution of the war. Where, measured by such standards, no damage has been suffered no liability exists.

The Government of the United States was careful to incorporate in the Treaty of Berlin broad and far-reaching provisions designed to compensate American nationals for all losses, damages, or injuries suffered directly or indirectly by them, during the war period, caused by acts of Germany or her agents in the prosecution of the war. As this Commission has heretofore held, these provisions embrace claims for damages suffered by surviving American nationals resulting from death.³ Such claims asserted by the United States before this Commission as were impressed with American nationality both (1) on the date when the loss, damage, or injury occurred and (2) on November 11, 1921, when the Treaty of Berlin became effective, fall within the terms of that Treaty, and this Commission's jurisdiction attaches.⁴

A claim put forward by the United States on behalf of an individual who was an American national both on May 7, 1915, the date of the destruction of the *Lusitania*, and on November 11, 1921, when the Treaty of Berlin became effective, and who has suffered damages by reason of the loss on the *Lusitania* of the life of a British subject, fully meets these tests and falls within the terms of the Treaty of Berlin. In such a case an American national has unquestionably been damaged by the act of Germany in the prosecution of the war, and such damage is clearly attributable to Germany's act as a proximate cause. The fact that the damage was inflicted through the taking of the life of a British subject is immaterial. To the extent that damages were suffered by British nationals as surviving dependents of the British subject whose life was taken, Germany is obligated under the Treaty of Versailles to compensate Great Britain.⁵ But a claim on behalf of an American national, who has been damaged through the taking of the life of the British subject, can not be asserted against Germany by Great Britain.⁶ It is impressed with American nationality in point of origin and, when it is also American owned at the time the Treaty of Berlin

³ See Opinion in the *Lusitania* Cases, Decisions and Opinions, page 17, and Opinions and Decision in Life-Insurance Claims, pages 132-133 and 138. (Note by the Secretariat, this volume, pp. 33, 111 and 115 *supra*, respectively.)

⁴ See Decisions and Opinions, page 188. (Note by the Secretariat, this volume, p. 150 *supra*.)

⁵ In estimating the damages sustained by its nationals through the loss of civilian lives, Great Britain applied substantially the same rules as are recognized by this Commission in its Opinion in the *Lusitania* Cases. See "Table B—British Claim against Germany for Reparation in Respect of Loss of Life of Civilians", found in the report made by Great Britain in connection with "British Claim for Reparation against Germany under Part VIII of the Treaty of Versailles". The British claim was based on the damages sustained by the survivors, and not on the value of the life lost. Only survivors possessing British nationality were taken into account. See the final report dated February 26, 1924, of the "Royal Commission on Compensation for Suffering and Damage by Enemy Action" within Annex I to Section I of Part VIII of the Treaty of Versailles (Cd. 2066).

⁶ Cases have come to the attention of this Commission in which Great Britain has declined to consider claims of American survivors of a British subject whose life was destroyed with the *Lusitania* and referred such claimants to the Government of the United States.

became effective, it may be espoused internationally by the United States on behalf of its national and by no other nation.

To hold that such a claim can not be put forward by the United States because it grows out of the act of Germany in taking the life of a British subject would be to hold that Germany is not liable under the Treaty of Berlin for damages suffered by an American national during the war period and attributable to Germany's act as a proximate cause. Such a holding would be repugnant to the terms of the Treaty and the decisions heretofore rendered by this Commission construing it. It would amount to a denial to the individual survivor, because of his American nationality, of all right to compensation for a pecuniary injury suffered by him proximately caused by Germany's act, where, had he been a British national, Germany's obligation to make compensation would have been clear. Where the survivor is British the claim is British in point of origin and must be put forward by Great Britain. Where the survivor is American the claim is American in point of origin and must be put forward by the United States.

The Umpire decides that Germany is obligated to make compensation for damages suffered by American survivors of a British subject whose life was destroyed with the *Lusitania*. The rule here announced is in entire harmony with the uniform practice of this Commission in repeatedly denying to the United States the right to put forward claims on behalf of British dependents of American nationals lost with the *Lusitania*.

Done at Washington January 30, 1925.

Edwin B. PARKER
Umpire

MAUD THOMPSON DE GENNES (UNITED STATES) v. GERMANY

(*March 11, 1925, pp. 215-219; Certificate of Disagreement by the National Commissioners, February 16, 1925, pp. 213-215.*)

NATIONALITY OF CLAIMS: CONTINUOUS NATIONALITY.—ESPOUSAL OF CLAIM.—EVIDENCE: DIPLOMATIC CORRESPONDENCE. Claim on behalf of widow of American national lost on *Lusitania* on May 7, 1915, who on November 17, 1917, by subsequent marriage, lost American nationality. *Held* that claim does not fall within Treaty of Berlin since not impressed with American nationality on November 11, 1921 (reference made to Administrative Decision No. V, see p. 119 *supra*); and that lodging of claim with Department of State in August, 1915, and German assumption of liability by note of February 4, 1916, do not take case out of Administrative Decision No. V: United States never espoused this particular claim until long after claimant relinquished American nationality (evidence: diplomatic correspondence), and German offer of February 4, 1916, never accepted by United States as satisfactory.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 803-806; Annual Digest, 1925-26, pp. 416-417; Kiesselbach, *Probleme*, pp. 337-339 (German text); Witenberg, Vol. II, pp. 71-75 (French text).

Bibliography: Borchard, p. 72; Kiesselbach, *Probleme*, pp. 12, 36-55.

Certificate of disagreement by the National Commissioners

The American Commissioner and the German Commissioner have been unable to agree upon the jurisdiction of the Commission over the claim of Mrs. Maud Thompson de Gennes, Docket No. 2262, and hereby certify that question to the Umpire for decision.

The facts upon which this question arises are briefly as follows:

The claimant was born in the United States and on March 31, 1904, married Elbridge B. Thompson, an American citizen, born at Seymour, Indiana, August 2, 1882. The claimant's husband was lost on the *Lusitania*. The claimant married again on November 17, 1917. Her second husband was a citizen of France, and by reason of this marriage she lost her American citizenship, under the laws of the United States then in force, and she has not since resumed her American nationality.

In August, 1915, and prior to her loss of American nationality, the claimant filed with the Department of State of the United States her claim against Germany for damages for the loss of her husband, Elbridge B. Thompson, through the sinking of the *Lusitania*. On February 4, 1916, the German Government, through its Ambassador at Washington, delivered the following communication to the Secretary of State:

"The Imperial German Government having subsequent to the event issued to its naval officers the new instructions which are now prevailing, expresses profound regret that citizens of the United States suffered by the sinking of the *Lusitania* and assuming liability therefor offers to make reparation for the life of the citizens of the United States who were lost by the payment of a suitable indemnity."

It will be noted that the claimant was an American citizen at the time the *Lusitania* was sunk and also on February 4, 1916, when the Government of Germany first assumed liability for losses sustained by American nationals through the sinking of the *Lusitania*.

The American Commissioner is of the opinion that this claim was espoused by the Government of the United States at the time that Government undertook the diplomatic negotiations with the German Ambassador at Washington with reference to the liability of Germany to make compensation for damages to American nationals arising out of the sinking of the *Lusitania*, which negotiations resulted in Germany's assumption of liability for such losses.

The American Commissioner is further of the opinion that, for the reasons stated in his Opinion on the jurisdiction of this Commission as determined by the nationality of claims, when a claim of American nationality has been espoused by the Government of the United States, it must thereafter be treated as a claim of American nationality, irrespective of any subsequent change in the nationality of the subordinate private interests therein, and consequently that this claim possessed the status of American nationality at the time the Treaty of Berlin became effective, within the meaning of Administrative Decision No. V. In this case it is proper to distinguish between the nationality of the claim and the nationality of the claimant on whose behalf the Government of the United States presents the claim.

The German Commissioner disagrees with the American Commissioner on all these points.

The German Commissioner believes that the negotiations leading to the German note of February 4, 1916, do not constitute an espousal of the specific claims in the legal meaning of that term.

The German Commissioner is further of the opinion that the Treaty of Berlin and its provisions have superseded all previous understandings between

the United States and Germany as to war claims by creating, as stated by the Umpire in Administrative Decision No. V (at page 184),^a "rights in behalf of American nationals which had no prior existence but which were created by the Treaty".

The question is discussed in the German Commissioner's Opinion on the nationality question (page 173)^b and is, to his understanding, already decided by the Umpire under clause II of Administrative Decision No. V, stating that a claim must be "impressed with American nationality both (*a*) on the date when the loss, damage, or injury occurred and (*b*) on November 11, 1921, when the Treaty of Berlin became effective".

The National Commissioners have also disagreed as to the amount of the damages suffered, and if the Umpire should decide that this claim comes within the jurisdiction of the Commission the National Commissioners also certify to the Umpire for decision the question of the amount to be awarded.

Done at Washington February 16, 1925.

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

^a Note by the Secretariat, this volume, pp. 147-148 *supra*.

^b Note by the Secretariat, this volume, p. 138 *supra*.

Decision

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the two National Commissioners certifying their disagreement.

Elbridge B. Thompson, an American national, 32 years of age, was lost with the *Lusitania*. He was survived by his wife and sole heir-at-law, Maud R. Thompson, then 36 years of age, who on November 17, 1917, at Paris, married Jean de Gennes, a citizen of France. By reason of this marriage the claimant lost her American citizenship and became, and has since remained, a French subject. She is the sole claimant herein. For the reasons fully set forth by this Commission in its Administrative Decision No. V (Decisions and Opinions, pages 175-194 inclusive),^a this claim does not fall within the terms of the Treaty of Berlin, inasmuch as it was not impressed with American nationality on November 11, 1921, when that Treaty became effective.

But the American Commissioner is of the opinion that this particular case does not fall within the rule laid down in Administrative Decision No. V, because in August, 1915, the claimant, who was then an American national, lodged with the Department of State of the United States a memorial making claim for damages sustained by her resulting from the loss of her husband, through the sinking of the *Lusitania*, and on February 4, 1916, the German Government, through its Ambassador at Washington, in a formal note expressed

" . . . profound regret that citizens of the United States suffered by the sinking of the *Lusitania* and assuming liability therefor offers to make reparation for the life of the citizens of the United States who were lost by the payment of a suitable indemnity."

The views of the American Commissioner in support of this opinion and the views of the German Commissioner dissenting therefrom are set forth in their certificate of disagreement.

^a Note by the Secretariat, this volume, pp. 140-155 *supra*.

It appears from the record that the attorney for the claimant addressed a letter to the Secretary of State of the United States which reached the office of the Solicitor of the Department of State on August 20, 1915. Accompanying that letter was a document signed and sworn to by Maud R. Thompson August 16, 1915, addressed "To the Department of State, of the United States, Washington, D. C.", and entitled "Memorial Setting Forth the Claim of Maude R. Thompson". This memorial briefly states that claim is made by Mrs. Thompson, a native-born American citizen, for the loss of her husband and of personal property belonging to him and to her lost with the *Lusitania*. Germany is not mentioned in any way in either the memorial or the letter transmitting it. Apparently it was treated as a claim against Germany, and the Solicitor of the Department of State on August 24, 1915, acknowledged its receipt and informed the claimant's attorney that "the claim will in due course receive careful consideration". Apparently no further action was taken until May 20, 1920, when the Department of State wrote to claimant's attorney calling his attention to the insufficiency of the evidence submitted and added that "The Department therefore considers that any claim which your client desires to file should be prepared in accordance with the Department's form of Application for the Support of Claims against Foreign Governments". It is apparent that this particular claim had never been espoused by the United States or asserted by it as a claim against Germany until long after the claimant relinquished her American citizenship by becoming a subject of France. When the Treaty of Berlin became effective the claimant had not been an American citizen for nearly four years.

But it is insisted that the diplomatic negotiations between the United States and Germany with respect to the sinking of the *Lusitania* amounted to an espousal of *this claim* by the Government of the United States and that such espousal together with the assumption of liability by Germany, in the language above quoted from its diplomatic note of February 4, 1916, at a time when the claimant was an American national, impressed this claim with American nationality.

It is manifest from a careful reading of the whole of the diplomatic correspondence between the United States and Germany with respect to the sinking of the *Lusitania*, beginning with the note of May 10, 1915, that neither Government was attempting to deal with any specific claim or claims. The United States was asserting a principle and insisting that Germany should disavow the act of its submarine commander in sinking the *Lusitania* and give assurance that such acts would not recur. This is made perfectly clear by the telegrams from the American Secretary of State to the American Ambassador at Berlin of July 14 and 19, 1915, in which the following language occurs:

"It was hoped at least that principle for which Government of the United States stood would be acknowledged by German Government and the failure in this respect has made adjustment by compromise practically impossible."

"In your conversations with Foreign Office avoid giving hope that your Government might consider any form of compromise."

"Make it clear that the *Lusitania* case is incidental to issue of principle as to safeguarding neutrals on the high seas; that admission of liability as to Americans on *Lusitania* will not be sufficient unless avoidance of future acts is substantially assured."

The demands of the Government of the United States were not met by the note of the German Government of February 4, 1916, relied on to bring this claim within the Treaty of Berlin, nor was it or any subsequent note accepted by the United States as a satisfactory reply to its demands. Germany's offer to pay "a suitable indemnity" "for the life of the citizens of the United States

who were lost" on the *Lusitania* was never accepted by the United States before the Treaty of Berlin became effective. All offers theretofore made by Germany, as well as all of her obligations to the United States or its nationals, whatever their nature, arising during the war period, were merged in and fixed by the Treaty of Berlin. This Commission has so held in its decision with respect to Germany's obligations under that Treaty as determined by the nationality of claims presented (Administrative Decision No. V, Decisions and Opinions, at pages 184-185).^b The basis of Germany's liability under the Treaty of Berlin for damages suffered by American nationals growing out of injuries resulting in death (including deaths of *Lusitania* victims) is fully stated in the decision of this Commission in the "Life-Insurance Claims" (Decisions and Opinions, pages 121-140 inclusive)^c and need not be repeated here, save to point out that Germany's obligations are fixed by that Treaty quite independently of and without any even remote reference to the unaccepted offer made by Germany in the diplomatic note of February 4, 1916.

As late as March 31, 1922, the American Secretary of State in submitting a report of "Lusitania Claims" in response to a resolution of the Senate of the United States wrote: "The adjustment of claims growing out of the sinking of the *Lusitania* is at present the subject of diplomatic negotiations between the Government of the United States and the Government of Germany."

The Umpire finds that, during that period in which the claimant herein remained an American national, (1) her specific claim was not espoused by the Government of the United States and (2) no agreement was reached between the United States and Germany fixing liability on the part of the latter for damages suffered by the claimant or any other American national growing out of the sinking of the *Lusitania*.

The Umpire decides that the record in this case presents no exception to the rule announced in this Commission's Administrative Decision No. V and that as this claim was on the date the Treaty of Berlin became effective impressed with the claimant's French nationality it does not fall within the terms of the Treaty of Berlin and Germany is not obligated to pay it.

Applying the rules announced in Administrative Decision No. V and in the other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington March 11, 1925.

Edwin B. PARKER
Umpire

MARY BARCHARD WILLIAMS (UNITED STATES) *v.* GERMANY

(*March 11, 1925, pp. 225-229; Certificate of Disagreement by the National Commissioners, February 16, 1925, pp. 221-224.*)

NATIONALITY OF CLAIMS: AT ORIGIN, DUAL NATIONALITY.—INTERPRETATION OF MUNICIPAL LAW.—DAMAGES IN DEATH CASES: SURVIVORS' ORIGINAL RIGHT TO RECOVER DAMAGE.—INTEREST. Claim on behalf of American-

^b *Note by the Secretariat, this volume, pp. 147-148 supra.*

^c *Note by the Secretariat, this volume, pp. 103-116 supra.*

born widow of British national lost on *Lusitania* on May 7, 1915, who under statutes of United States by marriage lost, and at husband's death *eo instanti* resumed, American nationality, which she kept ever since. *Held* that claim impressed with American nationality in point of origin and falls within Treaty of Berlin, even if for uncertain period claimant's British nationality continued. Survivors' original right to recover pecuniary damage sustained by them in death cases: reference made to Administrative Decision No. VI (see p. 155 *supra*). Interest allowed at 5% per annum from November 1, 1923.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 806-809; Annual Digest, 1925-26, p. 242; Kiesselbach, *Probleme*, pp. 343-345 (German text); Witenberg, Vol. II, pp. 80-83 (French text).

Bibliography: Borchard, pp. 72-73; Kiesselbach, *Probleme*, pp. 12, 36-55.

CERTIFICATE OF DISAGREEMENT BY THE NATIONAL COMMISSIONERS

The American Commissioner and the German Commissioner have been unable to agree as to the jurisdiction of the Commission over the claim of Mrs. Mary Barchard Williams, Docket No. 594, their respective Opinions being as follows:

Opinion of Mr. Anderson, the American Commissioner

This is a claim on behalf of Mary Barchard Williams, for damages suffered by her on account of the death of her first husband, who was lost on the *Lusitania*.

The claimant's first husband, Edmond E. Barchard, was a subject of Great Britain at the time of his marriage to the claimant on October 9, 1909, and also at the time of his death.

The claimant was a citizen of the United States by birth and became a British subject by marriage and admittedly remained a British subject until the death of her first husband.

On April 1, 1917, the claimant was married to her present husband, Charles G. Williams, a citizen of the United States.

The claimant contends that this is a claim of American nationality, notwithstanding the British nationality of herself and her husband up to the time of his death. She bases this contention upon the effect of Section 3 of the United States Naturalization Act of March 2, 1907, as applied to the facts in her case.

Section 3 of that Act provides:

"That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship * * * if residing in the United States at the termination of the marital relation, by continuing to reside therein."

The claimant was residing in the United States when her first marriage was terminated by the death of her husband and thereafter continued to reside in the United States. She contends that on these facts and under this law her American nationality was immediately reestablished as of the moment of her husband's death, and consequently that she had the status of an American national at the time when this claim accrued.

The German Agent contests the claimant's contention, that on these facts her American nationality was immediately reestablished under this law.

These contentions present two questions for decision, (1) when did the claim arise and (2) when was the claimant's American nationality reestablished?

As to the time when the claim accrued, it has been settled by the decisions of this Commission in the *Lusitania* Opinion, in the Life-Insurance Claims, and

in the claims of American nationals growing out of the death of aliens, that under the terms of the Treaty of Berlin the right to recover damages resulting from death accrued when, but not until, the death occurred. This is expressly stated in the Umpire's decision as to claims of American nationals growing out of the death of aliens in which the earlier decisions above mentioned are reviewed and applied.

That decision holds further that:

"The right to such compensation does not vest in the claimant through the decedent, for such right was never lodged in the decedent. On his death the initial right to demand compensation for damages suffered vests in the survivor. The basis of the liability to respond in damages is not the loss sustained by the nation, or by the estate of the deceased, or the value to them of the life lost, but rather the damages resulting to the survivor from the death. The claim of such survivor is original and not derivative."

And again:

"A claim put forward by the United States on behalf of an individual who was an American national both on May 7, 1915, the date of the destruction of the *Lusitania*, and on November 11, 1921, when the Treaty of Berlin became effective, and who has suffered damages by reason of the loss on the *Lusitania* of the life of a British subject, fully meets these tests and falls within the terms of the Treaty of Berlin. In such a case an American national has unquestionably been damaged by the act of Germany in the prosecution of the war, and such damage is clearly attributable to Germany's act as a proximate cause. The fact that the damage was inflicted through the taking of the life of a British subject is immaterial."

Under these decisions this claim comes within the jurisdiction of the Commission for the determination of the damages suffered by the claimant resulting from the death of her husband, if the claimant is right in her second contention that she was reinstated as an American national immediately upon the death of her husband.

The question of American nationality depends upon the laws of the United States, and the nationality status of a claimant under the Treaty of Berlin must be determined in accordance with those laws.

It is true that under the laws of Great Britain this claimant might have continued her British nationality after the death of her husband, but the fact was that upon his death she was, and thereafter remained, a resident of the United States, which was sufficient, under the laws of the United States, to reestablish her American nationality as of the moment when her marriage terminated.

It is not necessary to determine whether or not there was a deliberate election on the part of the claimant, immediately upon the death of her husband, to resume her American nationality in preference to continuing her British nationality. The laws of the United States did not require her to make any formal declaration of election or resumption of American nationality. Continuing to reside in the United States was the only condition imposed by its laws, and as that condition was complied with from the instant of her husband's death, her resumption of American nationality must be regarded as having taken effect as of the moment of her husband's death.

That the Government of the United States considers that this was the effect of its laws as applied to the facts of this case is evidenced by the espousal and presentation of this claim on behalf of this claimant by the Government of the United States.

Chandler P. ANDERSON

Opinion of Dr. Kiesselbach, the German Commissioner

I disagree with the American Commissioner and beg to refer to the exhaustive argument of German Counsel prepared in this case and filed November 20, 1924.

Since under the statute applicable here claimant has a right either to *resume* her former American citizenship or to retain her British nationality, I do not think that the death of claimant's husband can effect in itself a reversion of claimant's nationality, thus depriving her of the optional right warranted under the statute.

Therefore claimant has to be considered as an alien at the time of the death of her husband in the meaning of the Treaty and of the Umpire's decision on the rights of American nationals for damages growing out of the death of aliens.

Under these circumstances it may be left in abeyance whether, even if upon the husband's death claimant would become an American citizen *eo instanti*, such legal effect could make her loss the loss of an American national within the meaning of Administrative Decision No. V.

I further disagree with the American Commissioner on the legal effect the espousal and presentation of this claim can have on this Commission.

As it was unavoidable that the American Government turned over more than 12,000 claims unexamined and uncontrolled to the American Agency acting before this Commission, it is not the discretion of the American Government but the discretion of the American Agent which causes a claim to be presented to this Commission. This discretion, though carefully and diligently applied, can have no effect on the legal status of a case and on the decision of this Commission.

W. KIESELBACH

The National Commissioners accordingly certify to the Umpire of the Commission for decision the points of difference which have arisen between them as shown by their respective Opinions above set forth.

The National Commissioners have also disagreed as to the amount of damages suffered, and if the Umpire should decide that this claim comes within the jurisdiction of the Commission the National Commissioners also certify to the Umpire for decision the question of the amount to be awarded.

Done at Washington February 16, 1925.

Chandler P. ANDERSON
American Commissioner

W. KIESELBACH
German Commissioner

Decision

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the two National Commissioners certifying their disagreement.

Edmond E. Barchard, a British subject, with domicile in the United States, was lost with the *Lusitania*. He had married the claimant herein at El Paso, Texas, on October 9, 1909. There was no issue of this marriage. At the time of his death his wife, who was 31 years of age, was wholly dependent on him for support and the only one dependent on him for support.

The decedent, who was 40 years of age at the time of his death, was a mining engineer by profession with an income of approximately \$4,000 per

annum. The record indicates that he was a man of good character and good habits and was physically sound. He was growing professionally and the outlook for increasing his income from his profession was good. His entire income was applied by the decedent to the support and maintenance of himself and wife. On his death she was left destitute and thrown on her own resources for support. On April 1, 1917, she married Charles G. Williams, an American national and a member of the bar of Columbus, Ohio. No claim is made for the personal property belonging to and lost with the decedent, which was impressed with his British nationality.

The claimant was born in the United States and throughout her life has resided therein. The decedent and claimant maintained their domicile in the United States during their entire married life. For some time prior to decedent's death they were domiciled at Columbus, Ohio, where the claimant then was and where she has ever since resided.

Is the claim here presented impressed with American nationality in point of origin? The answer to this question depends on the construction and the application to the facts in this case of so much of the act of the Congress of the United States approved March 2, 1907, which was in effect at the time of the marriage of the claimant and decedent and at the time of decedent's death, as provides—

“That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.”

It will be noted that this statute divided American women married to foreigners into two classes, viz: (1) those residing abroad at the termination of the marital relation and (2) those residing in the United States at the termination of the marital relation. As a condition to the resumption of American citizenship the statute required those belonging to the first class to take affirmative action after the termination of the marital relation either by registering as an American citizen within one year with a consul of the United States or by returning to reside in the United States. The statute required no act, election, or volition of a woman belonging to the second class as a condition to the resumption of American citizenship. All that it required of her was that she do nothing but passively permit the statute to clothe her with the American citizenship of which this same statute had deprived her during the period of her marriage to a foreign citizen or subject.

By virtue of this statute and of a similar British statute the claimant by her act in marrying a British subject was *eo instanti* deprived of her American citizenship and coincidentally became a British subject. This statutory rule had its source in the ancient principle of the identity of husband and wife and was designed to prevent domestic as well as international embarrassments and controversies (*Mackenzie v. Hare*, 1915, 239 U. S. at pages 311-312). But the statute in effect provided that the operation of the rule should cease upon the termination of the marital relation in which the reason of the rule had its source. Because of her residence and domicile in the United States the claimant owed temporary allegiance to it even while she was a British subject. When the marital relation was severed by her husband's death she continued to reside in the United States and that temporary allegiance became permanent by virtue of the statute above quoted which *ipso facto* clothed her with American citizenship without any further act or volition on her part. She *eo instanti* relinquished her American citizenship when she married a British subject. She

eo instanti resumed her American citizenship upon the termination of the marital relation by his death. She has always claimed American citizenship, save during the existence of her marital relation with a British national when the act of the Congress of the United States deprived her of it. But that same act, operating upon her, a native American, resident and domiciled in the United States with the fixed intention to continue to reside therein, automatically restored her American citizenship upon the termination of the marital relation by her husband's death.

The act of the Congress of the United States passed in pursuance of its Constitution, on which alone American nationality depends, required nothing further of her. If it be said that under the statutes of Great Britain the claimant, after the death of her husband, had the right to elect to continue her British nationality, the sufficient answer is that it affirmatively appears from the record that she made no such election. If it be said that there must have been a period, however short, between her husband's death and her conscious election not to remain a British subject, during which period her British nationality continued, the sufficient answer is that it affirmatively appears from the record that prior to her husband's death she had a fixed determination to continue to reside in the United States and had elected that in the event of her husband's death she would not remain a British subject. But even if it be conceded that there was an uncertain period, not susceptible of being made certain by any fixed statutory rule, during which period claimant's British nationality continued pending a definite election by her after her husband's death not to remain a British subject, then at most hers was a not unusual instance of dual nationality, for by virtue of the statute of the United States and her continued residence therein she was *ipso facto* clothed with American nationality. While it is not necessary here to decide the claimant's status with respect to her possessing or not dual nationality following her husband's death, or the duration of such status if it existed, it is clear that as the claimant at the time of and ever since her husband's death has resided and had her domicile in the United States and that under the statutes of the United States she became, on her husband's death, and has since remained an American citizen, the claim is one in behalf of which the United States may properly intervene.

As several times pointed out in the decisions of this Commission, the compensation which Germany is obligated to make under the Treaty of Berlin for damages resulting from death is for pecuniary damages sustained by the survivors resulting from the death of another, and not damages sustained by the decedent or by his estate. Such right to recover damages accrues when, but not until, the death occurs. Upon the death of claimant's husband the initial right to demand compensation vested in her. This demand is original and in no sense derivative (see Administrative Decision No. VI, Decisions and Opinions, pages 208-211).^a Coincidentally with the vesting in her of this initial right, the claimant, through her residence in the United States and its continuance, was by virtue of the act of the Congress fully restored to American citizenship. It follows that the claim for damages suffered by her, here put forward by the United States, is American in origin and that, as she has ever since remained a citizen of the United States, this claim falls within the terms of the Treaty of Berlin.

Applying the rules announced in the *Lusitania* Opinion, in Administrative Decisions No. V and No. VI, and in the other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the

^a *Note by the Secretariat*, this volume, pp. 164-166 *supra*.

Government of Germany is obligated to pay to the Government of the United States on behalf of Mary Barchard Williams the sum of ten thousand dollars (\$10,000.00) with interest thereon at the rate of five per cent per annum from November 1, 1923.

Done at Washington March 11, 1925.

Edwin B. PARKER
Umpire

EDWARD A. HILSON (UNITED STATES) *v.* GERMANY

(*April 22, 1925, pp. 236-242; Certificate of Disagreement by the National Commissioners, February 21, 1925, pp. 231-236.*)

NATIONALITY OF CLAIMS: AT ORIGIN.—AMERICAN NATIONAL: DEFINITION.—NATURALIZATION: EFFECT OF DECLARATION OF INTENTION TO BECOME AMERICAN CITIZEN, OF DIPLOMATIC PROTECTION OF FOREIGNERS AS AMERICAN CITIZENS.—INTERPRETATION OF MUNICIPAL LAW.—INTERPRETATION OF TREATIES: ORDINARY AND OBVIOUS MEANING.—WAR: RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN. Claim on behalf of American seaman, naturalized on July 5, 1918, for damage through sinking of American merchant vessel by German submarine on November 8, 1916, when claimant, still British national, had already made formal declaration of intention to become American citizen and, under United States statutes, was entitled to protection as such. *Held* (1) that claim does not fall within Treaty of Berlin: damage not suffered by American national (definition), claimant owed *temporary*, not *permanent* allegiance to United States at time of damage (reference made to Administrative Decisions Nos. V and I, pp. 119 and 21 *supra*); under United States statutes, neither declaration of intention to become American citizen, nor extension to foreigners of same measure of protection as to American citizens change nationality of foreigners; interpretation of treaties: ordinary and obvious meaning; and (2) that, though under general international law claim properly presentable, Commission only concerned with claims falling within Treaty of Berlin.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 810-815; Annual Digest, 1925-26, pp. 269-271; Kiesselbach, *Probleme*, pp. 350-354 (German text); Witenberg, Vol. II, pp. 84-90 (French text).

Bibliography: Annual Digest, 1925-26, p. 271; Borchard, pp. 73-74; Kiesselbach, *Probleme*, pp. 12, 36-55.

Certificate of disagreement by the National Commissioners

The American Commissioner and the German Commissioner have been unable to agree upon the jurisdiction of the Commission over the claim of Edward A. Hilson, Docket No. 26, and hereby certify that question to the Umpire for decision.

This is a claim of a nationalized American citizen who, before he became nationalized but after he had become a declarant, and while he was serving as a seaman on an American vessel, suffered the damage for which the claim is made. The facts in the case are briefly as follows:

The claimant was a radio operator on the American Steamship *Columbian* when she was stopped and sunk by a German submarine on or about Novem-

ber 7, 1916. The claimant, with the others members of the ship's crew, was temporarily transferred, by order of the commander of the submarine, to the Steamship *Balto* and later to another vessel, which also had been seized by the submarine, and on November 11 was ordered, with other members of the crew, into a rowboat in which they finally reached the coast of Spain, after rowing some twenty or twenty-five miles through a rough sea in stormy winter weather.

As a result of the treatment and exposure experienced by the claimant, he alleges that his health was seriously and permanently injured, and for this injury he claims \$10,000.00 damages. He also claims for lost personal property valued at \$809.30.

At the date of these occurrences the claimant was a British subject, but he contends that his claim was of American nationality in its origin and continuously thereafter on the following grounds:

On December 6, 1915, he made formal declaration of his intention to become an American citizen and received his first papers.

In May, 1914, he became a member of the crew of the *Columbian*, as appears from the petition, and he continued to hold that rating until January 2, 1917, as shown by his "Certificate of Seaman's Service" issued by the Department of Commerce Shipping Service February 16, 1922.

The personal injury suffered by him through the treatment experienced at the time of the sinking of the *Columbian* interrupted his subsequent employment in the American merchant marine.

On July 5, 1918, the claimant became a naturalized citizen of the United States, and he ever since has maintained that status.

He claims that on these facts, by virtue of the laws of the United States, as well as under international law, he was entitled to the protection of the United States Government at the time the claim accrued, and that the Government of the United States is entitled to claim damages on his behalf against Germany for injuries suffered by him in consequence of the acts of the German Government or its agents in sinking the American Steamship *Columbian* while the United States was a neutral in the war.

It has long been the custom and policy of the Government of the United States to espouse and present diplomatically claims of this character as shown by paragraph 5 of the "General Instructions for Claimants" issued by the Department of State of the United States, which defines such a claim as one of American nationality, entitled to receive the protection of the United States. This paragraph reads as follows:

"Nationality of Claim.—The Government of the United States can interpose effectively through diplomatic channels only on behalf of itself, or of claimants (1) who have American nationality (such as citizens of the United States, including companies and corporations, Indians and members of other aboriginal tribes or native peoples of the United States or its territories or possessions, etc.), or (2) who are otherwise entitled to American protection in certain cases (*such as certain classes of seamen on American vessels, members of the military or naval forces of the United States, etc.*). Unless, therefore, the claimant can bring himself within one of these classes of claimants, the Government can not undertake to present his claim to a foreign Government. For example, the declaration of intention to become a citizen of the United States is insufficient to establish the right to protection by the United States *except in case of American seamen.*"

Paragraph 6 of these instructions distinctly distinguishes between claims of this character and claims of foreigners who were not entitled to the protection of the United States until "*after the claims accrued*".

The right thus asserted by the Government of the United States to protect against a foreign government an alien seaman employed on an American vessel, if he has declared his intention to become a citizen, is recognized by American municipal law as well as by the State Department's instructions. Section 2174 of the Revised Statutes of the United States provides that such seaman before he has become naturalized "shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen".

In the opinion of the American Commissioner, claims of this character are recognized under international law as properly presentable internationally, and under the laws of the United States this claim, on the facts stated, must be treated as a claim of American nationality at the time of its origin.

Considering that an injury to a seaman on a vessel may impede the operation of the vessel and adversely affect the interests of the owner and interfere with the government of the flag under which the seaman serves, and on the other hand that by accepting employment on a vessel under the American flag the seaman is entitled to the protection of that flag against aggression by foreign agencies, it follows that a national interest is involved and that the government concerned may justly assert an international right to protect the seaman under its flag on that ground.

For these reasons the action of Congress and of the Department of State in asserting this right to give an alien seaman who has taken out his first citizenship papers the status of an American citizen for the purpose of protecting him against acts of foreign governments may properly be regarded as merely declaratory of an existing international right based on the recognized principles of international law.

Inasmuch as this claim was a claim of American nationality from its inception, under American law and under the policy and tradition of the Government of the United States, based upon recognized international custom and the rules of international law, and inasmuch as the claimant had become an American citizen by naturalization prior to the adoption of the Knox-Porter Resolution on July 2, 1921, it follows that Congress, in adopting that resolution, undoubtedly intended that its provisions should include this claim.

It also follows that the United States intended to include this claim and other similar claims in the Treaty of Berlin by incorporating in that Treaty the provisions of the Knox-Porter Resolution which cover such claims, and in the circumstances it must be presumed that Germany understood and acquiesced in this intention of the United States.

In the opinion of the American Commissioner, therefore, this claim was impressed with American nationality at the date of its origin and must be treated as coming within the jurisdiction of this Commission, under the terms of the Treaty of Berlin, as interpreted in Administrative Decision No. V on the nationality status of claims.

The German Commissioner disagrees with the American Commissioner in his conclusion that the claim at issue here comes within the jurisdiction of this Commission.

As already discussed in his Opinion in the nationality question, the instructions of the Department of State show that they distinguish between two classes of possible claimants. One class comprehends those claimants who are termed in the language of the Treaty "persons, wheresoever domiciled, who owe *permanent* allegiance to the United States". The other class comprises claimants who do *not* owe such permanent allegiance. To this second class the claimant belonged at the time of the origin of his claim.

Under Administrative Decision V (page 193, Decisions and Opinions),^a a claimant must have belonged to class one not only on November 11, 1921, when the Treaty of Berlin became effective, *but also* on the date when the loss or injury occurred.

As this second prerequisite does not obtain on behalf of this claimant as to the time the claim accrued, his claim is not within the jurisdiction of this Commission.

It is therefore immaterial whether under American municipal law or under international law claimant could be entitled to protection.

That claims of that kind are mentioned in the instructions of the Department of State has in the opinion of the German Commissioner no bearing on the Commission's decision. As justly stated by the American Commissioner in his opinion on the nationality question (page 156),^b the instructions "were not intended to be, or understood as, a statement of a settled rule of international law, but merely as a statement of the policy which 'as a rule' the Department would follow in dealing with international claims". And the expression "as a rule" was defined by the American Commissioner as *not* meaning "a rule of international law" but "the usual practice of the Department of State, *which was subject to changes and exceptions in its discretion*". As the instructions show, this interpretation is, with regard to the question at issue, in harmony with their wording, saying that "The Government of the United States *can* interpose
* * *".

Now, these instructions, which seem to have been drafted in May, 1919, and which were "revised" on January 30, 1920, were never brought to Germany's knowledge and were, as already explained by the German Commissioner in his Opinion cited above (page 159),^c not binding upon Germany.

But even if the Government of the United States had made the instructions an official part of its negotiations with Germany, the only conclusion Germany could have drawn from the knowledge of them would have been that under the wording of the Treaty of Berlin the United States made use of its undoubted right to make changes and exceptions.

Although "the requirements of international law with respect to the nationality status of claims may be changed by mutual agreement in a claims treaty between the governments concerned", as the American Commissioner justly points out on page 147 of his Opinion on the nationality question,^d nevertheless such changes may consist in what one of the powers concerned considers a restriction on its usual practice and policy in the interposition of claims.

The presumption that Germany "understood and acquiesced in" the intention of the United States to bring this claim within the provisions of the Treaty of Berlin is therefore not correct.

Even if the Government of the United States had had such an intention—though this has never been made known to the German Government—this would be without consequence, since the wording of the Treaty does not express but rather contradicts such intention.

In the opinion of the German Commissioner, therefore, this claim must be dismissed under conclusions I and II of Administrative Decision No. V.

The National Commissioners have also disagreed as to the amount of damages suffered, and if the Umpire should decide that this claim comes

^a *Note by the Secretariat*, this volume, p. 154 *supra*.

^b *Note by the Secretariat*, this volume, p. 128 *supra*.

^c *Note by the Secretariat*, this volume, p. 130 *supra*.

^d *Note by the Secretariat*, this volume, p. 122 *supra*.

within the jurisdiction of the Commission the National Commissioners also certify to the Umpire for decision the question of the amount to be awarded.

Done at Washington February 21, 1925.

Chandler P. ANDERSON
American Commissioner
 W. KIESSELBACH
German Commissioner

Decision

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

The record discloses that Edward A. Hilson, a British national, was employed as a radio operator on the American Steamship *Columbian* when she was captured by a German submarine on November 7, 1916, and on the following day torpedoed and sunk. He with other members of the ship's crew eventually reached the coast of Spain after rowing in an open boat some twenty or twenty-five miles through a rough sea. A claim is put forward by the United States on claimant's behalf for personal injuries alleged to have been suffered by him through exposure to the elements and also for the value of his personal effects lost when the *Columbian* was sunk.

Prior thereto the claimant had, in pursuance of the naturalization statutes of the United States, made formal declaration of his intention to become an American citizen, but this intention had not matured into citizenship and he remained a citizen and subject of Great Britain. Section 2174 of the Revised Statutes of the United States, in effect at that time and the substance of which is in effect now, provides that "Every seaman, *being a foreigner*, who declares his intention of becoming a citizen of the United States" shall be admitted to citizenship after three years' service on board a merchant vessel of the United States subsequent to such declaration "but such seaman shall, *for all purposes of protection* as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen".¹

¹ It will be noted that this statute (the full text of which is quoted below) is carefully phrased to describe the measure of protection owing by the Government of the United States to an alien seaman serving on an American ship, without conferring on him American citizenship, even temporarily, and without entitling him to any of the privileges of American citizenship save that of protection during his term of service as an alien seaman. This protection was extended to him not as an American national but as an alien seaman and was limited to the duration of his service on an American ship.

"SEC. 2174. Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant-vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant-vessel of the United States, anything to the contrary in any act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American

The claimant on July 5, 1918, became through naturalization and has since remained an American citizen. The question presented is the narrow one, Is Germany under the terms of the Treaty of Berlin obligated to pay such damages as may have been suffered by claimant during November, 1916?

It will be constantly borne in mind that the Treaty of Berlin constitutes a contract by which Germany accorded to the United States, as one of the conditions of peace, rights on behalf of *American nationals*. Many of the claims against Germany arising under the reparation provisions of the Treaty of Versailles and presented to this Commission by the United States on behalf of its nationals could not have been maintained under the rules of international law but were created by and are based exclusively on the contract terms of the Treaty of Berlin. The obligations thus assumed by Germany, and the reparation claims with which this Commission is empowered to deal, are manifestly limited to such as are embraced within the Treaty terms, which are enumerated in this Commission's Administrative Decision No. I. As heretofore pointed out² it results from that decision that no claim "falls within the Treaty unless it is based on a loss, damage, or injury *suffered by* an American national—that is, it must be American in its origin".

The term American national as used in the Treaty and the decisions of this Commission has been defined by this Commission in its Administrative Decision No. I as "a person wheresoever domiciled owing permanent allegiance to the United States of America". The decision was concurred in by the American Commissioner, and while the German Commissioner did not concur in the decision as a whole he and the Government of Germany did concur in this definition and he and the Government of Germany have accepted the decision as a whole as binding on both Governments.

This definition of an American national is taken from that part of the Joint Resolution of the Congress of the United States approved July 2, 1921, which is carried into and forms the basis of the Treaty of Berlin. There the claims, for the satisfaction of which it is stipulated that Germany shall make suitable provision, are limited to those "of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered * * * loss, damage, or injury to their persons or property", etc. The phrase "who owe permanent allegiance to the United States of America" was manifestly used advisedly. It has a well defined meaning in American jurisprudence. It broadens the term "American citizens" to embrace, not only citizens of the United States, but *Indians*³ and *members of other aboriginal tribes or native peoples of the United States and of its territories and possessions.*⁴

(Footnote continued from page 180.)

citizen, be deemed such, after the filing of his declaration of intention to become such citizen."

Sec. 2174 of the Revised Statutes was repealed by section 2 of the naturalization act approved May 9, 1918, 40 Statutes at Large 542, after its provisions, with some modifications, had been incorporated in the 7th and 8th subdivisions in section 1 thereof, still in force.

² See Administrative Decision No. V, dealing with "Nationality of Claims", Decisions and Opinions, at page 185. (*Note by the Secretariat*, this volume, p. 148 *supra*.)

³ Not until June 2, 1924 (43 Statutes at Large 253), were all non-citizen Indians born within its territorial limits made citizens of the United States.

⁴ See *Gonzales v. Williams*, 1904, 192 U.S. 1, at page 13, holding that a citizen of Porto Rico owed permanent allegiance to the United States without deciding the question with respect to the American citizenship of the individual in question.

The distinction between absolute or permanent allegiance and temporary allegiance has long been recognized by the Supreme Court of the United States:

But on the other hand it *expressly limits* American citizenship for all purposes of the Treaty to those who owed *permanent allegiance* to the United States.

It is not contended that Hilson owed permanent allegiance to the United States at the time he suffered the damages complained of. On the contrary the very statute above quoted invoked to afford to him the protection of an American citizen describes the class to which he belonged as "every seaman, being a foreigner". He was at the time of the sinking of the *Columbian* a citizen and subject of Great Britain. He owed allegiance to the United States while serving on an American ship. But such allegiance was limited to the duration of his service and was of a temporary nature.⁵ At the time of suffering the damages complained of the claimant was a British subject. The personal injuries of which he complains were injuries suffered by a British subject. The personal effects which he lost were impressed with his British nationality. The fact that the United States had through its statutes extended to claimant, an alien seaman, the same measure of protection for the duration of his service on an American ship as that extended to an American citizen does not change the nationality status of claimant, and Germany's obligations arising under the Treaty of Berlin are limited, so far as non-government-owned claims are concerned, to claims which were in point of origin suffered by American nationals.

An expression of an intention to become a citizen does not make such declarant a citizen. The status of a declarant has sometimes been described as "inchoate citizenship". The term between the filing of the declaration and the admission to citizenship has sometimes been referred to as "a probationary period".⁶ But it has never been held that the mere declaration of an *intention* to become an American citizen constituted a tie *permanently* binding the declarant to the United States, to which he should thenceforth owe permanent allegiance. The allegiance which a declarant owes to the United States is at most of a temporary nature. His declaration is a step toward the transfer of his allegiance, which is completed only when he has matured his "intention" to become a citizen by complying with all the requirements of the statutes of the United States.⁷ Then, but not until then, does his allegiance become permanent. The Congress of the United States in its act approved July 9, 1918,⁸ recognized the soundness of the rule here announced by so amending the Selective Draft Act of May 18, 1917, as to provide—

(Footnote continued from page 181).

Carlisle v. United States, 1873, 16 Wallace (83 U. S.) 147, at page 154; United States v. Wong Kim Ark, 1898, 169 U. S. 649, at page 657.

Section 30 of the Naturalization Act of the Congress of the United States approved June 29, 1906, authorized "the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States", etc.

The Attorney General of the United States in construing this act on July 10, 1908, said (27 Opinions of Attorneys General 13): "This describes exactly the status of inhabitants of the Philippine Islands. They are not aliens, for they are not subjects of, and do not owe allegiance to, any foreign sovereignty. They are not citizens, yet they 'owe permanent allegiance to the United States'".

⁵ It was expressly held by the Supreme Court of the United States in *Ross v. McIntyre*, 1891, 140 U. S. 453, at page 472, that where a British subject took service on an American ship as an American seaman "He owes *for that time*, to the country to which the ship on which he is serving belongs, a *temporary allegiance*, and must be held to all its responsibilities".

⁶ Foreign Relations of the United States 1890, page 695.

⁷ See *Ehlers' Case*, III Moore's Arbitrations 2551.

⁸ 40 Statutes at Large, at page 885.

"That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States".

It will be noted that the Congress there treated such a declarant as still a citizen or subject of the neutral country. Had he owed permanent allegiance to the United States he would not have been permitted at his election to be relieved from the provisions of the draft law and from liability to military service at the price of withdrawing his declaration and being thenceforth forever debarred from becoming an American citizen.

It may well be that this statute suggests the reason for the provision of the Joint Resolution of the Congress of the United States in so far as it limits Germany's obligations to pay damages to such only as were suffered by those persons who owed permanent allegiance to the United States of America. The Treaty of Berlin is one "restoring friendly relations" following a war in which all the resources of both nations in men, money, and material were mobilized. The obligations assumed by Germany went far beyond those for which she would have been held liable under the rules of international law. In determining who should be protected by the terms of the Treaty, the Congress might well have concluded that it should apply only to those owing permanent allegiance to the United States during the period of war—those on whom it had a right to call for military service and who could not answer that call and be relieved of their *temporary allegiance* by the mere withdrawal of their declarations of *intention* to become citizens of the United States. And when America's need for military effort against Germany had happily passed and the two nations turned to the writing of a Treaty "restoring friendly relations," it would not be unnatural for the Congress of the United States to limit the protection to be accorded under the Treaty to those persons who owed it permanent allegiance at the time they were damaged and also at the time the Treaty became effective.

But whatever may have been the reason of the rule adopted by the Congress of the United States and carried into the Treaty of Berlin, restricting Germany's obligations to pay damages to such as were suffered by persons owing permanent allegiance to the United States, the rule itself is clearly expressed and has been definitely followed by this Commission in its Administrative Decision No. I, which, as before pointed out, is the law of this case. The limitation is written into the Treaty, and must be so applied as to give its ordinary and obvious meaning full force and effect.

The American Commissioner expresses the opinion that claims of the character here dealt with "are recognized under international law as properly presentable internationally". This may be conceded. He expresses the further opinion that "under the laws of the United States this claim, on the facts stated, must be treated as a claim of American nationality at the time of its origin". This Commission is concerned only with claims falling within the terms of the Treaty of Berlin, and that Treaty does not deal with claims of *alien seamen* on American vessels which the United States had undertaken to protect, but only with claims of *American nationals* who were such when they suffered the loss, damage, or injury complained of. The sole question is what rights the United States may assert on behalf of its nationals under the Treaty, not what claims it might have presented internationally under the rules of international law.

This Commission can not in construing the Treaty give weight to any considerations of national policy or to the duty of protection owing by the United States to the claimant and others similarly situated as expressed by the

acts of the Congress or otherwise. This Commission can consider not what the Congress and the parties to the Treaty might or could have said or done but only what they did say and do. Germany's obligations are fixed by contract as expressed in the Treaty of Berlin. Her obligations to make compensation are by that contract limited to such damages as were suffered by those owing permanent allegiance to the United States. The sole question presented, therefore, is the narrow one, Did claimant owe permanent allegiance to the United States within the meaning of the Treaty of Berlin both at the time he suffered the damages complained of and at the time the Treaty became effective? Manifestly he did not. Therefore Germany is not obligated to compensate for the damages suffered by him.

Applying the rules in Administrative Decision No. V and in the other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington April 22, 1925.

Edwin B. PARKER
Umpire

CHRISTIAN DAMSON (UNITED STATES) *v.* GERMANY

(*April 22, 1925, pp. 258-265; Certificate of Disagreement by the National Commissioners, April 4, 1925, pp. 243-258.*)

WAR: CIVILIANS AND CIVILIAN POPULATION AS DISTINCT FROM PERSONS WITH MILITARY STATUS; PERSONAL PROPERTY IMPRESSED WITH MILITARY CHARACTER; REQUISITION OF MERCHANT VESSELS; PUBLIC SHIPS.—INTERPRETATION OF TREATIES: (1) INEQUALITY, ARBITRARINESS IN APPLICATION, (2) TERMS, CONTEXT, OBVIOUS MEANING. Claim for damages on account of impairment of health suffered, and personal property lost, by American master of oil tanker, requisitioned by United States Shipping Board, operated by War Department as public ship, and sunk by German submarine on August 17, 1918, while engaged in transporting oil from United States to Europe for United States military forces. *Held* that claimant was not a "civilian" and, consequently, not a part of "civilian population" of United States, as those terms are used in Treaty of Versailles, Part VIII, Section I, Article 232, and Annex I, para. 1, as carried into Treaty of Berlin: (1) irrelevant whether under United States law claimant had or not "military status": use of national criteria would lead to inequality, arbitrariness in application of Treaty, (2) terms, read in context, obviously intended to describe class of nationals common to all Allied and Associated Powers and determined by individual's occupation at time of injury or damage, (3) nationals like claimant, whose activity aimed at direct furtherance of military operation against Germany or allies, were no "civilians" within meaning of Treaty (reference made to *United States, Garland Steamship Corporation, and Others v. Germany*, see p. 73 *supra*); and that claimant, therefore, not entitled to damages, neither for impaired health, nor for personal property lost (wearing apparel, personal effects, instruments used in navigation of ship), all of which was carried into war zone, served him in a military operation, and thus was impressed with military character of ship and himself.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 815-821; Annual Digest, 1925-26, pp. 435-437; Kiesselbach, *Probleme*, pp. 366-370 (German text); Witenberg, Vol. II, pp. 97-104 (French text).

Bibliography: Borchard, pp. 75-76; Kiesselbach, *Probleme*, pp. 11, 137-139.

CERTIFICATE OF DISAGREEMENT BY THE NATIONAL COMMISSIONERS

The American Commissioner and the German Commissioner have been unable to agree upon the jurisdiction of the Commission over the claim of Christian Damson, Docket No. 4259, their respective Opinions being as follows:

OPINION OF MR. ANDERSON, THE AMERICAN COMMISSIONER

In this case two jurisdictional questions are presented for decision by the Commission:

1. Was the claimant at the time he suffered the injuries for which damages are claimed a "civilian" within the meaning of the provisions of subdivisions (1) and (2) of Annex I of the reparation clauses of the Treaty of Versailles as incorporated in the Treaty of Berlin, and
2. Was the property for the loss of which damages are claimed included in the exception of "naval and military works or materials," with respect to which damages can not be claimed under subdivision (9) of the aforesaid Annex I?

The damages for which the claim is made arose from the sinking of the *Joseph Cudahy* on August 17, 1918, by a German submarine, without warning. At that time the claimant was in the employ of the United States Government as the civilian master of that ship, and he claims damages for personal injuries inflicted upon him and for the loss of his personal property through the sinking of that ship.

The *Joseph Cudahy* when sunk was en route in ballast from France to the United States and this Commission has held, the American Commissioner dissenting, that "the *Joseph Cudahy* at the time of her destruction was impressed with the character of 'military materials' " on the ground that—

"Being a tank ship operated by and for the exclusive use of the Army Transport Service of the United States, her return in ballast for additional supplies of gasoline and naphtha for the United States Army on the fighting front was an inseparable part of her military operations." (Opinion Construing the Phrase "Naval and Military Works or Materials", page 98.)

The status of the property destroyed

The decision of the Commission that the *Joseph Cudahy* was impressed with the character of "military materials" carries with it the consequence that damages for her destruction can not be claimed by the United States Government, because the Treaty excludes damages for property of that character. It does not follow, however, from this decision, and the Treaty does not provide, that all property on board of a ship having the character of "military materials" was impressed with that character and that damages can not be claimed for the destruction of such property. As stated in the Brief of the Agent for the Government of the United States:

"The mere fact that the personal property of claimant was on board a vessel that falls within the category of 'naval and military works or materials' no more makes such particular property naval and military works or materials than it

would make a civilian on board such a vessel a part of the military forces of a belligerent."

In each case the question of whether or not the cargo and other property on a vessel had the character of "naval and military works or materials" must be determined, just as the character of the vessel itself must be determined, with reference to its ownership, control, nature, use, and destination. That is the test established by that decision of the Commission for determining the character of all property in respect to which damages are claimed under subdivision (9) of Annex I aforesaid, and that is the test which must be applied to the claimant's property in this case.

It will be found on an examination of the opinion of the Commission construing the phrase "naval and military works or materials" that the reasons stated therein for impressing the *Joseph Cudahy* with the character of "military materials" furnish grounds against, rather than for, imposing that characterization upon the private property for the loss of which damages are claimed in this case.

The treaty provisions there under consideration are found in Annex I, subdivision (9), above mentioned, and are as follows:

"Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories:

* * * * * * *

"(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war."

The meaning of the phrase "naval and military works or materials" as applied to ships is defined in that decision as follows:

"This phrase, in so far as it applies to hulls for the loss of which claims are presented to this Commission, relates solely to ships operated by the United States, not as merchantmen, but directly in furtherance of a military operation against Germany or her allies. A ship privately operated for private profit cannot be impressed with a military character, for only the government can lawfully engage in direct warlike activities."

The word "materials" is defined as follows:

"Reading the French and English texts together, it is apparent that the word 'materials' is here used in a broad and all inclusive sense, with respect to all physical properties not attached to the soil, pertaining to either the naval or land forces and impressed with a military character; while the word 'works' connotes physical properties attached to the soil, sometimes designated in military parlance as 'installations', such as forts, naval coast defenses, arsenals, dry docks, barracks, cantonments, and similar structures. The term 'materials' as here used includes raw products, semi-finished products, and finished products, implements, instruments, appliances, and equipment, embracing all movable property of a physical nature from the raw material to the completed implement, apparatus, equipment, or unit, whether it were an ordinary hand grenade or a completed and fully equipped warship, provided that it was used by either the naval or land forces of the United States in direct furtherance of a military operation against Germany or her allies."

It is important to note that, as pointed out in these definitions, the word "works," as used in the phrase "naval and military works or materials", means only "physical properties attached to the soil, * * * such as forts,

naval coast defenses, arsenals, dry docks, barracks, cantonments, and similar structures". The "works" mentioned in this phrase, therefore, are properties which, in the nature of things, could be owned or controlled only by the Government when used for war purposes.

It is also to be noted that the words "works or materials" are associated together and governed by exactly the same qualifications in this phrase, and clearly it was the intention of the phrase makers that the word "materials" should apply equally with the word "works" only to properties owned by or under the control of the Government. The underlying reason for this interpretation is the same in each case, for unless either the "works" or "materials" were in the possession or under the control of the Government they could not properly have a naval or military character, because, as pointed out by this Commission in the above-quoted extract from its former decision, "only the government can lawfully engage in direct warlike activities".

The importance of this distinction between public and private property under the reparation clauses in the Treaty of Versailles has already been noted by this Commission in its opinion as to the meaning of the phrase under consideration, as follows:

"It is apparent that the controlling consideration in the minds of the draftsmen of this article [Article 232] was that Germany should be required to make *compensation* for all damages suffered by the *civilian population* of each of the Allied and Associated Powers during the period of its belligerency. It was the reparation of the private losses sustained by the *civilian population* that was uppermost in the minds of the makers of the Treaty rather than the public losses of the governments of the Allied and Associated Powers which represented the cost to them of prosecuting the war." (Page 77.)^a

It follows from these considerations that this phrase "naval and military works or materials" was not intended to apply to privately owned property, unless such property had come into the possession and under the control of the Government in such a way as to make the loss fall on the Government rather than on the private owner, and unless such property was being used by the Government in direct furtherance of a military operation.

The property in this case consisted of clothing and other personal effects and some navigation instruments belonging to the master personally. The nature of this property was not inherently military, and it was the sort of property which the claimant would have been allowed to retain in his possession if he had been captured, instead of being put adrift at sea, and this Commission has awarded damages in many instances where similar articles in the possession of prisoners of war when captured were not returned to them when released.

It would be a very far-fetched and forced construction of the established facts to hold that such privately owned property was in the possession or under the control of the Government or was being used at the time of its loss in furtherance of a military operation, and consequently within the excepted class. Furthermore such property can not in any sense be regarded as being used at the time of its loss *directly* in furtherance of such an operation.

As held in the above-mentioned decision of this Commission:

"In order to bring a ship within the excepted class she must have been operated by the United States at the time of her destruction for purposes directly in furtherance of a military operation against Germany or her allies." (Page 99.)^b

The reason given in that decision for holding that the *Joseph Cudahy* was engaged in a military operation was because it was presumed that she was

^a Note by the Secretariat, this volume, p. 76 *supra*.

^b Note by the Secretariat, this volume, p. 90 *supra*.

going to get "additional supplies of gasoline and naphtha for the United States Army on the fighting front". No such presumption, however, can be adopted about the personal property on board belonging to the civilian master, and it can not even be presumed that the master himself would have remained with the ship on a return voyage.

It was also held in that decision of the Commission that—

"The automobile belonging to the United States assigned to its President and constitutional commander-in-chief of its Army for use in Washington is in no sense military materials. But had that same automobile been transported to the battle front in France or Belgium and used by the same President, it would have become a part of the military equipment of the Army and as such impressed with a military character." (Page 97.)^c

Inasmuch as the Commission has decided that even government owned property is not military material unless used *directly* in furtherance of a military operation, it is immaterial to consider in this connection whether or not the master of the *Joseph Cudahy* had a military or civilian status, for in neither case can his privately owned property be regarded as being military or naval materials at the time of its destruction.

The civilian status of the claimant

It is necessary in connection with the part of this claim which relates to damages for personal injuries suffered by the master to determine whether or not he had a civilian status, because the Treaty provides for compensation for such damages only when suffered by civilians.

This claim arises under the provisions of Article 232 of the Treaty of Versailles together with subdivisions (1) and (2) of Annex I thereto, which were incorporated in the Treaty of Berlin. These provisions in so far as they apply to the present case are as follows:

ARTICLE 232. * * * "The Allied and Associated Governments, however, require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage as defined in Annex I hereto."

ANNEX I. "Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories:

"(1) Damage to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war, including bombardments or other attacks * * * on sea, * * * and all the direct consequences thereof, and of all operations of war by the two groups of belligerents wherever arising.

"(2) Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health as a consequence * * * of exposure at sea * * *), wherever arising, and to the surviving dependents of such victims."

It is conclusively shown by the authorities cited in the Brief of the American Agent that under the laws of the United States the claimant in this case had a civilian and not a military status at the time the damages occurred.

His relation to the Government was that of employee under the control of the United States, but he was neither enlisted nor commissioned as a member of the military or naval forces of the United States.

He was required to take an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic". but the oath

^c Note by the Secretariat, this volume, p. 88 *supra*.

taken by him differs from that taken by an enlisted man in that the latter also swears to "obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War". The oath required from the claimant was practically the same as that required from any civil official of the Government of the United States.

As stated in the Brief of the American Agent:

"The master and crew of the *Joseph Cudahy* were employed, not for fighting, but for the ordinary and usual nautical work of navigating a noncombatant public vessel carrying supplies for the use of the military forces." (Page 20.)

And also:

"That the vessel commanded by the claimant in this instance was not entitled to engage in offensive action against enemy ships is recognized by this Commission in its opinion of March 25, 1924, page 96. The rights of this vessel to commit acts of war were exactly the same as were the rights of any armed merchant vessel of the United States. The only acts of war that either the *Cudahy* or the armed merchant vessel of the United States might commit were such acts as were necessary to defense against an attack by an enemy war vessel." (Pages 40-41.)

The American Brief also cites numerous decisions of the United States courts and opinions of the United States Attorneys General holding that the employment of civilians in the Army or Navy of the United States does not constitute the employee a part of the military service or establishment of the United States.

Furthermore, the Secretary of War, in response to an inquiry from the American Agent with reference to the particular question under consideration, has ruled officially:

"Employees of the Army Transport Service did retain their civilian status while so employed. They were, however, subject to military discipline on board in so far as such control was necessary to prevent interference with the general administration of the vessel with troops aboard and operating under war conditions. The determination of the guilt of members of the crew of offenses committed aboard the ship was controlled under rules laid down in Special Regulations No. 71, instead of by court-martial as in case of an enlisted man, and orders for the performance of their duties were issued by the master of the vessel through his subordinates." (Page 8, American Brief.)

In commenting on this ruling the American Agent says in his Brief:

"This decision of the Secretary of War as to the actual civilian status of the employees of the Army Transport Service is, it is submitted, if not controlling, at least entitled to the greatest weight. See *Brown v. U. S.* 32 Ct. Cl. pp. 379, 388." (Page 8.)

This contention of the American Agent has been recognized by the Supreme Court of the United States, in numerous cases, as a settled rule for the construction of doubtful statutes. (See *United States v. Johnston*, 124 U. S. 236, at page 253; *United States v. Cerecedo Hermanos y Compañia*, 209 U. S. 337, at page 339; and *Schell's Executors v. Fauche*, 138 U. S. 562, at page 572, and the cases therein cited.)

The American Agent finally shows, on the authority of the pension and bonus and other war legislation of the United States, in his Brief that:

"The claimant in this instance was clearly not in the military service so as to give him a pensionable status. He was not in such service so as to entitle him to compensation provided for naval and military victims of the war or to entitle him to receive from the United States an allowance for the benefit of his family and dependents. He was not in the military service so as to receive the benefits

of the bonus legislation. Had he been in the military service and not a civilian he would then have received the benefit of these particular rights." (Page 42.)

The Treaty of Berlin deals with claims of American nationals and not with claims of British or French or German nationals, and, accordingly, the word "civilian" as used in the clauses under consideration of the Treaty of Versailles, incorporated in the Treaty of Berlin, must be understood to relate to the civilian status of claimants who are American nationals.

Just as the American nationality status of a claimant under the Treaty of Berlin must be determined by the laws of the United States, so the civilian status of an American national must be determined by the laws of the United States. The question of whether a national is a civilian employee of his Government or a part of its military or naval service can only be determined by the laws of his own country. In this case, the civilian status of the claimant has been conclusively established by the laws of the United States, under the authorities cited in the Brief of the American Agent, and consequently his claim comes within the category of damages suffered by civilians, under Article 232 and Annex I, subdivisions (1) and (2) thereof.

The German Commissioner disagrees with this conclusion, and contends that the Treaty provisions under consideration should be so interpreted as to exclude damages suffered by any claimant who voluntarily participated in the military effort of the nation, irrespective of his civilian status under American law.

In support of this contention the German Commissioner cites the provisions of subdivision (7) of Annex I aforesaid, which permit the Allied Governments to recover for allowances paid "to the families and dependents of mobilised persons or persons serving *with* the forces". He concludes from this provision that a distinction was recognized between persons serving *in* the forces and *with* the forces but that in both cases it was intended that such persons should not be treated as civilians.

It may be noted in this connection that this distinction between *with* the forces and *in* the forces is not found in the French text of the Treaty, which is equally authentic with the English text. In the French text the above phrase is rendered "ou de tous ceux qui ont servi *dans* l'armée". The word *dans* in French may sometimes have the meaning of the word "with" in English, but always in the sense of "within," which is obviously the meaning of the word "with" as used in the English text.

Entirely apart from this consideration, however, the interpretation contended for by the German Commissioner is objectionable because it would exclude the claims of all civilians in the service of their Government who participated in the military effort of the nation. All members of the Cabinet and of the Congress, and of the many war boards and other governmental organizations, all of whom participated in the military effort of the nation, would be placed in the excluded class under the interpretation proposed, although under the laws of the United States their official positions and the services rendered by them did not disturb their distinctly civilian status.

The obvious difficulty with this proposed interpretation is that it substitutes for a legal definition an arbitrary distinction which is not recognized in law and not supported by the terms of the Treaty.

In conclusion, the claimant, as a civilian employee of the United States at the time the injuries occurred, is entitled to all rights accorded to civilians under the Treaty of Berlin.

Chandler P. ANDERSON

OPINION OF DR. KIESSELBACH, THE GERMAN COMMISSIONER

A. Claim for *personal injury*.—Claimant was the so-called “civilian master” of the oil tanker *Cudahy* sunk by a German submarine on August 17, 1918. Under the opinion construing the phrase “naval and military works or materials” (page 98)^d the Commission has found that the *Cudahy* was “operated by and for the exclusive use of the Army Transport Service of the United States” and that “her return in ballast for additional supplies of gasoline and naphtha for the United States Army on the fighting front was an inseparable part of her military operations.”

Claimant had entered the Army Transport Service generally. This service is headed by an officer and is a special branch of the Quartermaster Corps of the War Department. Claimant, an American citizen, had taken an oath of allegiance upon entering the Army Transport Service.

The *Cudahy* was requisitioned and chartered under a bare-boat charter and was operated “by a civilian crew employed and paid by and in all things subject to the orders of the army authorities” (page 98).^e

The question to be decided is whether claimant is a “civilian victim” in the meaning of Annex I following Article 244 of the Versailles Treaty as incorporated in the Treaty of Berlin.

The question can not be answered either from a general conception of international law or by the application of terms of domestic law of the United States but only by a careful interpretation of the provisions of the Treaty itself, as contained in Annex I following Article 244.

I do not agree with the American Commissioner that “Just as the American nationality status of a claimant under the Treaty of Berlin must be determined by the laws of the United States, so the civilian status of an American national must be determined by the laws of the United States”.

The term “national” is a technical legal term of a generally acknowledged meaning, and a “national” of a “nation” can only be one who is recognized as such under the laws of that nation.

But the term “civilian population”, as well as the term “naval and military works or materials” and the term “property belonging to”, is not a technical legal term at all and can only be interpreted from the provisions and intentions of the Treaty. And it is significant that the Treaty, in using the broad term “mobilised persons or persons serving with the forces”, does not apply a legal term of an undisputed status but a rather vague and popular expression not a legal concept.

The interpretation of this expression leads in my opinion by two different roads to the conclusion that claimant has no right to compensation from Germany.

I. Annex I clearly distinguishes between “civilian victims” (clauses 2 and 3) or “civilians” (clause 1) and “naval and military victims” (clause 5) or “mobilised persons or persons serving with the forces” (clause 7).

This distinction follows the terms of the Pre-Armistice Agreement under which Germany’s liability was established for damage done to the “civilian population” and their property caused by Germany’s aggression on land, on sea, etc.

The well-founded reason for this discrimination was the desire of the Powers concerned to indemnify persons—and property—*involuntarily* drawn into the perils of the war.

^d *Note by the Secretariat*, this volume, p. 89 *supra*.

^e *Note by the Secretariat*, this volume, p. 89 *supra*.

The opposite of the term "civilian" as used here is not, as American counsel argue, any person "in the military service" or being a "member of the enlisted or commissioned personnel", which would probably square with the term "mobilised person", but the decisive criterion is his participation in the efforts of the nation's military and naval forces. This broader conception is embodied in the wording of the provisions of the Treaty, which manifestly excepts from the class of persons who are "civilians" in the meaning of the Treaty not only mobilized persons but every person "*servng with the forces*". The group thus excepted comprises (a) persons *not mobilized* but serving with the forces and (b) not only persons serving *in* the forces but—this being a broader term—*with* the forces.

Though, as the American Commissioner points out, the distinction between "*in*" the forces and "*with*" the forces is not found in the French text, I do not believe that that would weaken the force of my argument. The French text has the same distinction as the English text between "*des mobilisés*" and "*tous ceux qui ont servi dans l'armée*", thus showing that the French text also clearly embraces a broader conception than the strictly military force, i.e., the "*mobilisés*". And though the French word "*dans*" could have a different meaning from the English word "*with*", the conclusion would not be justified that *therefore* the French text would be decisive. When both texts are equally authentic, it follows that both phrases have the *same* weight and that then the undisputed rule of interpretation applies that "the language will be *strictly construed against*" the framers of the wording of the Treaty, and that the benefit of the doubt is in favor of Germany.

Therefore, under this principle the English text is controlling, and this the more so as it may certainly be assumed that an English-speaking nation will look for the meaning of an expression primarily to its own language.

So any person who serves *with* the forces of his country is *not* a civilian in the meaning of the Treaty and is therefore excluded from claims for compensation; and the same would apply to a person serving "*dans l'armée*", since the expression "serving with the forces" as well as the expression "having served '*dans l'armée*'" clearly was intended to include categories of persons other than such as are mobilized.

Now, a master of a ship designed and used for military operations and under the control of the military authorities of the United States is undoubtedly a person who serves, and serves very efficiently, with and in the forces of the United States. Similarly the British Government has classified transport workers under clause 5 as "naval and military victims," and the Reparation Commission has classified "civilian" minesweepers under the same clause.

It is therefore not decisive whether a person is "a military person" in the meaning of international law or of the law of the United States.

II. The intention already mentioned of the Powers concerned to protect and indemnify the population involuntarily drawn into the perils of the war was not confined to civilian *persons* only but also comprised property in so far as it was of a non-military character.

It therefore may be helpful to recall the principles laid down by this Commission to define the meaning of the phrase "naval and military materials" with regard to ships and to apply them by analogy in the definition of persons of a "non-civilian" character.

In order to bring a ship within the class of naval or military material it must (see page 78 of the opinion)[†] (a) be "used" or "designed" (or devoted) to use for (b) military purposes; and this use or design for use must be (c)

[†] Note by the Secretariat, this volume, pp. 78-79 *supra*.

ordered—or sanctioned—by the government, “for only the government can lawfully engage in direct warlike activities”.

An application of these rules brings this claimant clearly within the class of persons having a “military character”.

As master of the *Cudahy*, which ship was engaged in military operations, claimant himself was (a) active, that is, “used,” (b) for military purposes, and, as he was under the orders and in the pay of the Army Transport Service (this being a branch of the Quartermaster Corps of the War Department), his actions were (c) “ordered” by the Government.

Consequently the activities of the claimant were of a *military character* in the meaning of the Treaty, and therefore no claim exists to compensation for injuries suffered.

This does not mean that “all civilians in the service of their Government who participated in the military effort of the nation” were excluded from claims. But the conclusion means only that those who form a part of the military or naval forces of the nation by being *mobilized* or by *servicing* with *such forces* are not civilians within the meaning of the Treaty.

B. Claim for *personal property*.—(a) Notwithstanding the question as to the military character of claimant being thus answered in the affirmative, a few further remarks are necessary with regard to his right of recovery for *property* lost.

It can be left in abeyance whether every cargo on board of a vessel which is naval material in the meaning of the Treaty could be considered as military or naval material, since the property for the loss of which claim is made here is certainly not a part of such cargo.

I can not agree with the American Commissioner in his argument that equally with the word “works” the word “materials” should only apply to properties owned by or under the control of the government, though I concur in his opinion that the private property of claimant lost on the *Cudahy* is neither owned nor controlled by the American Government.

But such interpretation of the phrase “naval and military works or materials” would not be in harmony either with the contention put forward by the American Agent or with the interpretation given by the Reparation Commission.

As to cargo, the contention of the American Agent is that Germany is obligated to make compensation for all cargoes “other than such cargoes as were owned by the United States and devoted by it to military purposes, or such cargoes in *private ownership* as were consigned directly to the naval or military forces in the area of belligerent operations.”¹

And the Reparation Commission held in respect of cargo losses “that cargoes should be classed as ‘naval and military material’ within the meaning of paragraph 9, Annex I, *if they reached a state of manufacture which would limit their economic use to war purposes* or use both for war and civic purposes if directly consigned to theatres of war for the use of forces”.

So the intention of the makers of the phrase invoked by the American Commissioner did *not* limit the definition of cargo in the phrase “naval and military materials” to property owned or controlled by the government.

In accordance with the opinion of the American Agent and the interpretation by the Reparation Commission it seems to me unquestionable that ammunition, for instance, though privately owned and privately shipped, but destined for the war, is naval or military material. Yet under the definition of the American Commissioner Germany would be liable for its destruction.

¹ American Brief on the question of naval and military works or materials, filed in Docket Nos. 29, 127, and 546-556, at page 80.

Therefore it is immaterial that the United States neither owned nor controlled the claimant's property.

"It was," as the American Commissioner justly cites from the Commission's decision, "the reparation of the *private losses* sustained by the *civilian population* that was uppermost in the minds of the makers of the Treaty." And the question at issue here is only whether claimant belonged to the "civilian population" in the meaning of the Treaty or not.

Clause 9 of Annex I following Article 244 excepts only naval and military materials from Germany's liability to compensation, and it may be doubtful whether—as far as the mere wording of the provision goes—the personal apparel of the claimant can be considered as naval or military material in the strict meaning of that phrase. But certainly the goods owned by a military person or by a person serving with the forces are military material indirectly and to the extent that they are designed to furnish and supply to their owners the necessities of his military life and existence. They are not property belonging to the "civilian population".

And it is therefore only logical that no power has ever claimed for compensation for property loss suffered by a military person in connection with his warlike activities.

It is undisputed that this Commission has awarded damages in many instances where similar articles in the possession of prisoners of war were not returned to them when released. The German Government has never contested its liability and the German Agent has always admitted the obligation to compensate for such loss, for the reasons pointed out in my opinion of February 9, 1924, on the "naval and military works or materials" question, saying:

"Germany's liability for prisoners' private property is exclusively based by the *Allies* on the ground of maltreatment. Under international law it is undisputed that such 'private' property of a military person is *military material*, but it is against international law to deprive prisoners of it, as far as it is privately owned and can not be used for attack or defense".

(b) So far as concerns the question whether such of claimant's property as was capable of being used for direct military purposes is naval materials (as, for instance, the sextant and binoculars here which were used in the navigation of the ship), the fact that it is in the actual possession of a person engaged in warlike purposes makes it clearly naval or military material, because even if it is not actually used it is at all events designed to be used in case of emergency. This part of claimant's property is therefore naval material even in the stricter meaning of that phrase.

W. KIESELBACH

The National Commissioners accordingly certify to the Umpire of the Commission for decision the question of the jurisdiction of the Commission over this claim.

The National Commissioners have also disagreed as to the amount of the damages suffered by the claimant, and if the Umpire should decide that this claim comes within the jurisdiction of the Commission the National Commissioners also certify to the Umpire for decision the question of the amount to be awarded.

Done at Washington April 4, 1925.

Chandler P. ANDERSON
American Commissioner

W. KIESELBACH
German Commissioner

Decision

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement on three questions, which may be stated thus:

1. Did the claimant when he received the personal injuries complained of belong to the "civilian population" of the United States and was he then a "civilian", as those terms are used in Article 232 and Annex I to Section I of Part VIII of the Treaty of Versailles?

2. Was the personal property belonging to the claimant, which was lost with the sinking of the ship of which he was master, "naval and military * * * materials" as that term is used in paragraph 9 of the said Annex I?

3. If the first question should be answered in the affirmative and/or the second answered in the negative, what is the extent of the claimant's damages and the amount of the award against Germany to which the United States is entitled on his behalf?

These are the facts as reflected by the record herein:

Christian Damson, a naturalized American citizen, was in the employ of the Army Transport Service, a special branch of the Quartermaster Corps of the United States Army, and on July 12, 1918, was assigned to duty as the master of the Army Cargo Transport *Joseph Cudahy*, an oil tanker, requisitioned by the United States through its Shipping Board and on October 3, 1917, delivered to the War Department and operated by it through the Army Transport Service. The charter under which the Steamship *Joseph Cudahy* was operated provided that "the vessel shall have the status of a Public Ship" and that "the master, officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control of the United States". The *Cudahy* was engaged in transporting oil supplies from the United States to Europe for the use of the American military forces. She was torpedoed and shelled by a German submarine and sunk on the morning of August 17, 1918, while returning from France to the United States in ballast. Her master, the claimant herein, the crew, and the naval gun crew were compelled to abandon the ship at a point in the Atlantic Ocean about 700 miles off the coast of France and take to small boats, from which they were finally rescued, the master's boat after being on the open sea some six and one-half days. The recovery here sought is compensation for impairment of health alleged to have been suffered by claimant as a result of his experiences and also for the value of his personal effects lost with the *Cudahy*.

The claimant was the master of the *Cudahy* and as such under special regulations governing the Army Transport Service had "full and paramount control of the navigation of the ship".¹ The Army Transport Service which operated the *Cudahy* was "organized as a special branch of the Quartermaster Corps, United States Army, for the purpose of transporting troops and supplies by water. All necessary expenses incident to that service will be paid from the appropriations made for the support of the Army."² The claimant as master

¹ Paragraph 65 of Special Regulations No. 71 of the United States War Department governing the Army Transport Service, hereinafter cited as Army Transport Service Regulations.

² Paragraph 1 of Army Transport Service Regulations.

of the *Cudahy* was appointed by the Quartermaster General of the Army.³ He had "the general direction of the movements" of the *Cudahy* and was "in general charge of its business".⁴ The oath which the claimant was required to take on entering this service was so far as it went the oath which any person "in the civil, military, or naval service" of the United States was required to take (unless a special oath is prescribed by law) and the oath taken by Regular Army officers.⁵ He was by the War Department regulations required to wear a uniform when on duty.⁶ He belonged to a class of persons "accompanying or serving with the armies of the United States in the field" and as such was subject to court-martial under the provisions of the 2nd Article of War of the United States.⁷

This Commission has expressly held⁸ that the *Cudahy* was at the time of her destruction "naval and military works or materials" within the meaning of that phrase as used in paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles and hence not property "for which Germany is obligated to pay under the terms of the Treaty of Berlin". The basis for this holding was that, under the terms of so much of the Treaty of Versailles as is carried by reference into the Treaty of Berlin, there was no intention that Germany should be obligated to make compensation for destruction of or damage to property impressed with a military character either by reason of its inherent

³ Paragraph 6 of Army Transport Service Regulations.

⁴ Paragraph 20 of Army Transport Service Regulations.

⁵ Paragraph 40 of Army Transport Service Regulations and Exhibit No. 2 in this record. The oath taken by Regular Army officers is the oath prescribed by section 1757 of the Revised Statutes and is, under section 2 of the Act of May 13, 1884 (28 Statutes at Large 22), to be taken by "any person elected or appointed to any office of honor or profit either in the civil, military, or naval service, except the President of the United States," unless a special oath is prescribed by statute.

⁶ Paragraph 51 of Army Transport Service Regulations.

⁷ 39 Statutes at Large 651.

Ex parte Falls, 251 Federal Reporter 415 (May 24, 1918), wherein it was held that the chief cook on a ship operated by the Army Transport Service was a person "serving with the armies of the United States in the field" and hence "subject to military law" and liable to trial by court-martial. In its opinion the court said: "Carrying supplies to equip and sustain the army is a very important military operation in time of war. * * * It is unthinkable that Congress did not mean to include persons in the United States Army Transport Service, engaged in transporting our armies and sustaining them with equipment and supplies, in the class, in time of war, of those 'persons accompanying or serving with the armies of the United States in the field'."

Ex parte Gerlach, 247 Federal Reporter 616 (December 10, 1917), wherein it was held that a mate in the Army Transport Service was serving with the armies of the United States in the field and subject to court-martial. There the court said: "The words 'in the field' do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted."

See also *Ex parte Jochen*, 257 Federal Reporter 200 (April 8, 1919), wherein the court said, at page 204: "That it is not necessary that a person be in uniform in order to be a part of the land forces, I think clear, not only upon considerations of common sense and common judgment, but upon well-considered and adjudicated authority."

The Judge Advocate General of the Army of the United States distinguishes the class to which claimant belongs from the class "belonging to and serving in the Army" and who consequently have a military status (see manuscript letter J. A. G. 330.2, May 15, 1923).

⁸ See Decisions and Opinions, pages 97-98. (*Note by the Secretariat*, this volume, p. 89 *supra*.)

nature or by reason of the use to which it was devoted at the time of the loss. The *Cudahy* was being operated by the Army Transport Service for the purpose of transporting supplies of gasoline and naphtha for the use of the United States Army on the fighting front. As this operation was by the United States directly in furtherance of a military operation against Germany or her allies, such use impressed the *Cudahy* with a military character.

The claimant was the master of the *Cudahy* and as such had "full and paramount control of the navigation of the ship" in furtherance of a military operation against Germany or her allies. Was he a "civilian" and, as such, a part of the "civilian population" of the United States as those terms are used in the reparation provisions of the Treaty of Versailles?

It is contended that this question must be answered in the affirmative because, under the statutes of the United States and the decisions of its executive and legislative departments and of its courts construing them, the claimant did not have a "military status" and hence he had the status of a "civilian" within the meaning of the Treaty of Versailles. The conclusion is a *non sequitur*. Whether the claimant had or not a "military status" with respect to his relations with his government is a question purely domestic in character and its examination here would not prove profitable. Many of the statutes and decisions cited deal with claims to stipulated salaries, or to bonuses or to pensions or the like, of those serving *in* or *with* the military or naval forces of the United States. Manifestly all such questions are of a domestic nature and their consideration here tends to confuse rather than to clarify the language of the Treaty entered into by the United States and Germany, within the terms of which all claims must fall before Germany's obligation to pay attaches.

Turning to the Treaty and reading in connection with their context the words which this Commission is called upon to construe, it is obvious that the terms "civilian population" and "civilian" as used in the reparation provisions of the Treaty of Versailles were intended to describe a class of nationals common to all of the Allied and Associated Powers. The true test in determining what nationals of each power belong to this class is to be found in the object and purpose of their pursuits and activities at the time of the injury or damage complained of, rather than in the statutory label which their respective nations may have happened to attach to them. Twenty-six Allied and Associated Powers signed the Treaty of Versailles, which has become effective as to all of the signatories save three, including the United States of America. If the term "civilian population" shall be so construed as to include all nationals of each of the Allied and Associated Powers, save such as are given a technical military status by their respective laws, then the term will have as many meanings as there are Allied and Associated Powers. Where the laws of one of those powers give to practically all of its adult male population a military status, then, under the test proposed, such a nation would have practically no adult male "civilian population". The inequalities produced by the proposed test as between the several powers, all claiming under the same terms of the same Treaty, in themselves suggest the unsoundness of the test proposed. By reading the reparation provisions as a whole, it is clear that the terms "civilian population" and "civilian" describe a class common to all of the Allied and Associated Powers and that Germany's liability under the Treaty attaches only where claims are put forward by such a power for damages suffered by such of its nationals as fall within the general class described. If the activities of such nationals were at the time aimed at the direct furtherance of a military operation against Germany or her allies, then they can not be held to have been "civilians" or a part of the "civilian population" of their respective nations within the meaning of the Treaty. The line of demarcation between

the "civilian population" and the military within the meaning of the Treaty is not an arbitrary line drawn by the statutory enactments of the nation, each nation drawing it in a different place, but a natural line determined by the occupation, at the time of the injury or damage complained of, of the individual national of each and all of the Allied and Associated Powers without reference to the particular nation to which he may have happened to belong.

An individual who is wholly in the employ and control of the army of an Allied and Associated Power and is immediately engaged in a work directly in furtherance of a military operation against Germany, can not at the time be treated as a part of the "civilian population" of the nation to which he belongs, although he may not be nominally enrolled in the military organization of that nation so as to have a "military status" for all purposes affecting the domestic relation between him and his government.

In this Commission's opinion construing the phrase "naval and military works or materials" as applied to hull losses,⁹ where the test of the use to which the ship was devoted at the time of the loss was applied in determining whether it was impressed with a military or a non-military character, this illustration was used:

"The taxicabs privately owned and operated for profit in Paris during September, 1914, were in no sense military materials; but when these same taxicabs were requisitioned by the Military Governor of Paris and used to transport French reserves to meet and repel the oncoming German army, they became military materials, and so remained until redelivered to their owners."

The same rule, having its source in the same reason, applies to the drivers of those taxicabs. On the streets of Paris, operating their vehicles for profit, they were a part of the "civilian population" of France. But when pressed into service and used to transport the army to the battle front where the taxicab drivers were exposed to risks to which the "civilian population" was not generally exposed, they became a part of the French fighting machine; they were directly engaged in a military operation launched against the enemy and were no longer embraced in the "civilian population" of France within the meaning of the Treaty, although they may not have been enrolled in the army, or authorized to wear uniforms or bear arms, or possessed of a "military status".

The Umpire finds that the claimant was an American national in the exclusive employ and pay of the Government of the United States in time of war and a part of and subject to the absolute control of a military arm of that Government whose every resource and effort was directed against Germany and her allies; that he was subject to military discipline and to trial by court-martial; that under the decisions of the Judge Advocate General of the Army of the United States and of the courts of the United States he was "serving with the armies of the United States in the field"; and that he was in command of and had "full and paramount control of the navigation of the ship" which this Commission has already held was impressed with a military character *because* it was being used by the United States directly in furtherance of a military operation against Germany or her allies.

The Umpire holds that the claimant at the time of the sinking of the ship of which he was master was not a "civilian" or a part of the "civilian population" of the United States as those terms are used in the Treaty of Berlin and hence that Germany is not obligated to pay for such damages as claimant may

⁹ Decisions and Opinions, pages 75-101. (*Note by the Secretariat*, this volume, p. 73-91 *supra*.)

have sustained by reason of the exposure and privation which he suffered as a result of the sinking of the *Cudahy*. It follows that the first question propounded must be answered in the negative.

The personal property which the claimant lost consisted of his wearing apparel and personal effects and the instruments used by him in the navigation and operation of his ship. Had property real or personal belonging to claimant in France, Belgium, or elsewhere, not in claimant's immediate possession, "been carried off, seized, injured or destroyed by the acts of Germany or her allies", or had such property been damaged" directly in consequence of hostilities or of any operations of war", such damages would have fallen within paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles and Germany would have been liable therefor, notwithstanding that the claimant was at the time engaged in a military operation against Germany and not a "civilian" within the meaning of the Treaty. But the personal property which the claimant required for his immediate personal use and for use in the navigation of the ship which he was commanding and which was engaged directly in furtherance of a military operation against Germany was impressed with the military character of the ship and of the claimant. This property was deliberately carried into the zone of war and exposed to risks to which it would not have been exposed save to serve claimant in the operation of his ship, which was a military operation, and Germany is not obligated to make compensation for its loss. The second question presented must therefore be answered in the affirmative.

In view of these answers the point of disagreement between the National Commissioners covered by the third question does not arise.

Applying the rules announced in the previous decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington April 22, 1925.

Edwin B. PARKER
Umpire

EISENBACH BROTHERS AND COMPANY (UNITED STATES) *v.*
GERMANY

(*May 13, 1925, pp. 269-272; Certificate of Disagreement by the National Commissioners, May 12, 1925, p. 267; Opinion of German Commissioner, April 20, 1925, pp. 268-269.*)

SEA WARFARE: DESTRUCTION OF VESSEL AFTER ARMISTICE BY SUBMARINE MINE.—WAR: RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN; NEGLIGENCE.—DAMAGE: RULE OF PROXIMATE CAUSE.—INTEREST. Claim on behalf of American nationals for loss of shipment by destruction after Armistice, but during period of belligerency, of American merchant vessel, without negligence on her part, through submarine mine planted during war and prior to Armistice by unidentified belligerent. *Held* that under Treaty of Berlin Germany obligated to make compensation: (1) planting of mine was proximate cause of sinking; remote in time, not in natural and normal sequence, no proof of act or omission of Allied Powers

(who undertook to sweep mine fields) or anyone else breaking causal connexion; (2) sinking was "damage directly in consequence of hostilities or of any operations of war" within meaning of Treaty of Versailles, Part VIII, Section I, Annex I. para. 9, as carried into Treaty of Berlin, for which Germany responsible, whichever belligerent caused it (reference made to Administrative Decision No. I, see p. 21 *supra*): Commission not concerned with responsibility under general international law, signing of Armistice did not change hostile character of mine. Interest allowed at 5% per annum from December 1, 1919.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 821-823; Annual Digest, 1925-26, pp. 469-470; Kiesselbach, *Probleme*, pp. 373-375 (German text); Witenberg, Vol. II, pp. 105-108 (French text).

Bibliography: Borchard, p. 76; Kiesselbach, *Probleme*, pp. 10, 105-106.

CERTIFICATE OF DISAGREEMENT BY THE NATIONAL COMMISSIONERS

The American Commissioner and the German Commissioner have been unable to agree upon the jurisdiction of the Commission over the claim of Harry Eisenbach et al., Docket No. 5257, and accordingly, on their respective oral opinions and on the written memorandum of the German Commissioner dated April 20, 1925, they hereby certify to the Umpire for decision the question of the jurisdiction of this Commission over this claim.

The National Commissioners have agreed that in case the Umpire decides that Germany is financially liable for this claim under the terms of the Treaty of Berlin damages should be awarded to the amount of fifteen thousand two hundred fifty dollars (\$15,250.00), the invoice value of the property lost, together with interest thereon from December 1, 1919, the date of the loss, until the date of payment at the rate of five per cent per annum.

Done at Washington May 12, 1925.

Chandler P. ANDERSON
American Commissioner

W. KIESELBACH
German Commissioner

Opinion of Dr. Kiesselbach, the German Commissioner

Claimants were owners of one case and two bales of raw furs shipped to Germany on the Steamship *Kerwood*. On December 1, 1919, the *Kerwood* came in contact with a mine in the North Sea, planted by either the German Government or one of the Allied Powers. The ship and its cargo were destroyed.

The question is whether Germany is liable for this loss under the provisions of the Treaty of Berlin.

As the mine had been planted before the Armistice (November 11, 1918), and as Germany is liable for all damage directly in consequence of hostilities or of any operations of war caused by the act of *any* belligerent power (see clause 9 of Annex I following Article 244 and Administrative Decision No. I under (B) (3) (a)), and as the planting of the mine was an act of hostility or an operation of war, I consider it immaterial whether the mine was planted by the German Government or by the Allied Powers.

The only point at issue is whether the destruction of the *Kerwood* and its cargo through the contact with that mine is a "damage *directly* in consequence of" the act of *planting* the mine.

In deciding that point it must be borne in mind that the accident happened on December 1, 1919, that is, more than a year after the Armistice.

Now, as the German Agent justly argues, under the provisions of the Armistice Germany was prevented not only from the upkeep of her mine fields in order to make navigation outside the fields safe but also from sweeping the fields and from taking steps to protect shipping in the North Sea against floating mines either German or British or French.

It was left to the absolute discretion of the Allied Powers to protect the navigation in the North Sea and to control and clear the waters when and how they saw fit.

Germany was expressly forbidden to use the few ships left her on the high seas and any German ship found there was subject to capture.

Under those particular circumstances it is the interference of the Allied Powers, in that they prevented Germany from either sweeping the mine fields or keeping them in such order that the mines could not get afloat, which brought about the perilous conditions in the North Sea one year after the cessation of hostilities and which caused the accident.

A man who is forcibly prevented from closing a knife opened by him cannot be liable for a damage caused through such knife to him who prevented the closing. And the Allied and Associated Powers certainly did not intend to make Germany liable for the consequences of an act which they had expressly forbidden Germany to redress.

A loss caused under such circumstances cannot be "clearly, unmistakably, and definitely traced, link by link, to Germany's act" (Administrative Decision No. II, page 13),^a and therefore said mine explosion was not a direct consequence of an act of hostility or an operation of war.

For this reason the claim should be dismissed.

W. KIESELBACH

April 20, 1925.

Decision

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on the foregoing certificate of the National Commissioners certifying their disagreement.

From the Agreed Statement of the American and German Agents and the record herein it appears:

Harry Eisenbach and Alfred Eisenbach, composing the copartnership of Eisenbach Brothers and Company, long prior to the war were naturalized as citizens of the United States and have since remained such. On or about October 31, 1919, this firm shipped by the American Steamship *Kerwood* on consignment to their agent in Leipzig, Germany, one case and two bales of raw furs, invoiced at and of the reasonable market value of \$15,250. On December 1, 1919, the *Kerwood* and her cargo, including the shipment of furs belonging to claimants, were destroyed by the ship's coming in contact with a submarine mine, the location of which was not known and could not, in the exercise of reasonable diligence, have been discovered by her navigator, officers, and crew. The mine in question was planted during the war and prior to November 11, 1918, either by Germany or by one of the opposing group of belligerents. The claimants carried marine insurance covering the entire value of the shipment of furs, but this insurance did not cover mine risks. The

^a *Note by the Secretariat*, this volume. pp. 29-30 *supra*.

shipment was not covered by war-risk insurance and the claimants have not been reimbursed or in any way indemnified in whole or in part for its loss.

The damage for which claim is here made was suffered by American nationals during the period of belligerency. The sole question presented, therefore, is, Was the planting of the mine by a belligerent power during the war period and prior to the Armistice the proximate cause of the sinking of the *Kerwood* on December 1, 1919, and was her sinking a "damage directly in consequence of hostilities or of any operations of war" within the meaning of that phrase as used in paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles, which constitutes a part of the Treaty of Berlin, and on which is based paragraph (B) (3) (a) of this Commission's Administrative Decision No. I, in part defining Germany's liability under the last-named Treaty?

If this question be answered in the affirmative, then, under that Treaty, Germany is obligated to make compensation for the damage suffered by claimants irrespective of which group of belligerents or what belligerent planted the mine. If the question be answered in the negative, then, under the Treaty, Germany is not obligated to make such compensation.

The German Agent contends that a negative answer must be given to this question. (1) because the Armistice Agreement of November 11, 1918, provided for "Immediate cessation of all hostilities at sea", hence no act occurring thereafter can be considered as an act of hostility or an operation of war, and also (2) because the immediate and proximate cause of the sinking of the *Kerwood* was the failure of the Allied Powers to sweep the mine fields clear of mines, which task, following the Armistice, was undertaken by them.

Under the Treaty of Berlin Germany is obligated to make compensation for "all damages suffered by American nationals during the period of belligerency caused by *any belligerent*" and which was "directly in consequence of hostilities or of any operations of war in respect of all property (with the exception of naval and military works or materials) wherever situated" (paragraph (B) (3) (a), Administrative Decision No. I). This is a fixed contract obligation of Germany and in no wise dependent on the quality, the legality, or the illegality of the act causing the damage or the existence or lack of existence at the time of the particular damage of an intent to cause it. The mine was planted by a belligerent during the period of belligerency for the purpose of destroying shipping. Planting the mine was an act of hostility and an operation of war. At the time it was planted the mine was impressed with a hostile and belligerent character. The signing of the Armistice and the change in the hostile attitude and intent of the belligerents did not change the hostile character of the mine or the nature of the cause of the damage suffered by claimants. The act of a belligerent in planting it, while remote in time from the damage which it caused, is not remote in natural and normal sequence. On the contrary, the mine effectively performed the very function it was intended to perform—the destruction of shipping—and the change in the attitude of the belligerents, as expressed in the Armistice Agreement, which provided for the "Immediate cessation of all hostilities at sea", did not and could not operate on the mine to prevent its performing this hostile function. The damage wrought was directly attributable to the hostile act of planting the mine and was directly in consequence of hostilities within the meaning of the Treaty of Berlin.

But the German Agent contends that the immediate and proximate cause of the sinking of the *Kerwood* more than one year after the signing of the Armistice was the failure of the Allied Powers effectively to perform the task undertaken by them to sweep the mine fields clear of mines. He insists that

under the provisions of the Armistice Germany was required to deliver up to the Allied Powers most of her shipping and was deprived both of the facilities and the privilege of removing mines which were a menace to shipping, and hence Germany should not be held liable for the damage resulting from such failure. But the record is barren of proof of any act or omission on the part of the Allied Powers or anyone else calculated in legal contemplation to break the causal connection between the hostile act of planting the mine and the damage here complained of. It may be that cases will be presented in which such causal connection has been broken through negligence on the part of the one suffering the damage or his agents, or by some other intervening cause, which in turn constitutes the proximate cause of the damage. If there be any such cases pending before this Commission the facts should be fully developed and presented on submission. But this is not such a case. As the damage here complained of was suffered by American nationals during the period of belligerency and was directly in consequence of hostilities, Germany is obligated to make compensation therefor.

The Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Harry Eisenbach and Alfred Eisenbach, composing the copartnership of Eisenbach Brothers and Company, the sum of fifteen thousand two hundred fifty dollars (\$15,250.00), with interest thereon at the rate of five per cent per annum from December 1, 1919.

Done at Washington May 13, 1925.

Edwin B. PARKER
Umpire

ADMINISTRATIVE DECISION No. VII

(The *Vinland Case*, May 25, 1925, pp. 308-345; *Certificate of Disagreement by the National Commissioners*, pp. 273-308.)

INTERPRETATION OF TREATIES: (1) DIPLOMATIC CORRESPONDENCE. TRAVAUX PRÉPARATOIRES, EARLIER AGREEMENTS, (2) LANGUAGE, (3) INTENTION OF, INTERPRETATION BY FRAMERS, BENEFICIARIES. Brief survey of negotiations and agreements antedating Treaty of Berlin. Language, opinion of former delegates, purpose and intent of, actual interpretation by framers and beneficiaries, Congressional record, purpose of joint Resolution: see *infra*.

WAR: PROPERTY, RIGHTS, INTERESTS IN ENEMY COUNTRY, DIRECTLY, INDIRECTLY OWNED, INTANGIBLES; DAMAGE, INJURY BY EXCEPTIONAL WAR MEASURES, MEASURES OF TRANSFER. *Held* that expression "property, rights and interests" in Treaty of Versailles, Part X, Section IV, Annex, para. 3, carried into Treaty of Berlin, dealing with compensation for damage or injury by exceptional war measures or measures of transfer applied to such property, etc. of American nationals in German territory as it existed on August 1, 1914, includes, except property etc. *directly* owned by American nationals: (1) property etc. of any company or association in which they are interested (Article 297(e)), and (2) intangibles (*e.g.*, stocks, bonds, notes, contract rights).

WAR: PROPERTY BEYOND LIMITS OF ENEMY TERRITORY, TANGIBLES, INHERENT ESTATES OR INTERESTS; DAMAGE: (1) MATERIAL DAMAGE, (2) LOST PROFITS, EARNINGS, SALARIES, WAGES. (3) DIRECT AND INDIRECT DAMAGE, RULE OF

PROXIMATE CAUSE. *Held* that, under Treaty of Berlin, Germany obligated to make reparation for material (physical) damage to tangible things beyond limits of German territory (whatever the number of estates or interests inherent in them), not for the loss as such of prospective profits of business, prospective earnings, salaries, wages, and the like: (1) property damage beyond limits wrought through physical force operating on physical property, not through legislative measures and administrative decrees, (2) language of note of November 5, 1918, of United States Secretary of State to German Government and of Armistice Convention, (3) Treaty of Versailles, Part VIII, not applicable to "property, rights and interests referred to in Sections III and IV of Part X" (Article 242), (4) opinion of United States delegates, (5) language of Treaty of Versailles: Article 232, Annex I, para. 9, Annex II, para. 16 (reference made to Administrative Decision No. III, see p. 64 *supra*), and Annex IV, para. 1, indicating purpose and intent of drafters to here deal only with tangible property, (6) decision by Reparation Commission construing Annex I, para. 9, as authorizing no claims for "loss of enjoyment or of profit": a formal, unanimous decision, entitled to great weight under every rule governing interpretation of treaties, (7) report of British authorities submitting British Reparation Account to Reparation Commission, (8) Treaty of Berlin placing no heavier burden upon Germany than Treaty of Versailles: (a) record of debates in United States Congress on Joint Resolution, (b) clear purpose of Joint Resolution to demand equality of treatment for American nationals ("indirectness" of loss by American nationals dealt with in Section 5 refers to nationality of corporate or other entity or to property in which they may have been interested, does not affect rule of proximate cause), (c) notes of August 22, 1921, and August 8, 1922, of United States Secretary of State to German Government.

DAMAGES FOR PROPERTY DESTROYED BEYOND LIMITS OF ENEMY TERRITORY: MARKET VALUE, INTRINSIC VALUE; FACTORS FOR DETERMINATION OF MARKET VALUE OF PLANTS, CHARTERED VESSELS.—WAR: DESTRUCTION OF CHARTERED VESSEL, RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN.—CHARTERER'S INTEREST IN VESSEL: PROPERTY WITHIN MEANING OF TREATY OF BERLIN. Reference made to Administrative Decision No. III, see p. 64 *supra*: compensation to be made for property destroyed beyond limits of German territory is reasonable market value or intrinsic value at time and place of destruction, plus 5% interest per annum from November 11, 1918 (or later, if loss occurred at later date) to date of payment. *Held* that factors in computing reasonable market value of plants are: nature and value of business, earning capacity, goodwill; and in computing reasonable market value of chartered vessels: value of use of ship, belligerency of charterer's nation. Value of use of ship: *held* that charterer had pecuniary interest in ship if stipulated hire was below current market hire, so as to reduce selling price of vessel; and that, then, United States entitled to award on behalf of (a) owner, if American at requisite dates (reference made to Administrative Decision No. V, see p. 119 *supra*), in amount equal to reasonable market value of ship burdened with charter, with 5% interest, and (b) charterer (whose interest is "property . . . belonging to" him within meaning of Treaty of Versailles, Part VIII, Section I, Annex I, para. 9, as carried into Treaty of Berlin), if American at requisite dates, in amount equal to difference between reasonable market value of ship with and without charter, with 5% interest; but that charterer had no interest in ship if hire was above current hire, so as to increase selling price; and that, then, Germany's liability, if owner American, limited to reasonable

market value of tangible thing, the free ship. Belligerency of charterer's nation: *held* that belligerency, though a factor in computing market value of ship, does not affect charterer's right to use ship as against Germany: even if under general international law Germany was entitled to destroy ship, yet Commission only concerned with Germany's responsibility under Treaty of Berlin.

APPORTIONMENT OF AWARDS, DISTRIBUTION OF AMOUNTS PAID. *Held* that apportionment and distribution between owner and others, in case whole value of tangible property destroyed was impressed with American nationality, ordinarily are not for Commission, but for municipal tribunals.

DESTRUCTION OF VESSELS, DAMAGES: TANGIBLE PROPERTY LOST, PROBABLE CATCH, WIRELESS APPARATUS LEASED, HOSPITAL AND MEDICAL SERVICES, PERSONAL INJURIES, WAGES AND BONUSES PAID, LOST PROFITS, WAR-RISK INSURANCE PREMIUMS, EXPENSES TO ESTABLISH CLAIM BEFORE COMMISSION, PERSONAL EARNINGS. Claims on behalf of owner, master, crew of destroyed vessels.

Cross-references: A.J.I.L., Vol. 20 (1926), pp. 171-201; Annual Digest, 1925-26, pp. 251-253, 348; Kiesselbach, *Probleme*, pp. 400-426 (German text); Witenberg, Vol. II, pp. 110-147 (French text).

Bibliography: Annual Digest, 1925-26, pp. 253-254; Borchard, pp. 76-79; Kiesselbach, *Probleme*, pp. 11, 22-35, 93-94, 106-122.

CERTIFICATE OF DISAGREEMENT BY THE NATIONAL COMMISSIONERS

The American Commissioner and the German Commissioner have been unable to agree as to the jurisdiction of this Commission over claims for loss of earnings or profits of persons or property and for loss or damage in respect of intangible property, their respective Opinions being as follows:

OPINION OF MR. ANDERSON, THE AMERICAN COMMISSIONER

The Commission has been asked to pass upon the question of the obligation of Germany under the Treaty of Berlin to compensate American nationals for loss of profits or earnings resulting from damages to or in respect of property, and also in cases where such loss resulted from the detention or internment of American nationals, and on the further question of whether the Treaty includes damages in respect of intangible as well as tangible property.

It is contended on the part of Germany that the obligation imposed upon Germany by the Treaty does not include claims for loss of profits or earnings either of persons or of property, and also that the only damages to property which are included in the Treaty are damages to tangible property, except damages with respect to certain intangible property described as "property, rights and interests" to which exceptional war measures have been applied.

In considering the questions thus presented, and in order to determine whether in any of these cases a different rule should be applied during the neutrality and belligerency periods, it will be convenient to deal separately with the Treaty provisions applicable to claims arising during the periods of the neutrality and of the belligerency of the United States.

The Treaty of Berlin contains no provisions applicable to Germany's liability in the cases under consideration apart from the provisions of the Treaty of Versailles and of the Knox-Porter Resolution which are incorporated by reference in the Treaty of Berlin.

I. During the Neutrality of the United States

In the Treaty of Versailles the only provisions which apply to claims arising during the neutrality period are found in Article 297, Part X, Section IV, dealing with property, rights and interests, and in the Annex thereto.

Paragraph 4 of the Annex to Section IV provides that the property, rights and interests of German nationals in the United States and the net proceeds thereof "may be charged * * * with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war".

An indirect liability is imposed upon Germany for the payment of these claims under Article 297 (i), which provides: "Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States."

The Knox-Porter Resolution, which was adopted after the date of the Treaty of Versailles, and, as appears from its terms, with special reference to that Treaty and to the above-quoted extracts from it provide in section 5 for the retention of all property of German nationals then in the possession of the Government of the United States until Germany had made suitable provision for the satisfaction of all claims against Germany of all American nationals "who have suffered, through the acts of the Imperial German Government, or its agents, * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, * * * in consequence of hostilities or of any operations of war, or otherwise", etc. This provision of the Knox-Porter Resolution, unlike the above-quoted provision of paragraph 4 of the Annex to Section IV of the Treaty of Versailles, is not limited to claims growing out of acts committed before the United States entered the war, but both provisions are alike limited to claims growing out of acts committed by the German Government or its agents.

The provisions of the Knox-Porter Resolution, being later in date than the Treaty of Versailles, may properly be taken as furnishing an interpretation and definition of the character of the claims covered by the above-quoted extract from the Treaty of Versailles.

Whether or not, however, these subsequent provisions of the Knox-Porter Resolution are taken as an interpretation of the earlier provisions of the Treaty of Versailles, both alike were incorporated in the Treaty of Berlin, and the United States, by the terms of Article I of that Treaty, is entitled to "have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified" in the Knox-Porter Resolution, "including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles", etc.

By virtue of these stipulations in the Treaty of Berlin Germany became obligated to make compensation for all the claims specified in the Knox-Porter Resolution and, at the same time, recognized that, in case of conflict, such claims are not limited to those provided for in the Treaty of Versailles, which are referred to as included in and, therefore, as representing only a part of the rights specified in that resolution.

A further definition of these claims has been adopted by the two Governments in their Agreement of August 10, 1922, under which this Commission is established. By Article I of that Agreement this Commission is required to pass upon three categories of claims "which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles". The second of these categories includes the claims under consideration and is as follows:

“(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war.”

For the reasons already stated, the above-quoted provisions of the Versailles Treaty and of section 5 of the Knox-Porter Resolution are the only provisions to be found, either in the Treaty of Versailles or in the Treaty of Berlin, which “more particularly define” the American claims, which the Commission is required to pass upon, for loss or damage “with respect to injuries to persons, or to property, rights and interests”, during the period of American neutrality.

Accordingly, reading together the above-quoted provisions of category (2) and of section 5 of the Knox-Porter Resolution and of the Treaty of Versailles, as defining the claims for which Germany is liable, it is clear that during the period of American neutrality the Treaty includes all claims of American nationals “who have suffered, through the acts of the Imperial German Government, or its agents, * * * in consequence of hostilities or of any operations of war, or otherwise” any loss or damage, including loss of use of property or loss of profits or earnings resulting from damage to or in respect of either tangible or intangible property, and also including loss of profits or earnings resulting from the detention or internment of American nationals as well as for injury to their persons or to their property whether tangible or intangible.

In other words, as already decided by this Commission in Administrative Decision No. 1, the financial obligations of Germany to the United States on behalf of its nationals under the Treaty of Berlin embrace:

(A) All losses, damages, or injuries to them, including losses, damages, or injuries to their property wherever situated, suffered directly or indirectly during the war period, caused by acts of Germany or her agents in the prosecution of the war, *etc.*

This interpretation of the Treaty has been given practical application by this Commission in the *Lusitania* cases, all of which arose during the neutrality period of the United States. The Commission held in its Opinion in the *Lusitania* Cases, applying the rules laid down in Administrative Decisions Nos. 1 and 11, that Germany was financially liable for all losses suffered by American nationals, “which losses have resulted from death or from personal injury or from loss of, or damage to, property, sustained in the sinking of the *Lusitania*”. It was further held by this Commission, as pointed out by the American Commissioner in his Opinion in the Life-Insurance Claims, that “in death cases the right of action is for the loss sustained by the claimant, not by the deceased’s estate, and the basis of damage is not the loss to his estate, but the loss resulting to claimants from his death”, and also that “one of the elements to be estimated in fixing the amount of compensation for such loss was the amount ‘which the decedent, had he not been killed, would probably have contributed to the claimant’”. Damages have been awarded in accordance with the decisions above mentioned in *Lusitania* death cases for the estimated value of contributions which probably would have been contributed to the claimant by the decedent, had he lived, thus demonstrating that Germany’s liability under the Treaty is not limited to damages resulting from injury to the person or to the tangible property of the claimant.

The German Commissioner contends in his Opinion that the word “property” as used in section 5 of the Knox-Porter Resolution, must be interpreted to mean only tangible property, because in the German translation of section 5 as incorporated in the Treaty of Berlin the word “Eigentum” is used for property and he insists that the word “Eigentum” technically means only tangible property.

Whatever technical meaning the word "Eigentum" may have, there are two objections to the interpretation proposed, which would seem to be conclusive against adopting it.

In the first place, section 5 uses the word "property" three times in addition to the particular instance now under consideration, and in each case in the German translation the word "Eigentum" is used. In each of the other three instances, however, the word "property" obviously means, as in the present instance, all the kinds of property, which are described in the Treaty of Versailles as property, rights and interests, and therefore was clearly intended to include intangible as well as tangible property.

In the second place, although the Treaty of Berlin does not provide that the German text shall have equal value with the English text, the German Commissioner's contention that they should have equal value may be accepted as correct, with the qualification, however, that this equality of the texts applies only to the treaty stipulations themselves and does not apply to the German translation of the original English text of a Congressional resolution, which was intended to be incorporated in the Treaty of Berlin exactly as passed by Congress. In this case, therefore, the English text of section 5 must be taken as superior to the German translation of that text, and the generally accepted meaning of the word "property" as used in the English original must prevail against any technical or more limited meaning which the word "Eigentum" may have.

II. During the Belligerency of the United States

So far as the questions under consideration are concerned, the conclusions above-stated as to claims arising during the neutrality of the United States apply equally to claims arising during the belligerency period, and, as appears in express terms in the extract above-quoted from Administrative Decision No. I, the conclusions of the Commission therein stated apply "during the war period", including both the neutrality and belligerency periods.

It is contended on the part of Germany, however, that these conclusions in their application during the belligerency period are to some extent modified or affected by certain provisions of the Treaty of Versailles applying to the belligerency period. This contention remains to be considered.

Apart from the claims arising under Part X, Section IV, of the Treaty of Versailles, which are not here under consideration, the claims arising during the belligerency period which this Commission is authorized to pass upon are embraced in the second category of claims under Article I of the Agreement of August 10, 1922, pursuant to which the two Governments have established this Commission.

The provisions of the second category of claims have been quoted above and, it will be noted, include "claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, * * * since July 1, 1914, as a consequence of the war".

It is important to bear in mind in this connection that this category includes claims for loss or damage of American nationals with respect to injuries to "property, rights and interests", and, as already pointed out, the introductory paragraph of the same article states that the claims embraced in this category are "more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles".

(a) *As more particularly defined in the Treaty of Versailles.*—Turning first to the provisions of the Treaty of Versailles as one of the sources to which we are referred for a more particular definition of these claims, it will be found that

the only provisions of that Treaty applicable to these claims are contained in Article 232 and subdivision 9 of Annex I of the Reparation Clauses, Part VIII of that Treaty.

Reading together the pertinent provisions contained in the above-mentioned article and annex, it will be found that Germany has undertaken to make compensation "for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany", by the aggression of Germany or her allies "by land, by sea and from the air" (Article 232), and in general "Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war" (subdivision 9, Annex I).

It is contended on the part of Germany that these provisions of subdivision 9 of the Annex apply only to tangible property and to that extent are intended to be a limitation upon the provisions of Article 232. This contention rests upon a misconception of the real meaning of these provisions.

In the first place, subdivision 9 includes "Damage in respect of all property * * * injured or destroyed", etc., which phrase appropriately applies equally to tangible and to intangible property and also to the loss of use of property.

In the second place, subdivision 9 clearly was not intended as a limitation upon the provisions of Article 232, because that article, after requiring compensation for all damage done to the civilian population and to their property, provides as an addition, and not as a limitation, "and in general all damage as defined in Annex I hereto". In this connection it is important to note that the provisions of subdivision 9 of the Annex contain an important addition to the damages provided for in Article 232, because the subdivision includes damage in respect of property "belonging to any of the Allied or Associated States", and damages of this character are not included in Article 232.

Furthermore, the provisions of subdivision 9 include not only "Damage in respect of all property", etc., but also "damage directly in consequence of hostilities or of any operations of war". This latter phrase obviously is not a restriction upon but a more general description of the damages which are described in Article 232 as "all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each", by the aggression of Germany and her allies, "by land, by sea and from the air, and in general all damage as defined in Annex I hereto".

It appears, therefore, that there is no provision either in Article 232 or subdivision 9 of the Annex which in terms limits, or which justifies an interpretation limiting, the damages covered thereby to those resulting from injuries to the person or to the tangible property of the claimant.

On the other hand, it appears that the terms of these provisions are entirely appropriate and adequate to cover injury to or loss with respect to intangible as well as tangible property, and also loss or damage suffered by a person as well as personal injuries. Inasmuch as these provisions are intended to limit Germany's admitted liability, under Article 231, for all loss and damage resulting from the war, it follows that in all doubtful cases the greater liability must prevail.

Furthermore, it appears, as already pointed out, that the two Governments have used the phrase "property, rights and interests" in category (2), above quoted, as describing the subject matter of the claims covered thereby. other

than claims for personal injuries, all of which claims they say are "more particularly defined" in the Treaty of Versailles. All of the other provisions of the Treaty of Versailles applicable to claims covered by this category relate to injuries to persons. It follows, therefore, that this phrase, "property, rights and interests" was used in that Agreement with reference to the above-quoted provisions of the Treaty of Versailles covering damages in respect of property, and consequently that those provisions were understood by Germany and the United States as covering damage with respect to intangible as well as to tangible property.

(b) *As more particularly defined in the Knox-Porter Resolution.*—The conclusions above stated will be confirmed by an examination of the other provisions of the Treaty of Berlin, which are also referred to in the Agreement of August 10, 1922, as giving a more particular definition of the claims under consideration.

The only other provisions of the Treaty of Berlin applicable to these claims are sections 2 and 5 of the Knox-Porter Resolution, which are incorporated in full in the preamble and are adopted as binding upon Germany in Article I of that Treaty.

The provisions of section 5 of that resolution have already been examined, and it has been shown that they apply equally to the claims under consideration, whether arising during the neutrality or the belligerency period. It has also been shown that they include not merely claims for injuries to the person or property of the claimant, but also claims of all American nationals who have suffered loss or damage, directly or indirectly, in consequence of hostilities or of any operations of war or otherwise, provided that such claims grew out of acts committed by Germany or its agents.

It has further been shown, in examining the provisions of the Treaty of Versailles applicable to these claims, that those provisions impose no limitation or restriction upon the provision of the Knox-Porter Resolution. On the contrary, as appears from the foregoing discussion of the provisions of the Treaty of Versailles, instead of imposing restrictions, they go further than the provisions of section 5 of the Knox-Porter Resolution by including claims growing out of the acts of the allies of Germany or of any of the belligerents, including the United States, during the belligerency period, as well as claims growing out of acts of Germany and its agents. These more extensive rights are secured to the United States and its nationals by the incorporation in the Treaty of Berlin of these provisions of the Treaty of Versailles and the provisions of section 2 of the Knox-Porter Resolution.

Even if it were true, however, that the claims covered by the Treaty of Versailles during the belligerency period were more restricted than those covered by the Knox-Porter Resolution, the superior authority of the provisions of that resolution has been definitely settled in the negotiations between the two Governments which resulted in the Treaty of Berlin, and again in the negotiations which resulted in the Agreement of August 10, 1922, under which this Commission is organized.

As appears from the diplomatic correspondence between the two Governments preceding their entry into the Treaty of Berlin, Germany sought to limit its obligations under that Treaty to claims supported by the Treaty of Versailles and to exclude any additional claims provided for in the Knox-Porter Resolution. The Government of the United States refused to accept this limitation, and stated its position in a note communicated to the German Government on August 22, 1921, as follows:

It is the belief of the Department of State that there is no real difference between the provision of the proposed treaty relating to rights under the Peace Resolution

and the rights covered by the Treaty of Versailles except in so far as a distinction may be found in that part of Section 5 of the Peace Resolution, which relates to the enforcement of claims of United States nationals for injuries to persons and property. With respect to this provision, it should be noted that it does not increase the obligations or burdens of Germany, because all the property referred to would be held subject to Congressional action, if no treaty were signed, and would not be available to Germany in any case under the terms of the Treaty of Versailles, save as against reparation obligations. Whether the claims of the United States nationals are pressed in one way or another would be a matter of procedure, and would make no practical difference to Germany in the final result.

Germany acquiesced in this position of the United States, and the Treaty was signed without making the change which had been suggested by Germany to accomplish the proposed limitation.

Nevertheless the question was again raised by Germany in the negotiations which resulted in the Agreement establishing this Commission, and again the United States refused to accept the proposed limitation. The position of the Government of the United States was stated in those negotiations in its note of August 8, 1922, to the German Government as follows:

As a matter of fact under a proper interpretation of the Treaty of Versailles probably all claims which are covered by the Treaty of 1921 are included in the Treaty of Versailles. But it is undesirable that there should be any misunderstanding with regard to technicalities or as to any just claim covered by the Treaty of 1921. It is made clear by the Resolution of July 2, 1921, that the Government of the United States must insist on suitable arrangements being made for the settlement of claims growing out of acts of the German Government or its agents since July 31, 1914.

The German Commissioner in his Opinion ignores the interpretation thus insisted upon by the United States and contends that—

At all events the United States *knew* at the time of the passing of the Knox-Porter Resolution, and the United States and Germany knew at the time they concluded the Treaty of Berlin, that the Reparation Commission had recently, that is, on March 14, 1921, accepted *expressis verbis* the German viewpoint and *acknowledged* that under clause 9 of Annex I following Article 244 Germany was not liable for *loss of profit, etc.*

He concludes, therefore—

So the United States in reserving to itself the rights and advantages of the Treaty of Versailles acquiesced in and accepted—so far as the rights to reparation under clause 9 are concerned—the interpretation given to that clause by the Allied Powers and by Germany.

This contention of the German Commissioner is wholly inconsistent with the position clearly maintained by the United States in the negotiations resulting in the Treaty of Berlin and again in the later negotiations resulting in the Agreement of August 10, 1922, which position was recognized by the recital, in Article I of the Treaty of Berlin, that “all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles” are included in, which means that they are not exclusive of, but merely a part of, “all the rights privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921”, all of which are accorded to the United States by the Treaty of Berlin.

The notes of the United States in the above-mentioned negotiations very accurately set forth the position of the Government of the United States in entering into the Treaty of Berlin and into the Agreement of August 10, 1922, which is, that while under a proper interpretation of the Treaty of Versailles

probably all claims which are covered by the Treaty of Berlin are included in the former Treaty, yet in case there is any controversy or dispute as to this the United States insists on the rights accorded by the Treaty of Berlin. Moreover, as above pointed out, the latter Treaty should be regarded as interpreting and clearing up any ambiguity that might exist in the former Treaty, so far as the United States and its nationals are concerned.

In this connection it is also necessary to consider the meaning and effect of certain of the provisions of section 2 of the Knox-Porter Resolution, which, as above shown, is one of the sources to which reference is made for a more particular definition of the claims described in category (2) of the Agreement under which this Commission is organized.

Section 2, so far as pertinent to the claims under consideration which arose during the belligerency period, provided as follows:

Sec. 2. * * * there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, * * * which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled, *etc.*

One of the rights to which the United States and its nationals are entitled by reason of its participation in the war, and which they also are entitled to enforce, is the right to recover compensation for all damage resulting from any violation of the rules of war, as established by the law of nations, with respect to the treatment of American nationals and their property during the period of belligerency. The above-quoted provisions of section 2 accordingly cover all claims for damages arising from illegal acts of war on the part of Germany, including the illegal destruction of fishing or merchant vessels of the United States, or resulting from the use of submarines as commerce destroyers in any manner not sanctioned by the law of nations. On this point attention is called to the treaty signed by the United States, Great Britain, France, Italy, and Japan, under date of February 6, 1922, relating to the use of submarines. That treaty contains the following declaration of the law of nations applicable to the question under consideration:

Article I

The Signatory Powers declare that among the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, the following are to be deemed an established part of international law:

(1) A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure.

A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

(2) Belligerent submarines are not under any circumstances exempt from universal rules above stated; and if a submarine can not capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.

As pointed out in the above-quoted extract from the note of the Secretary of State dated August 8, 1922, which was communicated to the German Government before the Agreement of August 10, 1922, was signed, if the provisions of subdivision 9 of Annex I of Part VIII of the Treaty of Versailles are properly interpreted, they are broad enough to cover all the claims covered by the above-

quoted extract from section 2 of the Knox-Porter Resolution during the belligerency period. Entirely apart from that question, however, the United States is entitled to insist upon its rights under section 2 of the resolution which are expressly accorded by the Treaty of Berlin.

Finally, it is contended on the part of Germany that Article II of the Treaty of Berlin imposes a limitation upon the United States, the effect of which is to exclude some of the claims under consideration. Article II of that Treaty provides:

The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty [Treaty of Versailles] mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions.

It will be noted, however, that this limitation applies only to the enforcement of rights and advantages stipulated in the Treaty of Versailles and depends upon the existence of some limiting rights accorded to Germany by the provisions of that Treaty.

It does not exclude rights otherwise accorded by the Treaty of Berlin apart from the provisions of the Treaty of Versailles, neither does it exclude rights under the provisions of the Treaty of Versailles except to the extent that such rights are inconsistent with rights accorded to Germany by those provisions.

For the reasons already stated, therefore, these provisions of Article II of the Treaty of Berlin do not apply to or exclude any of the claims here under consideration.

Conclusions

The foregoing analysis of the provisions of the Treaty of Versailles and of the Knox-Porter Resolution which are incorporated in the Treaty of Berlin, with reference to the claims under consideration, leads to the following conclusions:

1. "Claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war", which are covered by paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles, are more particularly defined in section 5 of the Knox-Porter Resolution, so far as American nationals are concerned.

2. The phrase "loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise", covers any loss or damage, including loss of the use of property and loss of profits or earnings resulting from damage to or in respect of either tangible or intangible property, and any loss of profits or earnings resulting from the detention or internment of civilians, as well as for injury to persons or to their property, whether tangible or intangible, irrespective of whether such loss, damage, or injury arose during the period of the neutrality or of the belligerency of the United States.

3. The words "damage" and "property", as used in Article 232 and subdivision 9 of Annex I to Section I of Part VIII of the Treaty of Versailles, have the same meaning in relation to the belligerency period that the corresponding words "loss, damage, or injury" and the word "property" respectively have in section 5 of the Knox-Porter Resolution, as above defined.

OPINION OF DR. KIESSELBACH, THE GERMAN COMMISSIONER

Since the questions discussed by the American Commissioner in his Opinion on the jurisdiction of this Commission over claims for loss of earnings or profits of persons or property and for loss or damage in respect of intangible property are brought before the Commission by the cases of the United States of America on behalf of West India Steamship Company, Claimant, *v. Germany*, Docket No. 24, and the United States of America on behalf of Joseph Rose, Claimant, *v. Germany*, Docket No. 756, I may refer to my respective opinions laid before this Commission on February 12 and January 14, 1925, covering the questions at issue, which opinions follow with my additional opinion of May 12, 1925:

Opinion of February 12, 1925, in Docket No. 24

Claimant, the West India Steamship Company, having chartered the Norwegian Steamship *Vinland* under a time charter for three months, ending June 16, 1918, for a monthly payment of \$13,500, alleges it has suffered losses through the sinking of the vessel on June 5, 1918.

The *Vinland* carried two cargoes of sugar, from two Cuban plantations or estates, consigned to two firms in New York.

On the date of the ship's loss, but without knowledge of it, claimant entered into a further contract to carry coal from Newport News to San Domingo.

Claimant's contention is that the *Vinland* in the ordinary progress of her voyage would have arrived in New York about noon June 7, 1918, and that she would have been ready to proceed on another voyage on June 9. Though this new voyage would admittedly have required "about 19 days" claimant anticipated no trouble in obtaining the necessary extension of the charter-party expiring June 16.

Claimant contends further that it would have been possible to enter into a further charter for a return cargo from San Domingo to New York, several cargoes of sugar being available in San Domingo.

Claimant therefore has set forth its losses as follows:

Under the two contracts with regard to the two cargoes of sugar on board the <i>Vinland</i>	\$ 4,505.10
Under the charter-party of June 6	5,642.25
By reason of being prevented from entering into a profitable charter party for a return cargo from the West Indies	7,373.80
TOTAL	17,521.15

I. To support this claim American counsel argue that "by virtue of the charter party concluded January 28, 1918, between the West India Steamship Company and the owners of the steamship *Vinland*, the West India Steamship Company became in fact, and . . . in law, the absolute owner of the steamship *Vinland* (except as to the fee or legal title) for a period of three months, with full and complete right as such owner to employ and use the vessel in commercial undertakings with a view to earning profits", that this right to use is property, and that therefore Germany is liable for such "property loss".

American counsel in thus arguing seem to overlook that the answer to the question at issue must be taken from the Treaty of Berlin.

As the loss was suffered in June, 1918, clause 9 of Annex I following Article 244 of the Treaty of Versailles as incorporated in the Treaty of Berlin applies.

Under that provision Germany is liable for "Damage in respect of all property . . . belonging to . . . nationals".

The scope and meaning of this phrase can only be taken from the Treaty itself, and, if any doubt remains, from the intention of its framers.

In trying to find the true meaning of the provision it must be borne in mind that two questions are involved:

- (a) What kind of property is contemplated in clause 9, and
- (b) What measure of damage has to be applied for compensation.

(a) The term "property", while, as German counsel justly argue, primarily restricted to tangible things, has come to have by extension a secondary meaning, which meaning may include a chose in action, i.e., a contractual right. But if the term "property" can thus have a double meaning, it does not follow that the broadest and, to Germany the most unfavorable, meaning must be applied here.

If ever the rule of interpretation, as stated in the *Lusitania* Opinion, that the language of the Treaty, being that of the United States, must be strictly construed against the United States, has a real bearing, the term "property" can only be interpreted here in its more restricted meaning.

Manifestly the Treaty itself distinguishes between the two conceptions. In Article 297 it protects the "property, rights and interests" of the nationals of the Allied and Associated Powers, and in clause 9 the term "property" only is used. So it is clearly shown that the makers of the Treaty must have intended a distinction with regard to the scope of Germany's liability. And that this distinction is not made inadvertently but deliberately and intentionally is clearly proven through the wording of Article 242, this Article providing that "The provisions of this Part of the present Treaty do not apply to the *property, rights and interests* referred to in Sections III and IV of Part X (Economic Clauses)", thus making quite clear that the framers of the Treaty in using only the term "property" in Annex I following Article 244 had well in mind that they had applied the broader term "property, rights and interests" elsewhere with regard to the economic clauses.

The sound reason thereof, as already shown in my Opinion in the Life-Insurance Claims, was, as far as the reparation claims proper go, provided for under Article 232 and Annex I following Article 244, that it was the "direct physical damage" and "direct physical injury" only which Germany was to be made to pay for. Now, "direct physical damage" can be inflicted exclusively on *tangible* things, not on "rights" or "interests".

Following this conception, clause 9 deals with property "*wherever situated*" "*carried off, seized, injured or destroyed* by the acts of Germany . . . on land, on sea or from the air", which expressions can hardly be applied except to tangible things; and the same term "property" is applied in paragraph 12 (e) of Annex II following Article 244, dealing with the measure of damage "for repairing, reconstructing and rebuilding property . . ., including reinstallation of furniture, machinery and other equipment", manifestly applying to tangible things only.

The French text shows even more clearly and convincingly that clause 9 deals *only* with tangible things.

The expression used in clause 9 of Annex I following Article 244 is "Dommages relatifs à toutes propriétés", whilst Article 297 settles the question of "biens, droits et intérêts privés". Now, Article 242 provides that "Les dispositions de la présente Partie du présent Traité"—that is, the provisions concerning the reparations claims proper as regulated in Annex I following Article 244—"ne s'appliquent pas aux *propriétés*, droits et intérêts visés aux Sections III et IV de la Partie X (Clauses économiques)", juxtaposing so the term "*biens, droits et intérêts*" and the term "*propriétés, droits et intérêts*" as identical.

This shows that the term "*propriétés*" in clause 9 is used in the meaning of "*biens*", which is even more clearly evidenced by the wording of the note of the

Reparation Commission of March 4, 1921, referring to clause 9 of Annex I as dealing with "la réparation . . . des dommages afférents aux *biens* enlevés, saisis, endommagés ou détruits".

Doubtless, therefore, the French text provides in clause 9 for compensation for damage done to "*biens*", which means tangible things, as acknowledged in the decisions of the Anglo-German Mixed Arbitral Tribunal, in contradistinction to damage inflicted upon "*biens, droits et intérêts*", which expression comprehends property in its broader sense, that is, property, *rights, and interests*.

The Knox-Porter Resolution, in speaking of "loss, damage, or injury to their persons or *property*", uses with regard to *property* damage the same language as that of clause 9 of Annex I following Article 244 of the Treaty of Versailles.

Under these circumstances the United States would not and could not have applied here the term "property" in a sense different from that conceived in the Treaty of Versailles without expressly saying so.

The United States did not say so and apparently did not intend to mean so, as is significantly shown by the German text of the Treaty of Berlin, which the framers of the Treaty agreed upon, and which has the same authority as the English text.

This German text applies the term "Eigentum", which, as explained in my Opinion in the Life-Insurance Claims, means "the exclusive power and control over *tangible things*".

So *tangible things* only, belonging to a national, are to be compensated for.

(b) It does not follow from this conclusion that in *measuring* the value of tangible things a loss of profit could not be taken into account.

As well under international law as under domestic law in many cases a full compensation would include compensation for loss of use or profit. But here again it is the duty of this Commission to recur to the meaning of the Treaty and to the intention of its framers.

The United States is not a party to the Treaty of Versailles but has only reserved under the Treaty of Berlin "the rights and advantages stipulated" in the Treaty of Versailles "for the benefit of the United States". The true scope of such rights and advantages, therefore, can only be derived from the manner in which *the parties* to the Treaty understood its meaning.

If the parties to a contract *agree* upon the extent of a "right" stipulated under it, it is not in the power of a third person, to whom *such* rights and privileges are accorded *as were* stipulated under that contract, to change or broaden its meaning. The rights accorded can only be accepted and applied in the sense in which the parties to the contract have conceived them.

But the United States was a party to the *framing* of the Treaty of Versailles. It may therefore fairly be assumed that a question of such importance as that at issue here had been carefully considered and discussed between the delegates of the Allied Powers. Therefore, it can also be assumed that the American delegates knew of the intention to confine Germany's liability as provided for under Annex I following Article 244 just as well as the English delegates did, and the conception of the latter is clearly indicated by the statement contained in the British Reparation Account, cited in the German Agent's Brief herein, at page 77, reading "*claims in respect of loss of business, profits, goodwill and other consequential damage . . . have been excluded*".

At all events, the United States *knew* at the time of the passing of the Knox-Porter Resolution, and the United States and Germany knew at the time they concluded the Treaty of Berlin, that the Reparation Commission had recently, that is, on March 4, 1921, accepted *expressis verbis* the German viewpoint and *acknowledged* that under clause 9 of Annex I following Article 244 Germany was not liable for loss of profit, the note of March 4 saying:

"L'annexe I . . . prévoit la réparation . . . des dommages afférents aux biens enlevés, saisis, endommagés ou détruits . . . toutefois l'annexe I ne prévoit pas la réparation du dommage afférent aux intérêts des sommes, représentant le montant des pertes ou la valeur des dommages subis, à la *privation de jouissance ou au manque de gagner*"; that is, in English, "The Annex I provides the reparation of damages caused by carrying off, seizing, damaging, or destroying the goods . . . but Annex I does *not* provide for compensation for interest on the amount representing the value of property damaged or lost¹ or *compensation for the loss of use or for the loss of profit*".

So the United States in reserving to itself the rights and advantages of the Treaty of Versailles acquiesced in and accepted—so far as the rights to reparation under clause 9 are concerned—the interpretation given to that clause by the Allied Powers and by Germany.

But even if that interpretation were not binding upon the United States, it remains that clause 9 has been interpreted, not only by Germany but by the Allied Powers as well, as excluding liability for loss of use or profit.

This would involve that, if nevertheless the United States believes another interpretation justified, *two* interpretations could be applied to the meaning of clause 9. So it would follow that that interpretation is susceptible of doubt.

Therefore, since, under the undisputed rules of interpretation as already urged above, the language of a treaty must be construed *against* its framers, Germany would be entitled to the benefit of such doubt, which means that the more favorable interpretation, excluding liability for loss of profit, would apply.

It follows that, as the United States has availed itself of the rights and advantages of clause 9 by making Germany liable not only for acts committed Germany *and her own allies* but also for certain acts of the enemy powers—as specified in Administrative Decision No. I—the United States could do so and has done so only consistently "with the rights accorded to Germany under such provisions", as stipulated in Article II of the Treaty of Berlin. And these "rights" are, since it was recognized in Article 232 that Germany could not make "complete reparation for all such loss and damage", the restriction of her liability to *physical* or *material*² damage, that is, damage done to tangible things, and the exclusion of rights to compensation for loss of use or profit.

With regard to the *measure* of damage, such distinction between physical damage and damage *following* from it through loss of use or profit—in European conception usually defined as consequential damage (see the British remark in the British Reparation Account, cited above)—is generally known. It divides a right to compensation into claims for the *actual* value and claims for damage *over and above such value* (that is, loss of profit).

This distinction was applied also in the American "Consideration of the claims arising in the destruction of vessels and property by the several cruisers" in the *Alabama* cases. There the claims were divided "into two general classes":

- "1. Claims for the alleged value of property destroyed by the several cruisers.
- "2. Claims *arising from damages* in the destruction of *property*, BUT *over and above its value.*"³

Under the first class the United States included "(a) owners' claims for the values of goods destroyed; (b) merchants' claims for the values of goods des-

¹ Such interest is provided for elsewhere in the Treaty.

² Lamont in "What Really Happened at Paris", edited by Edward M. House and Charles Seymour, page 271.

³ Papers Relating to the Treaty of Washington, vol. 3, page 249.

See also American Brief, page 46: "The Supreme Court of the United States has repeatedly held that the freight a ship is earning is something, is a property, *separate and apart from the value of the ship itself.*"

troyed; (c) whalers and fishermen's claims for the values of oil or fish destroyed" and under the second class were included "(a) owners' claims for the loss of charter-parties, freights, &c.; (b) merchants' claims for the loss of expected profits on goods; (c) whalers and fishermen's claims for the prospective catch of oil or fish".

So it is clearly shown that a distinction between a claim for actual value and a claim for loss of use or profit is not unknown to international jurisprudence. It is therefore by no means surprising that the framers of the Treaty of Versailles availed themselves of this distinction in restricting Germany's liability.

In closing this part of my opinion I need only call attention to the misunderstanding which apparently underlies the American Agents' citation of the *Seaham Harbour* case on pages 96-98 of his brief. That case was not decided under the provisions of Part VIII of the Treaty, which are at issue here and deal with the reparation claims proper, but, as correctly stated by American counsel himself, was decided under Part X of the Treaty.

That decision deals with the right to compensation for damage caused by the seizure and detention of the *Seaham Harbour* in a German port during the war, the vessel being restored after the conclusion of peace.

Article 297, clause (e), provides that Germany is liable in respect of damage inflicted by the application of exceptional war measures, and under clause (f) it is expressly stated that, where the property is restored, to measure the damage "account" shall be "taken of compensation in respect of *loss of use* or deterioration".

The object of the decision was to settle the disputed "basis for calculation" and *not* to discuss the undisputed meaning of the clauses (e) and (f) of Article 297. ⁴

If the decision could have any bearing on the question at issue here, it would only be that the wording of these clauses shows that the framers of the Treaty of Versailles deemed it necessary to *expressly* mention and state that "account" could be "taken of compensation in respect of *loss of use*" where they wanted to provide for such right. ⁵

My conclusions, therefore, are that *under the special provisions of the Treaty* Germany is liable for damage done to tangible things, and that such damage is confined to the material or actual value, which is the market price or the intrinsic value, at the time of the loss or damage, and which *excludes* compensation for loss of use or profit. ⁶

These conclusions apply as well to the reparations claims proper, arising during the period of belligerency, as to the so-called neutrality claims, arising during the period of neutrality, as both categories are defined by Administrative Decision No. I, the neutrality claims being placed on a parity with the reparations claims under the Decision in Life-Insurance Claims, page 130. ^a

II. Though under the conclusion reached under I it is immaterial whether claimant has suffered a "property" loss in the meaning of clause 9, since the provisions of the Treaty do not make Germany liable for *loss of use or profit*, it

⁴ The decision as cited by American Agent, page 97, reads: "In considering the effect and meaning of Paragraph (e) of Article 297, the Tribunal derive assistance from Paragraph f of the Article."

⁵ It is worth noting that the French decisions cited on pages 72-73 of the German Brief grant compensation for loss of profit under the provisions of Part X (Article 297) in deliberate contradistinction to the provisions of Part VIII (clause 9), which exclude such compensation.

⁶ These conclusions do *not* exclude compensation for profit which may attach for a claimant through the *actual* value of his "property" at the time the loss accrues.

^a (*Note by the Secretariat*, this volume, pp. 109-110 *supra*.)

may nevertheless be useful to examine claimant's contention that the loss it is alleged to have suffered is a loss with regard to its "property" in the meaning of clause 9.

In urging this contention the American Agent argues

(1) That a demise constitutes ownership and that every "owner" is entitled to compensation under the Treaty, and

(2) That the charter-party of the *Vinland* constituted a demise.

(1) So far as the first argument is taken from the legal character of a demise as constituting "ownership", it seems to me to be based on a misapprehension of the understanding and the meaning of the term "ownership" with regard to a demise.

It is the responsibility between owner and charterer, as well as the liability of owner or charterer towards shipper and other persons, which has given rise to multifarious controversies and to decisions and commentaries of the highest legal standing.⁷ The complexity of the relations between owner and charterer growing out of the operation of a vessel and especially from the carriage of goods at sea is so great that a clear-cut principle had to be devised as a criterion and guide.

The question was, Who was responsible, the owner or the charterer?

And the answer is, The owner, *except* where the charterer must be considered *AS owner*.

And the test is the legal scope of the charter. If the charter is a demise, then the responsibility is upon the charterer, and *he* is "clothed with the character or *legal responsibility* of ownership" (III Kent's Commentaries, page *138).

If the charter is a mere covenant to carry the goods, then the responsibility remains upon the owner.

And the criterion is whether "by the terms of the charter party, the ship-owner appoints the master and crew, and *retains the management and control* of the vessel" (III Kent's Commentaries, page *137) or whether the complete use and control of the vessel is vested in the charterer.

In construing a charterparty *with reference to the liability* of the owners of the chartered ship, it is necessary to look to the charterparty, to see whether it operates as a demise of the ship itself, to which the services of the master and crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particular vessel, and, as subsidiary thereto, to have the use of the vessel and the services of the master and crew.⁸

And in *Marcardier v. Chesapeake Insurance Company*⁹ the court distinguishes between a demise and a mere affreightment sounding in covenant and decides that "the freighter is not clothed with the character or *legal responsibility* of ownership"; and on the other hand in *Drinkwater et al. v. The Spartan*,¹⁰ 7 Federal Cases, page 1085, the decision holds that where the hirer has the *entire control* of the vessel he is *responsible* for the acts of the master and seamen.

But he may obtain a *limitation of his liability* to the value of his interest in the vessel and her pending freight (*Smith v. Booth et al.* (1901), 110 Federal Reporter 680).¹¹

⁷ See the argument of the German Brief, pages 13-18.

⁸ *Sandeman v. Scurr*, (1866) L. R. 2 Q. B. D. 96. See also Scrutton on Charterparties and Bills of Lading (11th ed.), page 4.

⁹ (1814) 8 Cranch (12 U. S.) 38, 49, cited by German Agent at page 19 of his brief.

¹⁰ Cited by American Agent, page 17.

¹¹ Cited by American Agent, page 50.

And it is again the question whether “*the duties and RESPONSIBILITIES of the owner*” are changed or not which is decided in the case of *Leary v. United States*, 14 Wallace (81 U.S.) 607.¹²

And it is this question of *liability* which is frequently regulated by statute.

It is the demisee, as determined under section 4286 of the Revised Statutes of the United States, who “shall be deemed the owner of such vessel *within the meaning* of the provisions of this Title”, and under such demise the vessel “shall be *liable* in the same manner as if navigated by the owner thereof”.¹³

And according to Kent it is “This highly vexed question, and so important in its consequences to the *claim of lien*, and the *responsibilities* of ownership” which “depends on the inquiry, whether the lender or hirer, under a charter party be the owner of the ship for the voyage”.¹⁴

But the answer to this inquiry fixing the charterer’s liability as that of an owner does not mean that such person, because he has the *responsibility* of ownership, has also its rights.

Therefore, the contention that the charter-party of the *Vinland* constitutes a demise and that such demise is to be considered as creating ownership in the meaning of the decisions and authorities cited by American counsel is not conclusive on the only question at issue here, as to what rights a charterer can have to compensation *against a third person not a party to the contract*.

The answer to *this* question can only be taken from the Treaty of Berlin.

If the term “property” as used in clause 9 is to be applied in its broader meaning of “*biens, droits et intérêts*”, then the right to use a vessel would be property in the meaning of the Treaty and it would be immaterial whether such “right” were based on a demise or on a mere contract.

This seems to be the viewpoint of American counsel when he tries to strengthen and broaden his argument by introducing the alternative contention that claimant has a property *right* (pages 6, 19, 20, 29, 36, 39, 52) or a property *interest* (pages 19, 21, 23, 25, 29, 61, 96).

Ignoring for the moment and for argument’s sake that clause 9 does *not* embrace compensation for loss of profit or use (as shown in the first part of this opinion), such conception of the term “property” would bring the decision down to the question whether the damages alleged to have been suffered are in contemplation of law remote, or whether they are the proximate result of an act of Germany.

But if the term “property” has no such broad meaning, recurrence has to be made to the Umpire’s decision on the phrase “naval and military works or materials” to determine the scope of Germany’s liability.

Under that decision it is not only the owner “in fact and in law”, that is, the person in whom the title vests, who has the right to compensation, but also the possessor inasmuch as he has the exclusive possession “conditioned only upon the duty to . . . return” the property “or in the alternative to make *adequate compensation*”.

So it is the exclusive possession *plus* the risk for the thing possessed which creates a basis for a claim.

The Reparation Commission has gone beyond this decision by including certain neutral ships under time charter “in respect of which *compensation was paid* by the claiming Power”.

This “step further” would mean that not the exclusive possession *and* the risk, but the risk only, had been considered as decisive.

¹² Cited in the American Brief, page 30.

¹³ German Brief, page 34.

¹⁴ III Kent’s Commentaries, page *138.

And the apparent reason for that step is that the loss of the ship resulted in a "direct" loss to the charterer who had to meet that loss under the terms of his charter-party.

But here the contention is merely that the charterer had "full possession" of the ship and that *therefore*, though not carrying an actual risk,¹⁵ he is entitled to compensation.

Manifestly this is even again a "step further", and a very considerable one, in determining and broadening the scope of Germany's liability under clause 9.

(2) As to the second argument interpreting the charter-party of the *Vinland* as a demise, it must be borne in mind that "The modern tendency is against the construction of a charter as a demise"¹⁶ and that "Nearly all the cases of demise are old cases, and their authority has been somewhat shaken by modern decisions",¹⁶ and that "It is *very rarely* that a charter-party does contain a demise of a ship".¹⁷

The courts of justice are therefore "not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer".¹⁸

Immaterial, therefore, is the use of expressions surviving under the "influence of the older system of demise . . . in phrases still used, *e.g.*, in the provision as to 'redelivery' in a time charter-party, under which the ship in fact is at all times in the possession of the shipowner".¹⁹

Moreover, to construe *this* charter-party as a demise would mean the construing of almost *every* time charter as a demise, because the charter-party at issue here is the common type of a modern time charter, written on a printed form with the printed heading "Time Charter Proforma No. A-29," for sale in the stationery shops of every commercial town of the seacoast and given as Appendix B of Carver's Carriage of Goods by Sea, except for a few immaterial differences.

It is the same form, with almost-exactly the same wording, which has been used for at least twenty-five years, and which has always been interpreted by the courts as *not* constituting a demise.²⁰

Reference may be made to the case of *The Manchester Trust, Ltd., v. Furness, Withy & Co.*, cited in the German Brief, page 13, where notwithstanding the clause "In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers" the court decided that a bill of lading signed by the master and without notice of the special provisions of the charter-party made the *owner* of the vessel liable, the master remaining the agent of the owner.

¹⁵ Under the terms of this charter-party the charterer does not even lose the freight if prepaid, in the event the ship is lost.

¹⁶ Scrutton on Charterparties and Bills of Lading, 1923, page 5.

¹⁷ Vaughan Williams, L. J., *Herne Bay Steam Boat Co. v. Hutton*, (1903) 2 K. B. D. at page 689.

¹⁸ The Supreme Court, speaking by Mr. Justice Clifford, in *Reed v. U. S.*, (1871) 11 Wallace (78 U. S.) 591, 601.

¹⁹ Scrutton, *op. cit.*, page 5, note (u). See the German argument regarding the expressions "redelivery", page 21 *et seq.*, and "let" and "hire," page 19 *et seq.*, of the German Brief.

²⁰ See the cases cited in the German Brief, page 28: *The Allianca*, 290 Federal Reporter 450 (D. C., 1923); *Clyde Commercial S. S. Co., Ltd., v. West India S. S. Co.*, 169 Federal Reporter 275 (C. C. A., 1909); *Dunlop S. S. Co., Ltd., v. Tweedie Trading Co.*, 178 Federal Reporter 673 (C. C. A., 1910); *The Volund*, 181 Federal Reporter 643 (C. C. A., 1910); and *The Beaver*, 219 Federal Reporter 139 (C. C. A., 1915).

And the same viewpoint is presented by the decision in the case *Wehner et al. v. Dene Steam Shipping Co. et al.*,²¹ where almost *the same form* of time charter-party, dated November 11, 1901, was before the court, and where it was held that notwithstanding the clause that the master "(although appointed by the owners) shall be *under the order and direction of the charterers* as regards employment, agency, or other arrangements" the master remained the owner's agent and that the charter-party was not a demise.

Following the decisions and authorities cited by counsel of both sides, there is no doubt that the unanimous opinion as to whether a charter constitutes a demise or a mere contract of affreightment considers the test to be who has the "possession, command and navigation" (*Leary v. United States*), i.e., "the entire control" (*Drinkwater v. The Spartan*), of the ship.

The determining element is who has the navigation and control, the possession following the navigation and control (*New Orleans-Belize Royal Mail and Central American Steamship Co., Limited, v. United States*).²² But such control and navigation remain with the owner, "although the general directions in which it should proceed were determined by the charterer" (*Lewis, etc. v. Kotzebue etc.*, 236 Federal Reporter 997, at page 1000); "Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person" (*Orleans, etc. v. United States supra*).

It matters not whether the right to use or even to exclusive use is with a third person, the charterer, or not. The contention of American counsel, that "The right to use a tangible thing . . . is the highest test of ownership. is a property right of unsurpassed character",²³ is not in harmony with the acknowledged principles of law.

"If the charter-party let only *the use* of the vessel, the owner at the same time retaining its command and possession and control over its navigation, the charterer is regarded as a *mere contractor* for a designated service * * * it is a contract for a special service to be rendered by the owner of the vessel" (*Leary v. U.S.*).

As the German Agent justly argues,²⁴ the contract to use a vessel exclusively in the service of the time-charterer is a thing entirely different from delivering the exclusive possession and control of the vessel over to a charterer: "In the first case we have a contract of service with a provision that a specific chattel, a ship, shall be used exclusively in the service of the charterer by the owner. In the second case we have a contract of bailment for hire."

The owner does not part with his control and possession by agreeing that the charterer may furnish the master "from time to time with all requisite instructions and sailing directions" (clause 13 of the instant charter-party), since "it is evident that the clause merely empowers the" charterer "to determine when she is to sail and between what ports she is to trade" (*Omoa and Cleland Coal and Iron Co. v. Huntley*).²⁵

And the owner does not part with such control by agreeing as he did here under clause 10, "That the Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment, agency, or other arrangements", as is already shown above from the decision in *Wehner et al. v. Dene Steam Shipping Co. et al.* Notwithstanding that clause

²¹ Cited page 23 of the German Brief.

²² 239 U. S. 202 (1915), cited in German Brief at page 21.

²³ American Brief, page 18.

²⁴ See German Brief, page 12. See also *ibidem*, page 63, showing how even the use of the *Vinland* is subject under the charter-party to far-reaching limitations.

²⁵ See German Brief, page 15.

the master remains the servant of the owner. It is significant that the bill of lading attached to the files is signed by the master *not* as agent of the charterer but *as captain*. Therefore the owner becomes party to the contract to carry the goods and the special provision of clause 10 undertakes to indemnify him from his liability through the charterer.

Referring for further details to Part I of the German Brief, it is obvious, therefore, in my opinion, that the charter-party of the *Vinland* cannot be considered as a demise but is a mere contract of affreightment.

III. It follows that if the rights acquired by claimant under the charter-party are merely contractual rights compensation could only be allowed when in contemplation of law the damages alleged were the proximate result of an act of Germany.

Now, this question is so fully discussed in the German Brief (page 38 *et seq.*) and in previous briefs that it suffices to refer to those arguments.

"Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with" the thing destroyed.²⁶

And certainly under the "ever-increasing complexity of human relations resulting from the tangled network of intercontractual rights and obligations" Germany could not possibly foresee that by legally sinking a Norwegian vessel an American charterer's claim could accrue as the far-reaching consequence. "springing solely from contractual relations".²⁷

Therefore the damage alleged by claimant is not the proximate result of Germany's act and an award in claimant's favor would establish an absolute *novum* under the law of nations.

Opinion of May 12, 1925

Since the foregoing opinion deals only with property claims during the period of American belligerency, I may, following the argument of the American Commissioner, add some remarks concerning the same category of claims arising during the time of neutrality.

As the American Commissioner justly points out, the only provisions in the Treaty of Versailles which apply to claims arising during the neutrality period are found in Article 297, Section IV, Part X. It is further true that Article 297 deals with "property, rights and interests", but it does so only with respect to such property, rights, and interests *in an enemy country* and provides for the settlement of the questions concerning them. And, among other things, paragraph 4 of the Annex to Section IV of Part X provides that the "property, rights and interests of *German* nationals within the territory of any Allied or Associated Power . . . may be charged" with certain categories of claims of nationals of the Allied and Associated Powers.

Among such categories are the so-called neutrality claims, that is, "claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war".

But the purpose of the clause is to enumerate the categories of claims which may be charged on the German property, rights, and interests in enemy countries and not to define and determine the scope and legal character of the claims enumerated. Moreover, while paragraph 4 describes such claims

²⁶ Decision in Life-Insurance Claims, page 134. (*Note by the Secretariat*, this volume, p. 113 *supra*.)

²⁷ *Ibidem*, page 137. (*Note by the Secretariat*, this volume, p. 115 *supra*.)

expressis verbis and in accordance with the provisions of Article 297, so far as claims growing out of property "in German territory" are concerned, as having "regard to their *property, rights and interests*", paragraph 4 does *not* include such a description with regard to the "claims growing out of acts committed by the German Government or by any German authorities" during the time of neutrality.

In my opinion, therefore, the wording of paragraph 4 as such does not justify the conclusion drawn from it by the American Commissioner.

To ascertain what claims have been included here, recurrence may be made to the interpretation laid down and applied by the Umpire in his Decision in Life-Insurance Claims, saying that the purpose of paragraph 4 was "to bind Germany to pay reparation 'claims' of American nationals for losses suffered by them growing out of Germany's acts during the period of American *neutrality* and falling within the *categories defined in Article 232 and Annex I supplemental thereto, just as Germany is bound to pay all other Allied and Associated Powers for similar losses* suffered by their nationals under similar circumstances during the same period and in some instances caused by the same act".

Thus the neutrality claims, *so far as they are covered by the Treaty of Versailles*, have the same legal character as the reparation claims proper, which are dealt with under Article 232 and the Annex following Article 244.

Therefore the arguments applied in my opinion in Case No. 24 with regard to the interpretation of that article and its annex apply also here.

So far as the Opinion of the American Commissioner is based on the *Knox-Porter Resolution* incorporated in the Treaty of Berlin, his contention is that "By virtue of these stipulations . . . Germany became obligated to make compensation for all the claims specified in the Knox-Porter Resolution and . . . that, in case of conflict, such claims are not limited to those provided for in the Treaty of Versailles" and that "those provisions [of the Treaty of Versailles] impose no limitation or restriction upon the provisions of the Knox-Porter Resolution".

This contention is inconsistent with the decisions of this Commission in the "Military and Naval Works or Materials" Cases and in Administrative Decision No. III, regarding the date of interest, in which the American Commissioner joined in the conclusions.

Both decisions apply restrictions and limitations on Germany's liability which are taken from the provisions of the Treaty of Versailles and could not be justified if the Knox-Porter Resolution applied in the sense now contended by the American Commissioner.

According to the German conception, section 5 does not constitute new categories of claims but simply enumerates those categories for the satisfaction of which the German property seized might be retained, thereby including the reparation claims proper, for which the German property could not be charged under the Treaty of Versailles.

It was thus that Germany understood section 5 and that Germany understood the Dresel note interpreting the resolution and saying that "so far as a distinction may be found" between the Treaty of Berlin and the Treaty of Versailles such distinction "relates to the *enforcement* of claims".

But by making that distinction the resolution could not set aside the restrictions and limitations of Germany's liability established in the Treaty of Versailles.

Such contention is already repudiated by the decisions of this Commission, reading:

Administrative Decision No. III, at page 63:

Germany . . . is obligated (*save where limited by the Treaty terms*) to make full, adequate, and complete *compensation or reparation*.

Ibidem, at pages 66-67:

* * * This liability of Germany, broader during the period of belligerency than during the period of neutrality, is fixed by those provisions of the Treaty of Versailles stipulated for the benefit of the United States, and is availed of by the United States under the Treaty of Berlin *but subject to "the rights accorded to Germany under such provisions"*.

Claims for damages suffered during the period of belligerency by American nationals asserting rights under the reparation provisions of the Treaty of Versailles, all of which fall within class (B) of Administrative Decision No. I, are subject to all of the limitations and restrictions contained in that treaty applicable to the provisions conferring such rights.

And in the Opinion in the *Lusitania* Cases, at page 29:

* * * While under that portion of the Treaty of Versailles which has by reference been incorporated in the Treaty of Berlin, Germany "accepts" responsibility for all loss and damage to which the United States and its nationals have been subjected as a consequence of the war, nevertheless the *United States frankly recognizes the fact "that the resources of Germany are not adequate * * * to make complete reparation for all such loss and damage", but requires that Germany make "compensation" for specified damages* suffered by American nationals.

Moreover, I can not admit that section 5 has the broad meaning contended by the American Commissioner. In this connection I may refer to what I have already said in my previous opinion of February 12, 1925, showing that the United States applied the word "property" and accepted its translation by the term "Eigentum" at a time when it not only knew of the deliberate distinction made by the framers of the Treaty of Versailles between the term "property" as used in Annex I following Article 244 and the term "property, rights and interests" as used in Article 242, but also knew of the interpretation given to the term "property" as applied in Annex I both by Germany and by the Allied Powers represented by the Reparation Commission, which Commission under paragraph 12 of Annex II following Article 244 had "*authority to interpret its provisions*"—this clause having become part of the Treaty of Berlin.¹

Certainly nobody will contend that the United States, knowing the interpretation given by the Reparation Commission, deliberately used the term "property" in the Knox-Porter Resolution in a broader sense without calling Germany's attention to it, instead of stating in the Dresel note that "It is the belief of the Department of State that there is *no real difference* between the provision of the proposed treaty . . . and the rights covered by the Treaty of Versailles" (except the distinction as to enforcement mentioned above).²

When the American Commissioner in conclusion refers to the Agreement of August 10, 1922, I can not agree that it has any bearing on the question at issue here. The Agreement of August 10, 1922, is the "source of, and limitations upon, the Commission's powers and jurisdiction" (Administrative Decision No. II, page 5), but as stated by the Umpire in his Opinion in War-Risk Insurance Premium Claims, page 48, "Germany's liabilities, which are fixed by the Treaty of Berlin, *can not be enlarged* by the Agreement".

¹ Under Article II of that Treaty.

² The same attitude is taken by the United States in the note of August 8, 1922, cited by the American Commissioner and saying that "probably all claims which are covered by the Treaty of 1921 are included in the Treaty of Versailles".

In the note of August 10, 1922, the Ambassador of the United States took the position that he was "authorized by the President to state that he has no intention of pressing against Germany . . . any claims not covered by the Treaty of August 25, 1921".

On the other hand, all claims falling under that Treaty were to be decided by the Commission. Thus the intention and meaning of both Governments with regard to the jurisdiction of the Commission was undisputed, and to achieve this purpose, mutually agreed upon, the Agreement was drafted.

But it never occurred to the German Government, and surely was never within the authority or the intention of the drafters of the Agreement, to give the wording of the Agreement a bearing on the interpretation of provisions of the Treaty itself which might be disputed later on before the Commission.

Opinion of January 14, 1925, in Docket No. 756

Claimant, Joseph Rose, an American citizen, was a member of the crew of the Schooner *Rob Roy* which was sunk by a German submarine on August 2, 1918.

Claimant did not suffer personal injuries but claims, in addition to loss of property, compensation for a loss of income, having been without employment for a period of two weeks following the sinking.

The question at issue is whether a claim for loss of income can be allowed in a case like this.

I. I do not dispute that *under international law* compensation may be awarded for loss of income caused through the illegal act of a government.

But I do not think that under the wording and the intent of the Treaty of Berlin such claim should be allowed.

Article 232 of the Treaty of Versailles provides that Germany has to make compensation for all damage to the civilian population of the Allied and Associated Powers and to their property, referring to Annex I for the definition of such damage. Now, the only clauses contained in Annex I and conceivably applicable here are clauses 1 and 2.

Clause 1 establishes Germany's liability for "Damage to *injured persons* and to surviving dependents *by personal injury* to or death of civilians caused by acts of war, including . . . attacks . . . on sea". As I understand that provision, it deals clearly and exclusively with *physical injuries* suffered by a person and "all the direct consequences thereof". Following the maxim applied in the Umpire's Decision in Life-Insurance Claims, page 132, *expressio unius est exclusio alterius*, this express mentioning of damages to persons actually and physically injured means the exclusion of damages to persons *not* physically injured, except, of course, if and as far as their cases would come in under other clauses of Annex I.

Consequently, as claimant did not suffer any actual and physical injury he has no legal foundation for his claim under clause 1.

The same would be the case if clause 2 should attach, though in my belief it is not applicable. Clause 2 provides that the damage falling under this clause shall include "*injuries to life or health* as a consequence of . . . exposure at sea".

Therefore, here, as in clause 1, it is the direct *physical* injury only which gives rise to a claim.

II. This conclusion is in harmony with the statement filed by Mr. Dulles with the reparation section of the Peace Conference, which involved, among others, the principle "That Germany make good her pre-armistice agreement as to compensation for all damage to the civilian population . . ., this

being construed by the American delegation to mean . . . *direct physical injury to civilians*".

As this squares exactly with the wording of the clauses at issue, contained in Annex I, it may be fairly assumed that such wording has to be interpreted in accordance with that statement.

III. A further reason to justify the inference drawn from Mr. Dulles' statement is that also with regard to property the principle established by him was accepted, restricting Germany's liability to "direct physical damage to property of non-military character".¹ It is true that this principle was abandoned in so far as to include "as a part of the reparation the costs for separation allowances and pensions incurred by the Allied states". But this was done by special provisions in the Treaty itself, and this exception does not affect the leading principle as such, which, following the statement of President Wilson that "we . . . can not now honorably alter simply because we have the power",² was accepted by agreeing "that reparation should be limited to what might actually be called *material damage*".³

This statement covers the *whole* reparation problem and accepts the principles laid down by Mr. Dulles as well with regard to property as with regard to persons. Therefore, it is further evidenced that damage to the civilian population must be construed to mean *direct physical injury* except where the wording of the Treaty clearly states otherwise.

W. KIESELBACH

The National Commissioners accordingly certify to the Umpire of the Commission for decision the points of difference which have arisen between them as shown by their respective Opinions above set forth.

Done at Washington May 12, 1925.

Chandler P. ANDERSON
American Commissioner

W. KIESELBACH
German Commissioner

Decision

PARKER, *Umpire*, rendered the decision of the Commission.

The National Commissioners have certified to the Umpire for decision points of difference, as disclosed by their respective opinions embodied in the certificate of disagreement, with respect to the obligations of Germany to make compensation "for loss of earnings or profits of persons or property and for loss or damage in respect of intangible property".

The Umpire decides that, save in certain excepted cases, Germany is not obligated under the Treaty of Berlin to make compensation for loss by American nationals (1) of prospective personal earnings as such or (2) of prospective profits as such growing out of the destruction of property, but holds that the earning power and the then value of the use of the property destroyed may be taken into account with numerous other factors in determining the reasonable market value of such property at the time and place of destruction, which value, with interest thereon as heretofore prescribed by this Commission, is

¹ See German Brief on the "Naval and Military Works or Materials" question, page 7.

² See Lamont in "What Really Happened at Paris", edited by Edward M. House and Charles Seymour, page 270.

³ See Lamont, *op. cit.*, page 271.

the measure of Germany's liability. The Umpire further decides that, save in certain excepted cases, the provisions of the Treaty of Berlin dealing with damage to property are limited to physical or material damage to tangible things. But two or more different estates or interests in a tangible thing may exist at the same time, the sum of which equals a full, complete, absolute, unconditional, and unencumbered ownership of the whole, and it is important to avoid confusing the nature of the damage to tangible things, with the nature of the estate or interest in those tangible things damaged or destroyed. Under the Treaty a thing can have but one value, but several estates or interests may inhere in it.

The excepted cases mentioned above are those resulting from damage or injury to the property, rights, or interests of American nationals in German territory as it existed on August 1, 1914, by the application either of exceptional war measures or measures of transfer as those terms are defined in the Treaty. In such cases a different rule obtains.

This decision does not deal with the measure of damage to property (1) injured but not destroyed, (2) destroyed but replaced, or (3) taken but returned to the private owner. The measure of damages in such cases varies as the facts in the cases vary, and those questions arising under this certificate will be reserved and specially dealt with by the Umpire.

The generality and the breadth of the scope of the certificate of disagreement and the lack of a definite statement of the points of disagreement between the National Commissioners render necessary a restatement of the construction placed by this Commission on the Treaty of Berlin, in order understandingly to apply its terms to the several concrete cases and groups of cases presented by the American and German Agents, in the decision of which the National Commissioners have been unable to agree.

A brief survey of the negotiations and agreements antedating the Treaty of Berlin and upon which it is in part based will prove helpful in interpreting its terms.

The Pre-Armistice negotiations are found in the correspondence between the United States and Germany beginning with the note of the German Chancellor to President Wilson of October 6, 1918, and ending with the note of the Secretary of State of the United States to the German Government of November 5, 1918. In the latter note is incorporated the only condition of peace dealing with the problems with which this Commission is here concerned, expressed in this language:

Further, in the conditions of peace, laid down in his address to Congress of January 8, 1918, the President declared that invaded territories must be restored as well as evacuated and freed. The Allied Governments feel that no doubt ought to be allowed to exist as to what this provision implies. By it they understand that compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea and from the air.

President Wilson expressed his agreement with the interpretation set forth in the paragraph quoted.

The Armistice convention was a military document dictated by the military advisers of the Allied and Associated Powers for the purpose, as expressed in the Pre-Armistice negotiations, to "fully protect the interests of the peoples involved and ensure to the associated governments the unrestricted power to safeguard and enforce the details of the peace". The reparation clause of the Pre-Armistice negotiations was not embodied *pro hac verba* in the Armistice convention but was referred to by the nineteenth paragraph thereof which provides that Germany shall make "reparation for damage done", "With the

reservation of any future concessions and claims by the Allies and United States”.

With the Treaty of Versailles as such and the history of its making this Commission is not concerned, except with respect to those parts of that Treaty which are by reference incorporated in and made a part of the Treaty of Berlin. As these, consisting of some one hundred and thirteen (113) printed pages, comprise by far the major part of the latter Treaty (American Treaty Series, No. 658), the remainder thereof being embodied in three (3) corresponding pages, the references in this opinion to parts, sections, articles, paragraphs, and subparagraphs will be understood as referring to the Treaty of Versailles unless the contrary appears from the context. The short titles “section 2 of the resolution” and “section 5 of the resolution” will be understood as referring respectively to those sections of the Joint Resolution of the Congress of the United States approved July 2, 1921, embodied in the preamble to the Treaty of Berlin.

This Commission is principally concerned with Part VIII, dealing with “Reparation,” and Part X, dealing with “Economic Clauses,” and particularly with Section I of Part VIII, embracing Articles 231 to 244, both inclusive, and Annexes I to VII, both inclusive, and with Sections III and IV of Part X, embracing Articles 296, 297, and 298, with their respective Annexes. The short title “paragraph 9” as used herein will be taken to refer to paragraph 9 of Annex I to Section I of Part VIII unless the contrary appears from the context. For the sake of brevity the language of the Versailles Treaty will sometimes be paraphrased so as to eliminate Germany’s obligations to the Allied Powers and conform to the Treaty of Berlin.

Section III of Part X deals with “Debts” as such. Section IV of Part X deals with “Property, Rights and Interests” and lays down the principles for the settlement of all questions “of private property, rights and interests *in an enemy country*” arising from the application of “exceptional war measures and measures of transfer”, as those terms are defined therein. The provisions of this section deal with enemy property, rights, and interests both in the United States and in Germany. This Commission is here directly concerned only with such of them as deal with the property, rights, and interests of American nationals “in German territory as it existed on August 1, 1914”. They divide into three classes: (a) Those relating to Germany’s obligations to make “compensation” to American nationals for damage or injury inflicted upon their property, rights, or interests, including debts, credits, and accounts, by the application either of exceptional war measures or measures of transfer as those terms are defined in paragraph 3 of the Annex to Section IV of Part X; (b) those relating to Germany’s obligations to account for American-owned cash assets as defined therein held by Germany; and (c) those relating to Germany’s obligations arising out of debts as such owing to American nationals by German nationals.

The evident purpose of the “Economic Clauses” of the Treaty was (1) to restore as far as practicable the economic relations between the peoples of belligerent powers which had been disrupted by the war and (2) to compensate the nationals of the Allied and Associated Powers for the damages and injuries suffered by them through the application of war measures by Germany in German territory. The war measures with which we are here principally concerned were:

(1) Measures prohibiting the payment of debts or the transmission of funds to enemy territory, which, with respect to claims by natural or artificial persons outside of Germany, in effect declared what was as to them a moratorium, during the existence of which the debtor was not required to pay interest to

them for delay. Those measures were strictly territorial in their application and designed to prevent funds falling into the hands of enemy powers which could be used by them in the maintenance of their economic stability or in the prosecution of the war.

(2) Measures looking to the supervision, the compulsory administration, and the liquidation of enemy property in German territory. Those measures applied to all enemy nationals resident in and out of German territory. The test of their application was enemy nationality rather than enemy territory.

Section III of Part X, among other things, sets up the machinery for a system of clearing offices—a method of payment—which was not adopted by the United States and with which this Commission has no concern. The American representatives at the Paris Conference were unwilling to commit their Government to the clearing-office system and frankly declared that they would advise against its participation therein. Provision was therefore made that this system should not come into force with respect to any of the Allied or Associated Powers save much as should expressly adopt it by the giving of notice.

In order to provide for the payment of debts owing to American nationals by German nationals without adopting the clearing-office system and also to provide for the payment of claims of American nationals arising during the period of American neutrality, paragraph 4 of the Annex to Section IV of Part X was, largely on the suggestion and insistence of the American representatives, written into the Treaty. This paragraph provides in substance that the property rights, and interests of German nationals within the territory of the United States and the net proceeds of their sale, liquidation, or other dealing therewith may be charged by the United States with the payment of amounts due in respect of claims by American nationals (1) “with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory,” or (2) “debts owing to them by German nationals.” and (3) “with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914” and before America entered into the war.

These provisions in terms simply authorize the United States to charge the proceeds of German property, rights, and interests and the cash assets of German nationals received by it with the payment of the enumerated claims of American nationals. But it will be noted that Germany has not only agreed that the assets of her nationals held by the United States may be applied to the payment of the debts mentioned but has expressly undertaken to compensate her nationals for their property so applied.¹ This is simply an indirect method on Germany's part of undertaking to pay these claims of American nationals, which by virtue of such undertaking become liabilities of Germany. The correctness of this conclusion has been expressly admitted and acquiesced in by the Government of Germany through the German Agent in a formal declaration filed with this Commission.² It is reasonably apparent that the German assets now so held by the United States are more than sufficient to satisfy Germany's obligations to American nationals, in view of which there

¹ Paragraph (i) of Article 297 provides that “Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States”.

² See the formal declaration presented in writing to this Commission by the Government of Germany through the German Agent embodied in the minutes of the meeting of this Commission of May 15, 1923 wherein it was declared that “Germany is primarily liable with respect to all claims and debts coming within the jurisdiction of the Mixed Claims Commission under the Agreement of August 10, 1922”.

does not exist any possible limitation on the extent of Germany's primary liability to pay these claims.

The Economic Clauses (Part X) of the Treaty fix the liability of Germany for the application of exceptional war measures and measures of transfer, as those terms are therein defined, to property of American nationals in German territory. Not only are the property, rights, and interests *directly owned* by American nationals protected but also those of "any company or association in which they are interested", to the extent of their interest therein. The provisions of Part X are applicable not only to tangible property but to "property, rights and interests". Here broad and apt terms are used to include stocks, bonds, notes, contract rights, and other intangibles, as well as tangible property. The reason for this is clear. German territory was not invaded. She was directly and solely responsible for what happened within her territorial limits. Her exceptional war measures and measures of transfer principally, though not exclusively, were directed against and operated upon debts, credits, accounts, stocks, bonds, notes, contract rights, and interests, rather than on tangible properties. In applying these war measures Germany acted advisedly, with full knowledge of the nature, character, and extent of the property, rights, and interests affected and of the fact that they were owned by American nationals; and she must be presumed to have had in contemplation the consequences of her acts and her responsibility for such consequences. Germany and her nationals had the use of the property, tangible and intangible, which she requisitioned or impounded through the application of exceptional war measures or measures of transfer, and she and her nationals enjoyed the use and the fruits of and the income from such property.

But with respect to the property of American nationals beyond the limits of German territory the situation was distinctly different. The German legislation and decrees, termed in the Treaty "exceptional war measures" and "measures of transfer", had no extraterritorial effect. The property damages wrought by Germany in the invaded territories and by sea and from the air were wrought through physical force operating on physical property, not through legislative measures and administrative decrees. The Allied Powers in their pre-armistice demands, communicated by President Wilson to Germany, had stipulated that "invaded territories must be *restored* as well as evacuated and freed". This they defined to mean "that compensation will be made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea, and from the air". This language connotes physical damage. When the military advisers of the Allied and Associated Powers came to dictate the terms of the Armistice, they, following the Pre-Armistice negotiations, while making the "reservation of any future concessions and claims by the Allies and United States", expressly stipulated that Germany should make "reparation for damage done". And when the representatives of the Allied and Associated Powers came to write these conditions of peace into the Treaty of Versailles they embodied them in Part VIII of the Treaty, entitling it "Reparation", but expressly provided (Article 242) that the reparation provisions of the Treaty (Part VIII) "do not apply to the property, rights and interests referred to in Sections III and IV of Part X (Economic Clauses) of the present Treaty, nor to the product of their liquidation". The framers of the Treaty expressly recognized that "the resources of Germany are not adequate * * * to make complete reparation for" "all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war" but nevertheless required and Germany undertook to "make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their

property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage as defined in Annex I hereto" (Articles 231 and 232).

Article 233, providing for the constitution of a Reparation Commission and fixing its powers and jurisdiction, stipulates that it "shall consider the claims" for "damage for which compensation is to be made by Germany" and notify the German Government "as to the amount of damage defined as above * * * as representing the extent of that Government's obligations." In order to enable the Reparation Commission to perform this function understandingly it was provided (Article 240) that "The German Government will supply to the Commission * * * any information relative to *military operations* which in the judgment of the Commission may be necessary for the assessment of Germany's liability for reparation as defined in Annex I".

Reading the provisions of Articles 232, 233, and 240 together, it is clear that the Treaty recognized the fact that Germany's resources were inadequate to make reparation to the Allied and Associated Governments and their nationals for all of the losses and damages sustained by them as a consequence of the war and that Germany's *reparation obligations* were expressly limited to such as are enumerated or "defined" in Annex I.

This was the construction placed by the Allied Powers on the Treaty in the compilation of their reparation accounts rendered to the Reparation Commission, which were made up to conform with the ten categories of Annex I of Section I of Part VIII of the Treaty. Thus the French Reparation Account is divided into two parts captioned:

"Part I. Damage to Persons. (Paragraphs 1, 2, 3, 4, 5, 6, 8, and 10 of Annex I to Part VIII of the Treaty of Versailles.)"

"Part II. Damage to Property. (Paragraph 9 of Annex I to Part VIII of the Treaty of Versailles.)"

The British Reparation Account is compiled in much the same manner.

It will be noted that the language of Article 232 follows closely the language of the Pre-Armistice negotiations but makes no provision for compensating American nationals for damages suffered by them during the period of American neutrality. This omission was cured by the provisions of paragraph 4 of the Annex to Section IV of Part X, by virtue of which Germany indirectly assumed liability for the "payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war".

Annex I to Section I of Part VIII, which, as already noted, is expressly mentioned in Article 232 as *defining* Germany's obligations to make compensation for damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each, recites that "Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories". Then follows an enumeration of ten distinct categories, the ninth of which deals with "property" and reads thus:

(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war.

It will be noted that this paragraph 9 so expands Germany's obligation to "make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property * * * by such aggression"

of Germany,³ or of Germany and her allies,⁴ as to include damage to property "belonging to any of the Allied or Associated States * * * with the exception of naval and military works or materials"; and further obligates Germany to make compensation not only for damage to property caused by the acts of *Germany or her agents* in the prosecution of the war⁵ but also for (a) damage to property caused by *her allies* and (b) damage to property caused by *any belligerent* directly in consequence of hostilities or of any operations of war.

America's representatives who participated in the making of this Treaty understood Germany's Pre-Armistice commitments with respect to property to mean "direct physical damage to property of non-military character" and with respect to physical injury to mean "direct physical injury to civilians".⁶ This view was accepted in principle by the representatives of the other powers and it was agreed "that reparation should be limited to what might actually be called material damage".⁷

The Treaty itself bears ample evidence of this intention to restrict property damage to "material damage", to "physical damage" resulting from the application of physical force in some form to tangible property. Force was the only measure which Germany could apply for the infliction of damage beyond her own territorial limits. The use of the single word "property", in Article 232 and in paragraph 9 of Annex I, to define the subject matter of the damage dealt with is in itself significant when read in connection with Article 242 (also embraced in Part VIII, "Reparation"), which provides that Part VIII does not apply to the "property, rights and interests referred to in Sections III and IV of Part X (Economic Clauses) of the present Treaty, nor to the product of their liquidation". The repeated references to damage to "property" outside of German territory, coupled with the repeated references to damage to "property, rights and interests" in German territory, were not accidental and suggest an intention to employ the word "property" in its narrowest sense in defining the subject matter of damage dealt with outside of German territory. The use of the phrase "carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war" ordinarily connotes physical action operating on tangible things. The use of the phrase "property wherever situated" ordinarily, but not necessarily, connotes physical property. Paragraph 1 of Annex IV obligates Germany to "devote her economic resources directly to the physical restoration of the invaded areas of the Allied and Associated Powers, to the extent that these Powers may determine". This, it will be noted, follows closely the language of the Pre-Armistice negotiations, in which it was declared "that invaded territories must be restored". Throughout the reparation provisions of the Treaty the *physical restoration* of property and the reparation for *physical damage* done to tangible property are constantly dealt with, indicating that the purpose and intent of the drafters of the Treaty was to here deal only with tangible property.

After providing that the Reparation Commission shall fix the amount of the

³ According to the Pre-Armistice negotiations.

⁴ According to the language of Articles 231 and 232 of the Treaty.

⁵ This is the extent of Germany's obligation arising under the provisions of paragraph 4 of the Annex to Section IV of Part X with respect to making compensation for property of American nationals damaged or destroyed during the period of American neutrality.

⁶ Bernard M. Baruch's "The Making of the Reparation and Economic Sections of the Treaty" (1920), page 19.

⁷ Thomas W. Lamont on "Reparations" in "What Really Happened at Paris" (1921), at page 271.

damage to be paid by Germany and notify this amount "to the German Government on or before May 1, 1921" (Article 233), the Treaty provides that "The Commission, in fixing on May 1, 1921, the total amount of the debt of Germany, may take account of interest due on sums arising out of the reparation of material damage as from November 11, 1918, up to May 1, 1921" (paragraph 16 of Annex II to Section I of Part VIII). As this Commission has already held,⁸ the "material damage" mentioned in the clause quoted "includes all damages in respect of the taking or destruction of or injury to property as defined in paragraph 9 of Annex I to Section I of Part VIII".

The Reparation Commission, constituted under the Treaty of Versailles and expressly clothed with authority to interpret the Treaty, in construing paragraph 9 held that it does not authorize claims "for compensation for the loss of enjoyment or of profit from the property affected or for supplementary expenses incurred in order to get the advantages which normally would have been obtainable from the property".⁹

This was a formal decision taken under paragraphs 12 and 13 of Annex II to Section I of Part VIII of the Treaty which require unanimity with respect to all questions of interpretation of its reparation provisions. Here is a formal, unanimous decision, so construing the Treaty as to limit the right of the Allied Powers to exact reparations from Germany, made within a comparatively short time after the ratification of the Treaty, by a Commission composed of nationals of the powers most largely interested in the payment of reparations by Germany, and the powers largely responsible for the making of the Treaty and for the use of the particular language construed. Under every rule governing the interpretation of treaties this decision is entitled to very great weight.

The report of the British authorities in submitting the British Reparation Account to the Reparation Commission recites that

In calculating the amount of damage in each case only damage caused by specific acts of Germany and her allies, or damage directly in consequence of specific hostilities or specific operations of war, has been included, and indirect and consequential damage has been excluded. * * *

* * * Compensation amounting to a very large sum has also been claimed in respect of loss of earnings or business profits owing to the claimants being kept in internment, or, in the case of seafarers, in respect of loss of wages or salary during the time they were unemployed owing to their ship having been torpedoed, and these elements of claim have also been disregarded as being indirect or consequential damage.

In connection with the item in the British account for damages "by air raid or bombardment from the sea" this explanation is made:

* * * All cases of indirect and consequential damage have been rejected, as well as those cases in which there is no clear evidence that damage was due to an act of aggression by the enemy. * * *

* * * Claims in respect of loss of business, profits, goodwill and other consequential damage of a like nature have been excluded. * * *

It can not be doubted that the makers of, and the principal beneficiaries under, the Treaty of Versailles construed its reparation provisions dealing with damage to property as limited to physical or material damage to tangible things. But two or more different estates or interests in a tangible thing may exist at the same time, the sum of which equals a full, complete, absolute, un-

⁸ Administrative Decision No. III, Decisions and Opinions, at page 67. (*Note by the Secretariat*, this volume, *supra*.)

⁹ Reparation Commission (V), Report on the Work of the Reparation Commission from 1920 to 1922, page 47.

conditional, and unencumbered ownership of the whole. It is important to avoid confusing *the nature of the damage* to a tangible thing with the *nature of the estates or interests* in that tangible thing which was damaged or destroyed. It can in legal contemplation have but one value, but several estates or interests may inhere in it.

Neither can it be doubted that in the preparation of their reparation claims the Allied Powers have, *in measuring the damages* resulting from the physical injury to or destruction of tangible property, excluded all claims for the loss *as such* of prospective profits of business and of prospective earnings, salaries, wages, and the like.

This brings us to an interpretation of the applicable provisions of the Treaty of Berlin, including those of the Treaty of Versailles which are read into and form a part of it and which have already been considered. Does the Treaty of Berlin place upon Germany a burden with respect to the damage or injury to the persons or property of American nationals heavier than that placed upon her by the Treaty of Versailles? The Umpire holds that it does not.

When the Congress of the United States came to consider the terms of a joint resolution declaring at an end the state of war existing between the United States and Germany, which resolution was finally approved July 2, 1921, the Treaty of Versailles had become effective, the Reparation Commission had been constituted thereunder, its decision interpreting the Treaty, hereinbefore referred to, had been rendered, the reparation accounts of the principal Allied Powers had been prepared and filed, and the extent of Germany's obligations had been notified to the German Government. There was then no doubt that the term "Damage in respect of all property" as used in the reparation provisions of the Treaty of Versailles was intended to mean, and did mean, as between the Allied Powers ratifying the Treaty and Germany, physical or material damage in respect of every estate or interest in tangible property. There is nothing in the joint resolution of the Congress of the United States or in the record of the debates of the Congress when that resolution was under consideration to indicate that as a condition of peace the Congress intended to lay upon Germany a heavier burden than that laid upon her by the Treaty of Versailles. On the contrary, the debates, in so far as they disclose the intention of the Congress in this respect, point in the opposite direction.¹⁰

¹⁰ When the Treaty of Berlin was before the Senate of the United States, Senator Walsh of Montana moved to strike from it the provisions obligating Germany to reimburse the United States for pensions and separation allowances paid by the latter. He said, *inter alia* (page 6367, Volume 61, Congressional Record), "at the conference of Versailles an insistent demand was made by certain of the Allies to exact compensation of Germany for all damages occasioned by the war; and * * * after the debate progressed before the Versailles conference, the contention was finally abandoned by every one of them, and it was agreed that the compensation to be exacted of Germany should be limited to the damage which was done to the civilian population * * *. I challenged anyone to attempt to defend pensions and separation allowances as damages done to the civilian population, and no one has attempted so to defend them".

At this point Senator Shortridge, of California, asked Senator Walsh in substance if he feared or thought that the United States, "by whomsoever guided or directed, will ever make" a demand on Germany for the payment of pensions and separation allowances, in effect expressing the opinion that such a contingency was so remote as to make of no consequence the objection of Senator Walsh to the Treaty as it stood. This opinion expressed by Senator Shortridge, which was not challenged and which, as appears from the debates, expressed the view held by the Senate, was fully justified when the President of the United States authorized the statement that he had no intention of pressing against Germany or presenting to this Com-

Two and one-half years had elapsed since the signature of the Armistice. It was apparent that the United States would not ratify the Treaty of Versailles. It was desirable that the technical state of war existing between the United States and Germany should be terminated. The Congress was mindful of the rule that the indemnity of a victorious belligerent is limited to the terms on which it agrees to close the conflict. Therefore, as a part of the declaration that the war between the United States and Germany was at an end, the Congress by section 2 of the resolution "expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same",

(1) "Which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled"; or

(2) "To which *it* is entitled as one of the principal allied and associated powers"; or

(3) "To which *it* or *they* have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof"; or

(4) "Which, under the treaty of Versailles, have been stipulated for *its* or *their* benefit"; or

(5) "To which *it* is entitled by virtue of any Act or Acts of Congress; or otherwise".

The United States held a position as one of the principal victorious powers which the Congress was careful to preserve. These *reservations*, which manifestly refer to *existing rights*, were addressed not only to Germany but also to the powers with which the United States had been associated during the war. The United States was a party to the Armistice convention. It was one of the principal of the group of powers for whose benefit the Treaty of Versailles was made, and, notwithstanding it had not ratified that treaty, the rights stipulated for its benefit inured to its benefit when the treaty became effective as against Germany. The Congress was careful not to take any action which could be construed as a waiver or a relinquishment of the rights of the United States arising by reason of its participation in the war, or by reason of its being one of the principal victorious powers, or by virtue of the terms of the Armistice, or under the Treaty of Versailles, or by virtue of acts of Congress, such as those dealing with enemy-owned property and the like.

The position of the Congress in making these reservations was clearly and forcefully expressed by the Secretary of State of the United States in his note, quoted in part by the National Commissioners in their opinions embodied in the certificate of disagreement filed herein, which was communicated to the German Government on August 22, 1921, as follows:

The American Government asserts its intention to maintain all the rights obtained through participation in the war, and thus to maintain an equal footing with its former co-belligerents. It was clearly intended by Congress that America and its citizens should not be at any disadvantage compared with their associates in the war, although the United States did not ratify the Treaty of Versailles.

But there is nothing in these reservations of existing rights which reserves for or confers upon American nationals any rights *greater* than those stipulated for

(Footnote continued from page 235.)

mission any claims falling within paragraphs 5, 6, and 7 of Annex I to Section I of Part VIII of the Treaty of Versailles (see exchange of notes between Chancellor Wirth and Ambassador Houghton on August 10, 1922, printed in connection with the Agreement between the United States and Germany providing for the creation of this Commission, American Treaty Series, No. 665.)

their benefit under the Treaty of Versailles as herein construed and heretofore construed by this Commission.

Section 5 of the resolution consists of but one somewhat complex and involved sentence into which numerous provisions have been crowded, doubtless by more than one draftsman. Obviously it was never intended to displace or to supersede or to enlarge the far-reaching, detailed, and meticulous provisions of Parts VIII and X of the Treaty of Versailles stipulated for the benefit of American nationals and read into the Treaty of Berlin. Property of the Government of Germany and of German nationals had come into the possession of and was held by the United States, by virtue of Congressional legislation. The Congress in declaring the war at an end expressly declared its intention to *retain* possession (that is, maintain the then existing status) of this property until such time as the German Government shall have

(1) Made "suitable provision for the satisfaction of all claims" against Germany of American nationals who have since July 31, 1914, "suffered, through the acts of the Imperial German Government, or its agents, * * * loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in" domestic or foreign corporations "or in consequence of hostilities or of any operations of war, or otherwise";¹¹

(2) Granted to American nationals "most-favored-nation treatment * * * in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights";

(3) "Confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals"; and

(4) "Waived any and all pecuniary claims against the United States of America."

In this omnibus sentence the Congress declared that the property described of the German Government and of German nationals would be "*retained*" until all four of the enumerated conditions had been fulfilled by Germany. Obviously this section of the resolution was not intended to operate as a treaty but simply as a unilateral declaration of the United States of its right and purpose, notwithstanding its simultaneous declaration that the war was "at an end", to retain German funds which it already held until Germany had met all of the conditions enumerated. This Commission is here concerned only with condition numbered 1, although all four of these conditions will be found to have their substantial counterparts in the Treaty of Versailles.

In an able brief submitted herein by learned counsel and adopted by the American Agent¹² it is pointed out that by the language of Article I of the Treaty of Berlin the United States and its nationals¹³ shall have and enjoy the rights and advantages specified in the joint resolution "including all the rights and advantages stipulated for the benefit of the United States in the

¹¹ See also Administrative Decision No. II, this Commission's Decisions and Opinions, at page 12. (*Note by the Secretariat*, this volume, p. 29 *supra*.)

¹² Brief submitted by counsel for the Huasteca Petroleum Company, claimant in the *Mirlo* case, List No. 10988.

¹³ Resolution of the Senate of the United States of October 18, 1921, ratifying the Treaty of Berlin, with the express understanding "that the rights and advantages which the United States is entitled to have and enjoy under this Treaty embrace the rights and advantages of nationals of the United States specified in the Joint Resolution or in the provisions of the Treaty of Versailles to which this Treaty refers".

Treaty of Versailles", and from this premise it is deduced that the provisions of section 5 must be broader than those of paragraph 9¹⁴ which they "include". But this argument falls when it is noted that section 5 does *not* include or anywhere mention or refer to the Treaty of Versailles, the rights under which were expressly reserved to the United States and its nationals by section 2 which, as already pointed out, places on Germany no heavier burden, so far as concerns the claims of American nationals, than that placed on her by the Treaty of Versailles.

It is perfectly apparent that the provisions of section 5 are, with respect to Germany's obligations to pay for property damaged or destroyed, in several particulars much narrower than paragraph 9. For instance, Germany's obligations for property damaged or destroyed dealt with in section 5 are limited to damages suffered through the acts of Germany or her *agents*, while paragraph 9 fixes liability on Germany under some circumstances for damages caused by the acts of Germany or her *allies* and under other circumstances for damages caused by the act of *any belligerent*. Section 5 does not mention or include "debts" as such, while, as heretofore pointed out, paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles makes provision for debts owing to American nationals by German nationals.

Through the much-misunderstood clause of section 5 dealing with claims of American nationals for "loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise", provision was made for the protection of all interests of American nationals in both domestic and foreign corporations, where such American nationals had indirectly suffered damage through the ownership of shares of stock in such corporations, or of bonds thereof, or otherwise.

This Commission in construing this language found in section 5 as applied to reparation claims said:

The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of that act must have been the loss, damage, or injury suffered. The *capacity* in which the American national suffered—whether the act *operated* directly on him, or indirectly as a stockholder or otherwise, whether the subjective nature of the loss was direct or indirect—is immaterial, but the *cause* of his suffering must have been the act of Germany or its agents.¹⁵

In other words, the indirectness of loss by American nationals dealt with in section 5 of the resolution refers to the nationality of the corporate or other entity or to the property in which they may have been interested rather than to the absence or remoteness of any causal connection between Germany's conduct and the particular losses complained of. "American" corporations were advisedly included in the enumeration of those through which as a stockholder an American national may indirectly suffer, so as to include American minority stockholding interests in corporations American in name only and foreign in majority stock ownership and control, because of which the United States, following precedents established by its Department of State, may, acting within its undoubted discretion, well decline to espouse the claims of the corporations as such. In all such cases American nationals have their remedy through the United States espousing their claims in their capacity of stockholders or otherwise, upon proving the extent of their damage and that

¹⁴ Paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles.

¹⁵ Administrative Decision No. II, Decisions and Opinions, page 12. (*Note by the Secretariat*, this volume, p. 29 *supra*.)

they have not already been indirectly compensated through payment to the corporation. American nationals who had an interest in property destroyed and who suffered through its destruction, no matter in what capacity they suffered, whether directly or indirectly, are protected to the extent of their interest. Thus construed, this clause of section 5 is in harmony with the established policy of the American Government to look behind forms and to the substance in discovering and protecting the interests of American nationals. It did not have the effect of broadening the terms of the Treaty of Versailles, but was a declaration of a rule which the United States would have invoked in construing that treaty in the absence of any such express provision.

In the resolution declaring the war at an end the Congress of the United States clearly manifested a purpose to demand that American nationals should in all things be placed on a parity with the nationals of the Allied Powers, not only with respect to claims arising during the period of American belligerency but also with respect to all damage caused during the period of American neutrality, by the acts of Germany. The position of the United States as one of the principal victorious participants in the war—a position which the Congress was careful to proclaim in section 2 of the resolution, and a position which America has at every step carefully preserved—entitled it to make this demand. But as hereinbefore pointed out and as pointed out by the decision in the Life-Insurance Claims,¹⁶ the provisions of paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles, read in connection with the other provisions of Part X and those of Part VIII of that Treaty, afford to American nationals as large a measure of protection as does the language of sections 2 and 5 of the resolution as carried into the preamble to the Treaty of Berlin.

That this was the view of the American State Department is disclosed by its note communicated to the German Government on August 22, 1921, and quoted in part by the National Commissioners in their opinions herein. There, it will be noted, the State Department expressed the belief that—

. . . there is no real difference between the provision of the proposed treaty relating to rights under the Peace Resolution and the rights covered by the Treaty of Versailles except in so far as a distinction may be found in that part of Section 5 of the Peace Resolution, which relates to the enforcement of claims of United States nationals for injuries to persons and property. With respect to this provision, it should be noted *that it does not increase the obligations or burdens of Germany*, because all the property referred to would be held subject to Congressional action, if no treaty were signed, and would not be available to Germany in any case under the terms of the Treaty of Versailles, save as against reparation obligations. Whether the claims of the United States nationals are pressed in one way or another would be a matter of *procedure*, and would make no practical difference to Germany in the final result.

The clause of section 5 to which the Secretary of State here referred is the first of those conditions hereinbefore enumerated to *enforce* which the Congress declared its intention to *retain* the German property already in its hands. Paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles empowered the United States to charge all property, rights, and interests of German nationals within its territory and the net proceeds of their sale, liquidation, or other dealing therewith, among other things, with the payment of claims of American nationals “growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before”

¹⁶ Decisions and Opinions, at page 131. (*Note by the Secretariat*, this volume, p. 110 *supra*.)

the United States entered into the war. The similarity of the language used in paragraph 4 of that Annex and in section 5 of the resolution is manifest and suggests that the framers of the resolution had paragraph 4 before them in drawing the resolution. The latter, however, went further than paragraph 4 of the Annex, in that it provided for the retaining by the United States of the property of Germany and its nationals until suitable provision shall have been made by Germany for the payment of claims arising during American belligerency as well as claims arising during American neutrality. This is the procedural distinction referred to by the Secretary of State in his note quoted above, which distinction relates solely to the *enforcement* of claims of American nationals, without in any wise increasing "the obligations or burdens of Germany", and this distinction would, as pointed out by the Secretary of State, "make no practical difference to Germany in the final result".

This procedural distinction does not touch the definition of what Germany shall pay *for*. That definition found in the Treaty of Berlin does not enlarge the definition found in the Treaty of Versailles. Nor does it directly touch the question of *how much* Germany shall pay. That must be judicially determined by this Commission through the application of appropriate rules for measuring damages to the facts of such claims of American nationals as fall within the terms of the Treaty of Berlin. But the difference mentioned by the Secretary of State concerns only *how payment* shall be made or secured, and this, together with the further question of *when* payment shall be made, are political questions, to be settled by the appropriate political agencies of the Governments concerned. Even this procedural distinction disappears when considered in connection with paragraph (h) (2) of Article 297 and paragraph (a) of Article 243 of the Treaty of Versailles, which in effect provide that the property of German nationals held by the United States may be applied to the payment of the claims and debts defined by Article 297 and paragraph 4 of the Annex thereto, and that any balance may be "retained" by the United States and, if so retained, "shall be reckoned as credits to Germany in respect of her reparation obligations"; that is (as that phrase is used in Article 243 applicable to the United States), Germany's reparation obligations to the United States arising during American belligerency, those arising during American neutrality having already been provided for by paragraph 4 of said Annex.

In the opinion of the Umpire the American Secretary of State was right when he expressed the belief to the German Government that "there is no real difference between the provision of the proposed treaty relating to rights under the Peace Resolution and the rights covered by the Treaty of Versailles" and that the provisions of the peace resolution embodied in the Treaty of Berlin do "not increase the obligations or burdens of Germany".

That this was still the view of the Secretary of State of the United States when the Agreement of August 10, 1922, was entered into, under which this Commission is constituted for "determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921", is disclosed by his note of August 8, 1922, to the German Government, also quoted from in the opinions of the National Commissioners, in part as follows:

As a matter of fact under a proper interpretation of the Treaty of Versailles probably all claims which are covered by the Treaty of 1921 are included in the Treaty of Versailles.

In its Administrative Decision No. II, handed down November 1, 1923, "Dealing with the Functions of the Commission and Announcing Fundamental Rules of Decision", this Commission said:

Clearly the United States is not in a position to base a claim on an isolated provision of the Treaty without reading it in connection with all related provisions to ascertain its meaning and intent. Especially is this true in view of the second paragraph of subdivision (1) of Article II of the Treaty of Berlin, which provides that the United States in availing itself of the rights and advantages stipulated for its benefit in the provisions of the Versailles Treaty read by reference into the Treaty of Berlin "will do so in a manner consistent with the rights accorded to Germany under such provisions".

It will be borne in mind that when the joint resolution of the Congress approved July 2, 1921, was drawn the draftsmen had before them the Treaty of Versailles, in some part of which is found a substantial counterpart for every provision embodied in section 5 of the resolution. Quite obviously this unilateral resolution, which is most general in its terms, was intended by section 2 to safeguard and "reserve" the rights of the United States and its nationals and by section 5 to "*retain*" a practical method of enforcing those rights, pending the negotiation, execution, and ratification of a formal treaty "restoring friendly relations". Words used in that resolution must be taken to have the same meaning as the same words *used in connection with the same subject matter* found in the Treaty of Versailles. When this rule is applied there is no warrant for so interpreting the resolution of the Congress as to place upon Germany a heavier burden than that placed upon her by the Treaty of Versailles.

The underlying principles controlling the determination of some of the questions now certified are not new to this Commission. They were considered and applied in announcing its Administrative Decision No. III on December 11, 1923, where the rule was announced that—

III. In all claims for losses wherever occurring based on property destroyed during the period of belligerency and not replaced, falling within classes (B) (2) (*e*) and (B) (3) (*a*) as defined in this Commission's Administrative Decision No. I, and also in all claims for losses based on property taken by Germany or her allies outside of German territory during the period of belligerency and not returned, the measure of compensation expressed in awards made will be the amount fixed by the Commission as the value of such property, with interest thereon at the rate of 5% per annum from November 11, 1918, to the date of payment.

Classes (B) (2) (*e*) and (B) (3) (*a*) as defined in this Commission's Administrative Decision No. I are those enumerated in paragraph 9¹⁷ hereinbefore quoted. They comprise damage suffered by American nationals caused by Germany or her allies in respect of all property (with the exception of naval and military works or materials) wherever situated which has been carried off, seized, injured, or destroyed, on land, on sea, or from the air, and also damage suffered by American nationals caused by any belligerent in respect of such property directly in consequence of hostilities or of any operations of war.

Elsewhere in that same decision (No. III, page 63) it is said that "the Commission holds that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place".¹⁸

¹⁷ Paragraph 9 of Annex I to Section I of Part VIII (Reparation) of the Treaty of Versailles.

¹⁸ This rule is generally accepted by international and municipal tribunals. That it is firmly established in American jurisprudence there can be no doubt. See the recent case of *Standard Oil Company of New Jersey v. Southern Pacific*

Another phase of this same question was before this Commission in the early part of 1924, when it was called upon to define the principles to be applied by the American and German Agents and their respective counsel in the preparation and presentation of cases, and by the experts in the preparation of their report to the Commission, dealing with the value of American hulls lost during the period of belligerency. The Commission on March 11, 1924, handed down a decision in the form of an order approved by the Umpire and both National Commissioners, a copy of which is in the margin,¹⁹ reciting that after careful reconsideration of the entire subject of the principles to be applied in assessing the value of American hulls lost during the period of belligerency the Commission "is of the opinion that the principles announced in its Administrative Decision No. III handed down December 11, 1923,

(Footnote continued from page 241.)

Company *et al.*, decided by the Supreme Court of the United States April 20, 1925. In that case Mr. Justice Butler, delivering the unanimous opinion of the court, said: "In case of total loss of a vessel, the measure of damages is its market value, if it has a market value, at the time of destruction. * * * Where there is no market value such as is established by contemporaneous sales of like property in the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy. * * * It is to be borne in mind that value is the thing to be found. * * * 'It is the market price which the court looks to, and nothing else, as the value of the property.' * * * Value is the measure of compensation in case of total loss." In this case it will be noted that the court held that the Director General of Railroads of the United States, who was in the lawful possession of and operating the lost ship, and who would have continued to operate her for a period of some 18 months had she not been lost, was a special owner of the ship and that the general owner, Southern Pacific Company, was the owner of the reversion and "Together they had full title". The market value of the lost ship for which the Standard Oil Company was held liable embraced not only the compensation recoverable by the owner but also the compensation recoverable by the special owner. No issue of apportionment was made as between them, and the opinion does not deal with their relative rights.

¹⁹ Excerpt from the minutes of the Meeting of the Commission, March 11, 1924: "The Umpire announced that the Commission had given very careful consideration to the brief of the German Agent filed herein February 26, 1924, dealing with the principles to be applied in assessing the value of American hulls lost during the period of belligerency, and, after careful reconsideration of this entire subject, is of the opinion that the principles announced in its Administrative Decision No. III handed down December 11, 1923, with respect to the measure of damages in all claims for property taken, should be here applied. It was, therefore,

"ORDERED, That in all claims falling within the terms of the Treaty of Berlin based on the destruction of hulls the measure of damages which will ordinarily be applied is the reasonable market value of the property destroyed in the condition in which it was as of the time and place of destruction, if it had a market value; if not, then the intrinsic value of the property as of such time and place. While the reasonable market value, if there were a true and ascertainable market value, will control, notwithstanding the market may have been either depressed or inflated by abnormal conditions howsoever produced, still purely speculative factors will be eliminated as far as practicable in arriving at such market value.

"The American and German Agents and their respective counsel in the preparation and presentation of cases, and the naval experts in the preparation of their reports to the Commission, will be governed accordingly."

with respect to the measure of damages in all claims for property taken, should be here applied”.

These rules have been consistently followed by the Commission. Under them damages for the destruction of American ships (“hulls”—cargoes being separately dealt with) have been measured. Under them damage to the plants and tangible properties of Belgian subsidiaries of American corporations has been assessed as damage done to the property of American nationals and awards have been made to the United States on their behalf. Under them the amount of Germany’s liability for the material or physical damage of tangible property of every nature has been determined. In computing the reasonable market value of plants and other properties at the time of their destruction, the nature and value of the business done, their earning capacity based on previous operations, urgency of demand and readiness to produce to meet such demand which may conceivably force the then market value above reproduction costs, even the goodwill of the business, and many other factors, have been taken into account. But this is quite a different thing from assessing damage for loss of prospective earnings or profits for a period of years computed arbitrarily or according to the earnings of competitors whose properties were not destroyed, and the awards made by this Commission do not embrace the items claimed of prospective earnings or prospective profits.

Coming now to the application of these principles and rules to the concrete cases presented by the American and German Agents to this Commission for decision, it is found that they divide into the following categories:

(1) Cases on behalf of the charterer of a destroyed ship seeking to recover for loss of net profits which he would have earned during the entire life of the charter had the ship not been destroyed;

(2) Cases on behalf of the owner and/or master of a fishing schooner for

(a) The value of fish, provisions, consumable stores, gear and equipment, and other tangible property lost with the vessel, and

(b) The value of “the probable catch” which would have been made had the vessel not been destroyed;

(3) Cases on behalf of the owner of a destroyed ship for

(a) The value of fuel and other consumable stores on board at the time of the loss,

(b) The amount paid by him as lessee to the lessor of wireless apparatus under a contract obligating the lessee to pay a fixed amount in the event of its loss,

(c) The amounts paid by him to the master and crew of the ship for loss of their personal effects and nautical instruments and for personal injuries sustained by them and for hospital and medical services rendered them,

(d) The amounts paid by him to the master and crew of the vessel, including wireless operator, as wages and bonuses covering a period dating from the destruction of the ship until their return to the United States.

(e) The amounts he would have earned under pending contracts of affreightment or existing charter-parties and which he was prevented from earning by the destruction of the ship,

(f) War-risk insurance premiums paid by him, and

(g) Refund of expenses incurred by him in establishing his claims before this Commission, including appraisals by experts, attorneys’ fees, and the like; and

(4) Cases on behalf of individual members of the crew of a destroyed ship for personal earnings lost by them following the sinking.

Of these four categories of claims the first is by far the most important with respect to the amount involved. A case typical of claims of this category has been put forward by the American Agent, being Docket No. 24, the United States of America on behalf of the West India Steamship Company, Claimant, *v.* Germany. Briefs prepared by numerous counsel, reflecting both learning and industry, have been filed in this case by the American and German Agents. It forms the basis of the principal part of the opinion of the German Commissioner embodied in the certificate of disagreement herein. The facts in this case will therefore be carefully examined.

The steamship *Vinland* was stopped and sunk by a German submarine during the period of America's belligerency, while on a voyage with a cargo of sugar from the West Indies to the United States. She was of Norwegian registry and ownership and operated by a Norwegian master and crew under the direction of an American charterer. When her papers were examined by the commander of the German submarine, he at once discovered that she was operating under an American charter and had a belligerent cargo (either American- or Cuban-owned) and advised the master of the *Vinland* that the ship would be sunk. After giving the master and members of her crew an opportunity to get away in their boats the sinking was accomplished by bombing. The charter-party under which she was operated was executed at New York January 29, 1918, on cable authority from the owner dated at Bergen, Norway, January 28, 1918. She was delivered on March 16, 1918, under this charter-party, which by its terms became effective for a period of three months from that date. She was lost on June 5, 1918, with her cargo.

The charter was the familiar form of "Time charter", and so designated. Under it the charterer, claimant herein, the West India Steamship Company, an American corporation, was for a valuable consideration given the entire service of the whole vessel with her master and crew, for a period of three months, or so much of that period as she was capable of rendering service. The owner agreed to maintain the vessel, to furnish it with a full complement of officers, seamen, engineers, and firemen appointed and paid by him, and to provide and pay for all provisions, wages, insurance, and also for all the cabin, deck, engine-room, and other necessary stores, The obligation of the owner was in effect to give to the claimant the whole ship for use within certain circumscribed territorial limits and for a limited period, coupled with the obligation on the part of the owner to maintain, navigate, and operate the ship under the direction of the claimant; in consideration for which the claimant agreed to pay in advance a fixed monthly rental, coupled with the stipulation that "should the vessel be lost, freight paid in advance and not earned * * * shall be returned to the Charterers". The charter contained the usual *vis major* clause mutually excepting amongst others the acts of "enemies", and the usual "deficiency" clause stipulating that if time should be lost "from deficiency of men or stores, breakdown of machinery, stranding, fire or damage preventing the working of the vessel for more than twenty-four running hours, the payment of the hire shall cease until she be again in an efficient state to resume her service", and also that during the time the ship should be out of service for the purpose of being bottom cleaned and painted "the payment of hire to be suspended until she is again in proper state for the service". The charterer had the right to appoint a supercargo to represent it on the ship, the owner furnishing him first-class accommodations, the cost of which was embraced in the hire paid. While this charter-party does not bear the essential indicia of a demise as found in well-considered and authoritative decisions of the municipal courts either of England or America, including the Supreme Court of the United States, still, in the last analysis, a demise is a

matter of substance, not of form, and "The question as to the character in which the charterer is to be treated is, in all cases, one of construction"²⁰ of the particular charter, and of the facts and circumstances of the exercise of the rights arising thereunder. Nor is the question as to whether a particular charter is or not technically a demise, as that term is used by municipal tribunals, controlling in determining the right of the charterer of a ship which has been destroyed to an award under the Treaty of Berlin.

The cases now before this Commission put forward on behalf of charterers are cases where the chartered vessel has been destroyed. The rule for measuring damages under the Treaty of Berlin resulting from such destruction is that already announced and applied by this Commission; namely, the reasonable market value of the ship at the time and place of destruction, plus interest thereon, as prescribed in Administrative Decision No. III. As pointed out in that decision, different rules for measuring damages, "varying as the facts in the cases vary," are applicable in cases where ships are "(1) damaged but not destroyed, (2) destroyed but replaced, or (3) taken but returned to the private owner". The Commission has not attempted to lay down any general rules governing the measure of damages in such cases, but has expressly stated that each case falling within those categories would be dealt with as presented.

Most of the cases cited in the briefs of various counsel and put forward by the American and German Agents in support of their respective contentions that the present charter constitutes or does not constitute a demise, which cases arose out of damage to ships not destroyed, wherein a different rule for measuring damages obtains from that applied to cases of the kind now before this Commission, tend to confuse rather than clarify the questions here presented. Those cases involve questions of (1) liability of the charterer to the owner for rental fixed by the terms of the particular charter, or (2) liability as between the owner and the charterer for damage resulting from the negligent operation of the ship, or (3) the right as between the owner or the charterer, or the right of the owner or the right of the charterer, to recover for the loss of the use of a vessel damaged but not destroyed, where the liability of a third party for inflicting the injury either was not disputed or was satisfactorily established. Obviously the liability of the charterer for rental, or for the negligent operation of the ship, depends on the terms of the particular charter with respect to the nature and extent of the charterer's possession, and the extent of his control over the navigation and operation of the ship, and on whether the charter was merely a contract for service or a demise of the ship during a fixed term. Likewise, as between the owner and the charterer the terms of the particular charter are important in determining the basis of apportionment between them of the amount of damage for which a third party is liable. But this apportionment does not affect the aggregate amount of such third party's obligation when established under appropriate rules for measuring damages applicable to cases where vessels are injured but not destroyed. On the whole, the rules sought to be evolved from these cases and applied to claims put forward on behalf of charterers of destroyed vessels are not particularly helpful in determining whether such claims fall within or without the terms of the Treaty of Berlin, or in measuring the claimant's recoverable damage, if any, under that Treaty.

As applied to the loss of tonnage the tangible things destroyed are ships. The value of their use at the time and under the conditions then existing has been taken into account by this Commission as a factor in determining the

²⁰ *Leary v. United States* (1872), 14 Wallace (81 U. S.) 607, at 610. *United States v. Shea* (1894), 152 U. S. 178.

market value of tonnage lost. Where, under the terms of a then existing charter-party, the charterer was at the time of the loss entitled to the use of the ship on terms which would have had the effect of reducing the price which the owner could have obtained for it *if sold burdened with the charter*, then at the time of the loss the charterer had a pecuniary interest in that particular ship, a *ius in re*, a property interest or property right the subject matter of which was the ship, an interest entering into and inhering in the ship itself. Such a right and interest is an encumbrance on the ship in the sense of constituting a limitation on the owner's right to possess, control, and use it and as affecting the price at which it could be disposed of in the market burdened with the charter. It is an interest in the subject matter which the municipal courts will protect against both the owner and those claiming under him with notice thereof.²¹ In cases where such interest existed at the time of the loss the measure of damages remains unchanged but the market value of the whole ship must be apportioned between the owner and the charterer in proportion to their respective interests therein; and the United States is entitled to an award on behalf of (a) the owner, if an American national at the requisite dates,²² in an amount equal to the price for which the ship could have been sold on the market at the time of loss *burdened with the charter*, with 5% interest thereon from November 11, 1918, or from the date of loss if destroyed at a later date, and (b) the charterer, if an American national at the requisite dates,²² in an amount equal to the difference if any between the said award on behalf of the owner and the reasonable market value of a free ship not burdened with the charter, with interest on the amount of this difference at the same rate and from the same date. This does not change the rule that so far as Germany is concerned her obligation is limited to making compensation for the tangible property destroyed—the ship—and that such compensation is measured by the reasonable market value of the ship at the time and place of its destruction plus interest thereon computed in accordance with the rules announced in Administrative Decision No. III. This rule for the apportionment of damages will be applied by this Commission in a case where an American-owned ship had been chartered to an alien on terms which operated to reduce its market value encumbered with the charter, and the owner's damage will be assessed at the reasonable market value of the ship *so encumbered*, with interest thereon. Conversely, in a case where the owner is not an American national, Germany will nevertheless be held obligated to make compensation to an American charterer to the extent of the difference if any between the reasonable market value of the ship free of the charter and the reasonable market value of that ship encumbered with the charter, with interest on the amount of this difference.

If the owner of an encumbered ship were awarded its entire unencumbered market value, then the owner who had made an improvident charter would profit by the destruction of his vessel. And if in addition thereto the charterer should, as contended by American counsel, be awarded an amount equal to the net value of the use of the ship during the full term of the charter, then Germany's aggregate obligations would be in excess of the aggregate of the reasonable market values of all interests in the whole ship.

²¹ *De Mattos v. Gibson* (1859), 4 De G. & J. 276, 8 W. R. 514, 45 English Reports Full Reprint 108; *Messageries Imperiales v. Baines* (1863), 7 L. T. 763, 11 W. R. 322; *Great Lakes and St. Lawrence Transportation Co. et al. v. Scranton Coal Co.* (1917, C. C. A.), 239 Federal Reporter 603; *The Aquitania* (1920, D. C.), 270 Federal Reporter 239; *The Bjornefjord*, Flint, Goering & Co., Ltd., v. Robins Dry Dock & Repair Co., 1924 American Maritime Cases 740.

²² Administrative Decision No. V, page 193. (*Note by the Secretariat*, this volume, p. 154 *supra*.)

Where a vessel was destroyed, Germany is obligated under the Treaty of Berlin to pay the reasonable market value of the whole ship, including all estates or interests therein, provided they were on the requisite dates²² impressed with American nationality. In arriving at the market value of the whole ship, it is a *free ship* that is valued, and no account is taken of the independent market value of any charter that may exist thereon. Such charter may at a given time be an asset or a liability as determined by several factors, chief among which is the relation of the stipulated hire to the current market hire.

When the whole ship destroyed was American-owned the aggregate amount of Germany's obligations for its loss is not affected by the existence of a charter or charters. But if any estate or interest in the ship was foreign-owned and the remainder American-owned, then Germany's obligations may be affected by the existence of a charter.

If the vessel destroyed was American-owned and under a foreign charter, and (a) if the stipulated hire was less than the current market hire, then ordinarily the charter was an asset to the charterer and an encumbrance and burden on the ship, so that the American owner owned less than a free ship; but (b) if the stipulated hire was more than the current market hire, then the charter ordinarily was a liability to the charterer, and an asset to the owner tending to increase the price which could have been obtained for the vessel by selling it on the market at the time of the loss, so that the American owner owned more than a free ship. In such a case, however, under the Treaty, Germany's liability is limited to the reasonable market value of the tangible thing, namely, the free ship.

If the vessel destroyed was foreign-owned and under an American charter, and (a) if the stipulated hire was less than the current market hire, then the charter was ordinarily an asset to the charterer and an encumbrance and burden on the ship, decreasing the selling price which the owner could probably have obtained for the ship on the market at the time of the loss, so that the foreign owner owned less than a free ship, and the difference between the interest of the foreign owner and a free ship would have been the interest of the American charterer in that ship, the value of which American interest Germany, under the Treaty, is obligated to pay; but (b) if the stipulated hire was more than the current market hire, then the charter was ordinarily a liability to the charterer, in which event he has suffered no damage resulting from the loss of the ship; but the existence of the charter may well be an asset to the owner tending to increase the price which the owner could probably have obtained for the ship by selling it on the market at the time of the loss, so that the foreign owner owned more than a free ship.

Applying what has been said to the case of the *Vinland*, it appears that the *ship* was destroyed. This was a physical damage to a tangible thing and falls within the Treaty, if the other Treaty requisites are present. The charter was not destroyed. By its own terms it terminated when the ship was destroyed, whereupon the charterer was entitled to a refund of such advance hire as had been paid but not earned. But if the charterer's rights and interest in the vessel were an asset in its hands existing at the time of the loss, then it had an interest in the *ship* at that time and *that interest* was destroyed. Hence a claim can be here asserted in its behalf to the extent of its interest in the reasonable market value of the ship at the time of its destruction.

The charter-party was entered into with full knowledge of the existence of a state of war, in which the charterer's nation was a principal belligerent; a condition which entered as a factor in determining the potential active life and the reasonable market value of the ship under a belligerent charter, and

the reasonable market value, if any, of the charter itself²³ embraced in the reasonable market value of the whole ship. At the time of its loss the vessel belonged to the claimant to use during the charter term so long as she was in a serviceable condition. But the claimant's right to use the ship was not an absolute right. It was limited by the risk of her being damaged or destroyed from *any* cause. It was limited by the right of the enemies of the United States lawfully to destroy the ship while in the service of a belligerent. These limitations on claimant's rights, as between it and the owner were expressed in the charter, and as between it and the enemies of the United States constituted implied conditions read into the charter, which was entered into in contemplation of *all* risks of loss, including the risks of war. No claim is made that the act of Germany in sinking the *Vinland* was unlawful as tested by the rules of international law governing the conduct of a belligerent. If that act was lawful then no right of claimant was invaded thereby, for while the claimant, as against her owner, had the right to the use of the ship, it never had a right to her use as against Germany's right lawfully to destroy her. However, as this Commission has frequently held, it is not concerned with the legality or illegality of Germany's acts but only with the question of determining whether or not Germany by the terms of the Treaty accepted responsibility for the act causing the damage for which claim is made. Leaving out of consideration, therefore, the quality of Germany's act in destroying the *Vinland*, and assuming *arguendo* the correctness of the position of American counsel that the claimant had the legal right to the *continued* use of the ship and that that right was property which was destroyed, nevertheless the Umpire holds (1) that any loss of prospective profits as such resulting from the termination of that right is not a damage in respect of property for which Germany is liable under the reparation provisions of the Treaty of Berlin, but (2) that to the extent that the claimant's right to the use of the ship constituted an interest in the ship, comprehended in the computation of her reasonable market value at the time of her loss. Germany is obligated to make compensation on behalf of the claimant.

All marine insurance and war-risk insurance on the ship itself was carried and paid for by the owner. The charterer carried war-risk insurance to protect it against the loss of freight moneys which it would have earned had the cargo been delivered at destination, and it collected from two insurance companies \$11,000 war-risk insurance on account of the loss which it sustained in the sinking of the ship. This claim is here put forward for the net amount which the charterer would have earned from the carriage of such freight had it been safely delivered at its destination, less the \$11,000 received by the charterer from insurance companies; and also for the net amount which it is claimed the charterer would have earned from the carriage of freights on another round trip during the life of the charter, had the ship not been destroyed. Obviously the claim in the form presented is for the loss of prospective profits, and as thus presented it does not fall within the terms of the Treaty of Berlin.

But at the time the *Vinland* was destroyed the claimant by virtue of a valid charter was, against her owner, entitled to the full use of the whole ship for a fixed term, to use as it saw fit. If the hire stipulated to be paid thereunder was less than the current market price, this charter had a market value. The

²³ In the case of *The Bjorneffjord*, Flint, Goering & Co., Ltd., v. Robins Dry Dock & Repair Company, in the United States District Court, Southern District of New York, 1924 American Maritime Cases 740, the court held, "The charterer had a right to the use of the vessel, which had a value and could have been disposed of in the open market."

charterer's interest in this vessel under this contract was "property * * * belonging to" the charterer within the meaning of that term as found in the Treaty.²⁴ The ship was the charterer's ship, to use in its unrestricted discretion, within the territorial limits and during the time specified, for the only purpose for which she existed—the carriage of freight and passengers. She *belonged to the charterer* as against the owner, to tie up at a wharf, to load or unload, or to sail the seas, as it might direct.

Did this charter operate as a burden or an encumbrance on the ship so as to affect the price which a purchaser, desiring and able to buy, would have paid on the market for her, subject to the charter, at the time she was destroyed? If so, the owner at the time of her destruction owned only an encumbered ship, and the charterer had an interest in the ship when destroyed, equal to the difference then between the market value of a free ship and the market value of the encumbered ship.

But if the charter did not have the effect of encumbering the ship or affecting its market value, or if the stipulated hire was in excess of the current market hire at which similar ships could have been chartered, then the charterer has sustained no loss from her destruction falling within the terms of the Treaty of Berlin.

In a case, clearly distinguishable from the group of cases of which the *Vinland* is typical, an American judge used apt and forceful language, sought to be here applied by several American counsel, as follows:

"The ship is the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew are the servants of the charterers. There is, in fact (to borrow a simile from another branch of the law), an estate carved out of the ship and handed over for a specified term to the charterer, and that estate consists of the capacity of the vessel for carrying freight and earning freight moneys, and the use of the vessel, master, and crew, for the advancement of the charterer's gains."²⁵

The Umpire subscribes to this statement of the law as applied to the facts of the case which the learned judge had before him, but it can not under the Treaty of Berlin be applied, as it is sought to be applied in many of the group of cases now before the Commission, not to carve an estate out of the ship, but to engraft upon the market value of the destroyed ship prospective profits which it is claimed would have been earned had the ship not been destroyed, during periods varying in extent from a few days to several years, some extending far beyond the date of the signing of the Armistice convention of November 11, 1918. In some instances it is probable that the amount so claimed equals or exceeds the reasonable market value of the whole ship at the time destroyed.

The Umpire holds that the United States on behalf of an American charterer of a ship which has been destroyed is entitled to an award against Germany to the extent, but only to the extent, it shall establish that the charterer had an interest in her reasonable market value free of charter at the time of her destruction and the extent of that interest.

²⁴ Paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles.

²⁵ Judge Hough in *The Santona* (D. C., 1907), 152 Federal Reporter 516, at page 518. Cited with approval by Mayer, D. J., in *The Aquitania* (1920), 270 Federal Reporter 239, at page 244, and by Goddard, D. J., in *The Bjornefjord*, Flint, Goering & Company, Ltd., v. Robins Dry Dock & Repair Co., 1924 American Maritime Cases 740.

The case of the charterer of the *Vinland*, West India Steamship Company claimant, has not been certified to the Umpire for decision, but has been put forward by the American and German Agents as typical of a group of cases before the Commission for decision. It and all similar cases will be prepared and presented by the respective Agents in accordance with the principles here announced.

In cases where the whole value of the tangible property destroyed is impressed with American nationality it will not ordinarily be necessary for this Commission to concern itself with apportioning the aggregate amount of the award between the owner and others claiming through or under him. The function of this international commission is to fix the amount of the financial obligations of Germany arising under the Treaty of Berlin. The distribution of the amount so fixed, as between the American owner of property damaged or destroyed and other American nationals whose rights are derived through him, is ordinarily a function for municipal tribunals according to local jurisprudence.²⁶

We now come to the application of the principles hereinbefore announced to the remaining three of the four categories, with their several subdivisions, of concrete cases presented by the American and German Agents to this Commission for decision. When Germany's obligations in respect to these several categories of claims are mentioned, it will be understood that they refer to Germany's obligations to pay claims impressed with American nationality on the essential dates as defined by Administrative Decision No. V.²⁷

The Umpire decides that—

With respect to category number (2), dealing with claims on behalf of the owner and/or master of fishing schooners:

Germany is obligated to pay (a) the reasonable market value of the fish, provisions, consumable stores, gear, equipment, and all other tangible property lost with the vessel, but

Germany is not obligated to pay (b) the value of the "probable catch" which had not been caught but which it is claimed would have been caught had the vessel not been destroyed;

With respect to category number (3):

Germany is obligated to pay on behalf of the owner of a destroyed ship—

(a) To the extent of the owner's interest therein, the reasonable market value of fuel and other consumable stores on board the destroyed vessel at the time of her destruction;

(b) The reasonable market value of wireless apparatus leased by the owner, under a contract to pay a fixed amount in the event of loss thereof, which amount has been paid by the owner to the lessor—not exceeding, however, the amount so paid, it being the value of the property or the owner's interest therein, not the cost of it or the liquidated damages fixed by the contract between the lessor and the owner, that constitutes the measure of Germany's obligation;

(c) The reasonable market value of the personal effects and nautical instruments lost by the master and/or members of the crew of a destroyed vessel, to the extent of payments made to them therefor by the owner; and also reasonable compensation for personal injuries sustained by them, and for hospital and medical services rendered to them, to the extent of payments made to them or for their account by the owner; *provided*, however, that such

²⁶ See Administrative Decision No. II, pages 8 to 10, inclusive. (*Note by the Secretariat*, this volume, pp. 26-28 *supra*.)

²⁷ Administrative Decision No. V deals with "Germany's obligations and the jurisdiction of this Commission as determined by the nationality of claims".

master and members of the crew owed permanent allegiance to the United States at the time of suffering such loss or injury and at the time the payments were made to them by the owner;

Germany is not obligated to pay on behalf of the owner of a destroyed ship—

(d) The wages and bonuses paid by him to the master and crew thereof, including wireless operator, covering a period from the date of the destruction of the vessel until their return to the United States;

(e) The amount he would have earned under pending contracts of affreightment, or under an existing charter-party, which amount represents prospective profits lost to him by the destruction of the ship;

(f) The amounts paid by him for war-risk insurance;

(g) The expenses incurred by him in establishing his claim before this Commission, including appraisals by experts, attorneys' fees, and the like;

And with respect to category number (4):

Germany is not obligated to pay claims put forward directly on behalf of individual members of the crew of a destroyed ship for prospective personal earnings lost by them following the sinking.

It will be noted that paragraph (9) of Annex I to Section I of the reparation provisions of the Treaty covers "Damage in respect of all property *wherever situated*" and that paragraphs (1) and (2) of this Annex cover "Damage * * * *wherever arising*." Claims of American nationals arising in German territory, or with respect to damage to property situated in German territory, falling under the reparation provisions of the Treaty, will be governed by such provisions. But claims of American nationals resulting from damage or injury to their property, rights, or interests in German territory as it existed on August 1, 1914, by the application either of exceptional war measures or measures of transfer, as those terms are defined in the Treaty, will be governed by the economic provisions (Part X) of the Treaty, under which a different rule for measuring damages obtains. This distinction is illustrated by a case²⁸ decided by the Anglo-German Mixed Arbitral Tribunal, wherein it was held that

A claim in respect of the loss of profits, wages paid to the crew while under detention *in Germany*, and other expenses occasioned by the detention and use of a merchant steamer by the *German authorities* during the war, comes under the provisions of Part X (Article 297 (e)) of the Treaty of Versailles and not under Part VIII of the Treaty.

Here the crew was interned first on a prison ship and then on shore. The vessel remained unused in the port of Hamburg for about one year and thereafter was used by the German military authorities for carrying coal. She was not destroyed and was ultimately returned to her British owners. The tribunal held that, under the provisions of Part X of the Treaty, Germany was obligated to pay to the owner of the ship the net annual profits which the operation of the ship would probably have yielded to the owner during her potential active life, taking into account war conditions; and also the amount paid by the owner as wages and allowances to the crew, up to the date of the internment of the crew but not thereafter.

All questions concerning the measure of damages in claims of this nature before this Commission falling within the provisions of Part X of the Treaty will be dealt with in each case as presented.

This decision in so far as applicable will control the preparation, presentation, and decision of all claims submitted to the Commission falling within its scope.

²⁸ The Owners of the S. S. "Seaham Harbour," Claimants, *v.* German Government, (1922) I Decisions of Mixed Arbitral Tribunals 550, (1924) IV *ibid.* 27.

Whenever either Agent is of the opinion that the peculiar facts of any case take it out of the rules here announced, such facts, with the differentiation believed to exist, will be called to the attention of the Commission in the presentation of that case.

Done at Washington May 25, 1925.

Edwin B. PARKER
Umpire

ADMINISTRATIVE DECISION No. VIII

(Claims of the Association of American Holders of Foreign Securities, Inc., and its Members, May 27, 1925, pp. 347-352.)

PROCEDURE, PRESENTATION OF CLAIMS: TIME-LIMIT, IDENTIFICATION OF CLAIM.—JURISDICTION.—LAW OF TREATIES: (1) DIPLOMATIC CORRESPONDENCE PART OF TREATY, (2) EVASION OF TREATY THROUGH MUNICIPAL LAW.—INTERPRETATION OF TREATIES: (1) PURPOSE, RULE OF EFFECTIVENESS, (2) CIRCULAR LETTER FROM STATE DEPARTMENT. Time-limit set by Commission's Rules (Rule IV (*d*)) for notice of claims which will be submitted. Notice given within time-limit on behalf of security holders association and its unidentified members (some of whom ratified their election after time-limit expired) that group of unidentified claims will be presented. *Held* that notice not sufficient: (1) Rule IV (*d*) based on agreement embodied in diplomatic correspondence relating to Agreement of August 10, 1922, which confers jurisdiction upon Commission, (2) Rule IV (*d*), accordingly, is part of Agreement and has force of jurisdictional limitation; purpose, effectiveness of Rule (reference made to circular letter from State Department), (3) municipal law technicalities cannot help evade international agreement.

Cross-references: A.J.I.L., Vol. 20 (1926), pp. 202-206; Kiesselbach, *Probleme*, pp. 427-430 (German text); Witenberg, Vol. II, pp. 160-164 (French text).

Bibliography: Borchard, pp. 79-80.

BY THE COMMISSION:

The Agents of the two Governments have requested a ruling by the Commission as to its jurisdiction over certain claims on the following Agreed Statement of Facts:

The above named Association, an American corporation, organized and existing under the laws of the State of Rhode Island (Exhibit 1, filed with Statement of Facts), on April 9, 1923, filed with the American Agency notice of claim on behalf of said Association and its members against the Government of Germany, which notice was transmitted by the American Agency to the Department of State and referred by said Department to the American Agency. Notice of the claim was given to the Commission and to the German Agent under the Rules of the Mixed Claims Commission IV (*d*) on April 9, 1923. The said Association, as such, does not own or claim to own any of the securities involved in the claims herein referred to. At the time of the filing of the notice, as aforesaid, the American Agent had no information regarding the names of the members of said Association, or as to the amount of damage, if any, said to have been suffered by each of the members. On or about May 12, 1924, the said Association submitted to the American Agent a list purporting to contain the names of the members of the Association as of April 9, 1923, which list also showed the amount of damage alleged to have been suffered by each member (said list is filed as Exhibit 12, and accompanies the

Statement of Facts). On or about November 11, 1924, the said Association filed a corrected list in four parts purporting to contain the names of parties elected to membership under the provisions of the by-laws, in the said Association at meetings of the stockholders thereof held on April 2 and April 4, 1923. Part 1 comprises a list purporting to contain the names of customers of the firm of Zimmerman and Forshay submitted by Lewis A. McGowan on April 2, 1923, and elected members of the Association under the provisions of Article 3, Section 3 of the by-laws; Part 2 comprises a list purporting to contain the names of firms and individuals submitted by Lewis A. McGowan on April 2, 1923, and elected to membership in the Association in accordance with the provisions of Article 3, Section 5, of the by-laws thereof; Part 3 comprises a list purporting to contain the names of individuals submitted by Lewis A. McGowan on April 2, 1923, and elected as members of the Association under the provisions of Article 3, Section 3, of the by-laws thereof; Part 4 comprises a list purporting to contain the names of customers of the firm of George F. Redmond and Company submitted by William R. Turner on April 2, 1923, and elected as members of the Association under the provisions of Article 3, Section 3, of the by-laws thereof (See for the four parts of this list Exhibit 25, accompanying the Statement of Facts). It is the understanding of the American Agent that the names of the individuals appearing on Part 4 of the list of members comprise such members as were holders of securities acquired subsequent to November 11, 1918. According to the proof submitted by the firm of Zimmerman and Forshay of New York, acting through John S. Scully, one of the members of the firm, prior to April 9, 1923, conferred with Lewis A. McGowan and authorized him to have such customers whose names appear on Part 1 elected as members of the Association. This action was taken voluntarily by said firm for the benefit of such customers, without their knowledge or consent; said customers were, however, subsequently notified of the action so taken (Exhibits 19, 20 and 24, accompanying Statement of Facts). The names appearing on Part 2 of the list of members comprise, in the main, names of firms dealing in German securities. Part 3 of the list of members comprises two individuals who, prior to April 9, 1923, authorized, according to evidence submitted, Lewis A. McGowan to take the necessary steps to secure their election as members of the Association (Exhibit 17, accompanying Statement of Facts). Subsequent to April 9, 1923, Lewis A. McGowan submitted sworn statements covering claims on behalf of four firms and/or individuals whose names appear on list Part 1. The American Agent is advised that Lewis A. McGowan has secured, but not as yet filed with the Agency, ratifications by at least five hundred parties whose names appear on the list of members of the Association. He is further advised that similar ratifications by the others appearing on the list of members of the Association are being submitted to Lewis A. McGowan daily (Form of ratification, together with form of Power of Attorney, will be found attached to Exhibit 20, accompanying Statement of Facts). The American Agent was furnished on or about December 4, 1924, by Lewis A. McGowan, with thirty-three Powers of Attorney duly executed by parties whose names appear on said lists.

On these facts the Agents of the two Governments request an administrative ruling on the question "whether, under clause (d) of Rule IV of this Commission, the ratification subsequent to April 9, 1923, of the election of said parties in the list of members filed with the Statement of Facts herein constitutes the parties so ratifying such election members of said Association as of the date of their election prior to April 9, 1923, so as to enable said parties to present in their own behalf or through said Association proof of claims for the consideration of this Commission under the notice of claim filed herein (Exhibit 1, filed with the Statement of Facts)".

The provisions of Rule IV (d) referred to in the foregoing question are as follows:

(d) Within six months after October 9th, 1922, the American Agent shall give notice of all claims which will be submitted to the Commission and not already filed, by delivering to the Secretaries a list or lists of such claims, and a copy thereof to the German Agent.

This Rule is based on a stipulation agreed to by the two Governments in entering into, and as part of, their Agreement of August 10, 1922, under which this Commission is organized. This stipulation in the form finally agreed upon is set out in the note of August 10, 1922, from the American Ambassador at Berlin to the German Chancellor as follows:

With regard to your suggestion that the Commission shall only consider such claims as are presented to it within six months after its first meeting, as provided for in Article III, I have the honor to inform you that I am now in receipt of instructions from my Government to the effect that it agrees that notices of all claims to be presented to the Commission must be filed within the period of six months as above stated.

For the reasons above stated, this stipulation became a part of, and must be read into, the Agreement which confers jurisdiction upon this Commission, and it accordingly has the force of a jurisdictional limitation upon the claims which this Commission is authorized to pass upon. The purpose of this stipulation is expressed by the German Chancellor in his note of the same date, to which the American Ambassador's note is a reply. The German Chancellor says:

In the view of the German Government it would furthermore be in the interest of both Governments concerned that the work of the Commission be carried out as quickly as possible.

The purpose of this stipulation could not be fulfilled by the filing of a general blanket notice that a group or class of claims would subsequently be presented. Moreover, if such a notice were held to be sufficient, the stipulation would be meaningless, because the general classification of claims to be considered by the Commission is embodied in the three categories of claims in Article I of the Agreement of August 10, 1922. In order to give meaning to the stipulation, therefore, it is necessary that the notice should identify the claims more specifically than merely as claims within these categories which are to be presented on behalf of unnamed claimants. This view is confirmed by a statement made in a circular letter issued by the Department of State, which was given wide publicity, announcing the organization of this Commission and calling attention to the time limit within which notice of claims must be given. This circular letter states:

In order that the desired notice can be given to the commission within the required time, it is important that claims be presented to the Department at as early a date as possible so that they may be examined and prepared for notification to the commission.

In other words, before the notice can be given, the claims notified had to be "presented to the Department" and "examined and prepared for notification to the commission". It is essential, therefore, that the notice given of a claim to be presented should identify it as a claim which had been previously submitted to the Department of State and also examined and prepared for notification.

It is contended on the part of the claimants in this case that the notice given as described in the above-quoted Agreed Statement of Facts complies with this requirement.

The Agreement of August 10, 1922, including the stipulation of the same date, which, as above stated, is embodied in it, fixes the jurisdiction of this Commission, and its application is governed by public and international law.

The real parties to the Agreement are the two Powers concerned and no contractual relation, either under municipal law or under international law,

exists between the persons on behalf of whom the United States, being the only claimant existing,¹ is presenting claims and the German Government as the defendant.

The much disputed doctrine with regard to the legal effect of a ratification of contracts between private persons *under municipal law* has therefore no bearing here.

The real purpose of fixing a certain period within which the claims must be notified has been stated above.

To evade this legal effect of an international agreement recourse cannot be had to technicalities of municipal law.

Even if it be proved that the "members" of the claiming Association were "elected" to their membership before April 9, 1923, it is undisputed that such "members", with possibly some exceptions which do not concern the Commission in this decision, did not know about their "election" and neither were bound to accept it nor did they accept it before April 9, 1923.

If, nevertheless, these "members" should now be allowed to bring their claims before the Commission by accepting the "membership" after the expiration of the time agreed upon between the two Governments, this would mean that the time for filing claims with the Commission was kept open, beyond the time fixed by the stipulation, for the benefit of certain claimants who were unknowingly elected to the membership of the claimant Association before April 9, 1923. Such result would clearly be contrary to the real purpose and meaning of the stipulation as above defined.

Therefore the question submitted to this Commission under the foregoing Agreed Statement must be answered in the negative, since a ratification subsequent to April 9, 1923, of the election of parties in the list of members filed with the Statement of Facts does not enable the parties so ratifying such election to present proof of claims in their own behalf or through the claiming Association for the consideration of this Commission.

Although this decision deals only with the jurisdiction of this commission under the Agreement of August 10, 1922, and not with the liability of Germany under the Treaty of Berlin, nevertheless it is appropriate to point out that under certain other recent decisions of this Commission a large portion of the claims under consideration would not be sustained as financial obligations of Germany within the terms of the Treaty of Berlin, even if they were allowed to be presented to this Commission on their merits.

Done at Washington May 27, 1925.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

¹ See Administrative Decision No. II, page 8. (*Note by the Secretariat*, this volume, p. 26 *supra.*)

HENRY W. WILLIAMSON AND OTHERS (UNITED STATES)
v. GERMANY

ELLEN WILLIAMSON HODGES, ADMINISTRATRIX OF THE
ESTATE OF CHARLES FRANCIS WILLIAMSON,
DECEASED (UNITED STATES) v. GERMANY

(February 21, 1924, pp. 364-366.)

DAMAGES IN DEATH CASES: ACTUAL FINANCIAL CONTRIBUTIONS, DEPENDENTS.

—EVIDENCE: PRESUMPTIONS. Claims for losses suffered by father, sister, brother and nephew of *Lusitania* victim. Application of rules announced in *Lusitania* Opinion, see p. 32 *supra*, and of other decisions. No evidence of decedent's earning capacity or income; inconclusive presumptions of valuable property stored. Damages allowed on behalf of decedent's father and sister, to whom decedent used to make contributions; no damages allowed on behalf of brother and nephew, who were not dependent upon him.

PARKER, *Umpire*, rendered the decision of the Commission.

These two cases, which have been considered and will be disposed of jointly, are before the Umpire for decision on a certificate of the American Commissioner and the German Commissioner ^a certifying their disagreement. A brief statement of the facts as disclosed by the records follows:

Charles Francis Williamson, an American national, 40 years of age, was a passenger on and was lost with the *Lusitania*. He had for a number of years prior to his death been spending most of his time in Paris, France, engaged in business as an art dealer, connoisseur, and commissionaire. The record fails to disclose his earning capacity or his income, and the books of his business can not be located. He lived in apparent affluence and associated with people of wealth, whom he numbered among his clients. In the autumn of 1914 the decedent shipped to New York for sale numerous paintings, tapestries, articles of furniture, and furnishings, which were later appraised at \$92,125.00.

In Docket No. 529 the claim, which is put forward on behalf of the administratrix of the estate of the decedent, is based on the theory that prior to his leaving France the decedent had secretly stored valuable property somewhere outside of Paris to prevent its falling into the hands of the German forces then approaching that city. The argument is pressed that the decedent must have been a man of substantial means because of his ability to borrow large sums of money on his unsecured notes from George J. Gould, Alfred G. Vanderbilt, and other men of great wealth; that since so much of his estate as could be discovered was not sufficient to pay his debts it must follow that he had stored valuable property worth not less than \$75,000, had taken a receipt therefor, had such receipt with him at the time of his death, and the loss of the receipt through Germany's act has resulted in damage to the decedent's estate in the amount of \$75,000 because of the impossibility without such receipt of locating the property in question, for which diligent search has been made without discovering a trace of it. This argument is not convincing. There is no competent evidence in the record that any property was ever stored by the decedent as alleged or any receipt therefor ever executed. In order to support the theory on which this claim is put forward it is necessary to base inconclusive presumptions on inconclusive presumptions, which is not permissible. The

^a Dated February 14, 1924.

claim is founded on mere conjecture and is without competent evidence to support it.

No demand is made for the value of the personal effects lost with decedent.

The net assets of the estate aggregated \$140,521.86, which was distributed among the creditors on the basis of 81.32% of the amount of their claims.

The decedent was survived by his father, Henry W. Williamson, then 75 years of age, a sister, Ellen Williamson Hodges, a brother, Harry A. Williamson, then 50 and 35 years of age respectively, and a nephew, John Baseman Williamson, son of a deceased brother (Eugene L. Williamson). In 1901 the father, at the instance of the decedent, retired from the office of Clerk of the Circuit Court of Allegany County, Maryland, and has since that time engaged in no employment, the decedent making regular contributions amounting to about \$700 per annum, sufficient to meet the father's modest needs.

The decedent had been unusually devoted to his sister, Ellen Williamson Hodges, whose husband had long been ill and died in 1916. The decedent not only contributed from time to time substantial amounts to his sister's maintenance but promised her that in the event of her husband's death he would take care of and support her. The care of her aged father now rests principally on Mrs. Hodges, who in order to support herself and father is employed in a Government department at Washington. There is no evidence that the other claimants were to any extent dependent upon the decedent or that he made any contributions to them.

It is apparent from the records in these cases and another case before the Commission that the pecuniary demands upon the decedent were quite heavy, and according to the provisions of his will more than one-half of his estate (had it been solvent) was bequeathed outside of the members of his family. While decedent had he lived would doubtless have continued making modest contributions to his father and sister, it is probable that such contributions would not have been very substantial in amount.

Applying the rules announced in the *Lusitania* Opinion and in other decisions of this Commission to the facts in these cases as disclosed by the records, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of (1) Henry W. Williamson the sum of five thousand dollars (\$5,000.00) with interest thereon at the rate of five per cent per annum from November 1, 1923, and (2) Ellen Williamson Hodges the sum of ten thousand dollars (\$10,000.00) with interest thereon at the rate of five per cent per annum from November 1, 1923; and further that the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the other claimants herein.

Done at Washington February 21, 1924.

Edwin B. PARKER
Umpire

HENRY GROVES AND JOSEPH GROVES (UNITED STATES)
v. GERMANY

(February 21, 1924, pp. 367-369.)

DAMAGES IN DEATH CASES: ACTUAL FINANCIAL CONTRIBUTIONS, DEPENDENTS.

Claim for losses suffered by brother of *Lusitania* victim. Application of rules

announced in *Lusitania* Opinion. No damages allowed: first claimant was in no sense dependent upon decedent and had no assurance that gifts which decedent used to make to him would continue; second claimant did not actually assert claim.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the American Commissioner and the German Commissioner ^a certifying their disagreement. A brief statement of the facts as disclosed by the record follows:

The United States asserts this claim on behalf of Henry Groves and Joseph Groves for losses sustained by them resulting from the death of their brother, George Groves, a passenger lost on the *Lusitania*. It is, however, clear from the record that no claim is asserted by Joseph Groves. With respect to the claim of Henry Groves the facts are:

Three brothers, George, Henry, and Joseph Groves, born in Lincolnshire, England, emigrated to the United States many years ago and located in Illinois, operating contiguous farms. All of them became naturalized citizens of the United States. The wife of George died in 1902, after which he spent much of his time with his brother Henry on the latter's farm, although he visited the home of his brother Joseph "and took his meals there a considerable part of the time" and also spent some time in England, just how much is not disclosed by the record. The statement is made by both Joseph and Henry Groves that during the last five years prior to the death of their brother George he presented Henry Groves from time to time, as donations or gifts, sums of money averaging about \$300 per annum, that Henry made no charge against the decedent for room or board during the time the latter lived with him, and that these donations or gifts were not in the nature of payments therefor. Neither Henry nor Joseph Groves were dependent upon their brother George. The latter left a will executed in England March 16, 1915, reciting that he was then a resident of Gainsborough in the County of Lincoln, England. It appears that he was then residing with his widowed sister, Sarah Parkinson. He bequeathed his entire estate to this sister and her children save small bequests made to two other brothers, James and Thomas, all residents of England and citizens of Great Britain. His brothers Henry and Joseph are not mentioned in the will, which was probated in England, his entire estate passing thereunder, his sister, Mrs. Parkinson, and her three children receiving about \$25,000, his brother James about \$2,500, and his brother Thomas about \$1,250.

It is apparent from the record that George Groves, then more than 68 years of age, a widower without children, was residing in England where he was born and where most of his family lived, making his home with his sister, to whom and her children he was devoted. There is no evidence in the record that he left any property in the United States or intended to return here. His brother Henry was in no sense dependent upon him and had no assurance that the gifts estimated at \$300 per annum would continue. On the contrary, the disposition made of his estate by the decedent in his will executed in England less than two months prior to his death negatives the idea that he intended to make any provision for or contributions to his brother Henry.

Applying the rules announced in the *Lusitania* Opinion to the facts as disclosed by the record, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government

^a Dated February 14, 1924.

of Germany is not obligated to make any payment to the Government of the United States on behalf of either Henry Groves or Joseph Groves.

Done at Washington February 21, 1924.

Edwin B. PARKER
Umpire

HEPZIBAH VERNON BUTLER (UNITED STATES)
v. GERMANY

(February 21, 1924, pp. 407-408.)

DAMAGES IN DEATH CASES: ANTICIPATED FINANCIAL CONTRIBUTIONS; PERSONAL PROPERTY: CLAIM TO BE PRESENTED BY EXECUTOR.—EVIDENCE: WITNESSES. Claim for loss suffered by mother of *Lusitania* victim. Application of rules announced in *Lusitania* Opinion, see p. 32 *supra*. Evidence concerning decedent's earning capacity: testimony of witnesses. *Held* that, since will of decedent was probated, claim for value of personal property lost should have been presented, if at all, on behalf of executor. Damages allowed for anticipated contributions to maintenance of claimant.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the American Commissioner and the German Commissioner^a certifying their disagreement. A brief statement of the facts as disclosed by the record follows:

George Lay Pearce Butler, an American national, 45 years of age, was a passenger on and went down with the *Lusitania* on May 7, 1915. He was survived by a widow, Inez Jolivet Butler—a violinist—who committed suicide in New York July 22, 1915; a father, who died July 21, 1920, at the age of 81 years; and a mother (this claimant), who was then 73 years of age; and also by two brothers and two married sisters, all of whom were mature and had domestic establishments of their own. A claim is being asserted here only on behalf of the surviving mother, Hepzibah Vernon Butler.

The decedent possessed marked versatility. He embarked in business as a banker; then became a concert singer, touring extensively; then an importer's agent and promoter; and during the last four months of his life was representing the Russian Government in the placing of contracts for munitions. At one place in the record the statement is made that he was en route to Europe to place a munitions contract for the Russian Government when he met his death; elsewhere in the record it is stated that he was en route to England for the purpose of bringing his wife to America. The testimony concerning his earning capacity is vague. Several witnesses estimated that during the last five years of his life his average annual income was from \$10,000 to \$20,000. There are also some more or less speculative estimates as to what he was earning and would probably have earned from his activities in placing munitions contracts.

It is stated in the record that the will of decedent was probated in New York September 6, 1916. His widow was then dead; his father and mother were then living. The record does not disclose the terms of the will or the value of his estate. It does appear from the record that the widow collected \$20,000 insurance on the life of decedent. The statement is also made that the mother

^a Dated February 14, 1924.

of the decedent "inherited from" him the sum of \$10,000. Whether the father, who was then living, "inherited" a like amount does not appear. One of the surviving brothers of decedent is a minister of the Gospel, the other a music teacher. The statement is made that the income of decedent was much larger than that of his brothers and sisters, and that he was better able to contribute to his mother's support. There is, however, no evidence in the record of such contributions having been made, save that decedent furnished his parents with "delicacies and luxuries".

The claimant, who is now 81 years of age, has personal property of the value of \$5,000 and an income for life from approximately \$20,000. She is feeble and in need of constant care and attention. Her income is not sufficient to maintain her. The record justifies her anticipation that had the decedent lived he would have contributed, to some extent at least, to her maintenance.

The value of the personal property lost with the decedent on the *Lusitania* is estimated at \$500, for which claim is made. As the will of the decedent was probated, this claim should have been put forward, if at all, on behalf of the executor. No such claim by the executor, or on behalf of the estate, is pending here.

Bearing in mind that the basis of the award is not the value of a life lost, nor is it the loss suffered by the decedent's estate, but only the losses to *claimant* resulting from the death of the decedent in so far as such losses are susceptible of measurement by pecuniary standards, and applying the rules announced in the *Lusitania* Opinion to the facts herein set forth, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Hepzibah Vernon Butler the sum of five thousand dollars (\$5,000.00) with interest thereon at the rate of five per cent per annum from November 1, 1923.

Done at Washington February 21, 1924.

Edwin B. PARKER
Umpire

CHARLES H. ROSENTHAL, ADMINISTRATOR *DE BONIS NON*
OF THE ESTATE OF RETTA C. SHIELDS, DECEASED
(UNITED STATES) *v.* GERMANY

EDWIN H. SHIELDS AND ALBERT MILLS, ADMINISTRATORS
DE BONIS NON OF THE ESTATE OF VICTOR E. SHIELDS,
DECEASED (UNITED STATES) *v.* GERMANY

(February 21, 1924, pp. 412-415.)

DAMAGES IN DEATH CASES: ANTICIPATED INHERITANCE OF ESTATE, ANTICIPATED FINANCIAL CONTRIBUTIONS.—EVIDENCE: WITNESS. Claims for alleged loss of anticipated inheritance of estate and of anticipated contributions, suffered by heirs and next of kin of *Lusitania* victims. Application of rules announced in *Lusitania* Opinion, see p. 32 *supra*. Evidence: testimony of witness. No damages allowed.

PARKER, *Umpire*, rendered the decision of the Commission.

These two related cases, which have been considered and will be decided together, are before the Umpire for decision on a certificate of the two National

Commissioners^a certifying their disagreement. A brief statement of the facts as disclosed by the records follows:

Victor E. Shields, an American national, and Retta Cohen, also an American national, were married October 1, 1896. There was no issue of this marriage. They were both passengers on and went down with the *Lusitania*. At that time Shields was 45 and his wife 43 years of age. Shields had for a period of approximately 25 years been engaged in the wholesale liquor business at Cincinnati, Ohio. His average earnings were approximately \$10,000 per annum. He left an estate of a value of more than \$100,000 and life insurance of \$40,000. Mrs. Shields left an estate of \$20,000 and life insurance of \$10,000. On the 8th day of May, 1907, Shields executed a will bequeathing to his wife his entire estate and naming her as executrix of his will without bond. On the same day Mrs. Shields executed a similar will bequeathing her entire estate to her husband and naming him executor of her will without bond. Both of these wills were in effect at the time of their deaths. Shields left surviving him the following as his only heirs and next of kin, all being at the time of his death and ever since American nationals: Virginia Altman, a widowed sister; William H. Shields, a brother, since deceased, leaving no issue but being survived by his wife, Stella C. Shields; Edwin H. Shields, a brother; Emma Mihalovitch, a widowed sister, since deceased, who left surviving her Clarence Mills, Albert Mills, and Edgar Mills, each of whom changed his name from Mihalovitch to Mills, by which name they are now known; and Rose Baron, a married sister.

Mrs. Shields left surviving her the following as her only heirs and next of kin, all being at the time of her death and ever since American nationals: Sol W. Cohen, a brother; Delia C. Leiser, a sister; Mammie C. Rosenthal, a sister; Juliette E. Wartcki, a sister; Rose C. Rosenthal, a sister; and Belle C. Klein, since deceased, who left the following children, Sidney Klein, Ben F. Klein, Agatha Klein, Stanley Klein, and Will C. Klein.

These claims are put forward by the administrators of the estates of Mr. and Mrs. Shields respectively in behalf of the respective heirs and next of kin of decedents. None of their relatives were dependent upon either Mr. or Mrs. Shields for support and neither of them during their lives made any contributions to their relatives. Charles H. Rosenthal, administrator of the estate of Mrs. Shields, testified on October 24, 1923, that "None of the next of kin of deceased", Mrs. Shields, "were dependent upon her for support at the time of her decease. Deceased, did however from time to time give to her sister Delia Leiser (one of her next of kin) sums, the amount of which I have been unable to learn, towards the comfort of said Delia Leiser. Said Delia Leiser is a native-born citizen of the United States, is aged 70 years and now lives at the southeast corner of Ridgeway and Harvey Avenues, Cincinnati, Ohio". The Commission has not been given the benefit of the testimony of Delia Leiser. With the exception of the testimony above quoted, there is not a syllable in the record in either case indicating that either of the decedents made contributions to members of their respective families or that there was any occasion for their so doing.

It is urged that as Mr. Shields was two years older than his wife, she would, but for the wrongful act of Germany in sinking the *Lusitania*, have probably survived him and would then under his will have inherited his entire estate of a value of more than \$100,000, and that her next of kin would have ultimately benefited thereby.

On the other hand, Mr. Shields' next of kin urge that his "wife having

^a Dated February 14, 1924.

perished with him on the *Lusitania*, there is no room for doubt that *if he had survived,*" he, being then without wife or children, would have been generous in his contributions to them. It is not suggested that either would have made contributions to the members of the respective families had both continued to live.

The speculative nature of these contentions is obvious. They furnish no sound basis on which to rest an award.

As heretofore pointed out, the awards which this Commission is empowered to make in death cases have for their basis not the value of a life but the losses sustained by the claimants resulting from a death, in so far only as such losses are susceptible of measurement by pecuniary standards. The records in these cases indicate that Mr. and Mrs. Shields maintained their own domestic establishment, separate and apart from both his and her relatives, all of whom were independent of them.

No claim is made in either case for property lost.

Applying the rules announced in the *Lusitania* Opinion to the facts as disclosed by the records, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimants herein.

Done at Washington February 21, 1924.

Edwin B. PARKER
Umpire

THOMAS C. MILLER AND OTHERS (UNITED STATES)
v. GERMANY

(September 19, 1924, pp. 425-427.)

DAMAGES IN DEATH CASES: ANTICIPATED FINANCIAL CONTRIBUTIONS, PERSONAL PROPERTY. Claim for loss suffered by parents of *Lusitania* victim. Application of principles and rules announced in Commission's decisions. Damages allowed for anticipated contributions to maintenance of parents, and for personal property lost.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the two National Commissioners^a certifying their disagreement. A brief statement of the facts as disclosed by the record follows:

James B. Miller, an American national, was a passenger on and went down with the *Lusitania*. At that time he was 31½ years of age, unmarried and left no issue. His father, Thomas C. Miller, then 59½ years of age, his mother, Emma J. Miller, then 55 years of age, a married sister, Adena Miller Rich, and a brother, Thomas C. Miller, Jr., all of whom were born and have ever remained American nationals, survived him. The deceased had contributed to the education of his sister and younger brother, but at the time of his death they were not dependent on him and he was making no contributions to them. No claim is made on their behalf. The father of deceased has long been and still is an honored member of the bar of Erie, Pennsylvania.

At the time of his death Captain Miller was in the service of the United States Department of Commerce as Assistant in the Coast and Geodetic

^a Dated February 14, 1924.

Survey receiving a salary of \$2,000 per annum plus an allowance of \$2.50 per day in lieu of subsistence while on active field duty. He had a most enviable record, had been especially commended by the Secretary of Commerce for distinguished services, was strong, active, and ambitious, and his prospects for advancement were bright. At the time of his death he was en route to Glasgow, Scotland, to take up advanced study in the University of Glasgow in furtherance of his life's work.

While at the time of his death the deceased was not contributing to the support of his parents, the record affirmatively indicates that he was definitely planning to care for them in their old age and equipping himself to that end. His brother and sister, both married, with others dependent on them, were not and are not in a position to care for their parents, now advanced in years. That a great loss was sustained in the death of James B. Miller there can be no doubt. While the evidence of pecuniary loss cognizable under the law is somewhat meager, the facts stated and the justifiable inferences therefrom support a substantial award.

The deceased had with him personal property of the value of \$3,650 which was lost.

Applying the principles and rules heretofore announced in the decisions of this Commission to the facts as disclosed by the record, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of (1) Thomas C. Miller and Emma J. Miller, his wife, jointly, the sum of fifteen thousand dollars (\$15,000.00) with interest thereon at the rate of five per cent per annum from November 1, 1923, and (2) Thomas C. Miller as Administrator of the Estate of James B. Miller, deceased, the sum of three thousand six hundred fifty dollars (\$3,650.00) with interest thereon at the rate of five per cent per annum from May 7, 1915.

Done at Washington September 19, 1924.

Edwin B. PARKER
Umpire

GLADYS BILICKE (UNITED STATES)
v. GERMANY

GLADYS BILICKE, INDIVIDUALLY AND AS GUARDIAN OF THE
ESTATE OF CARL ARCHIBALD BILICKE, AND OTHERS (UNITED
STATES) *v.* GERMANY

(September 24, 1924, pp. 435-438.)

DAMAGES: PERSONAL INJURIES; IN DEATH CASES: ACTUAL, ANTICIPATED FINANCIAL CONTRIBUTIONS, PERSONAL SERVICES.—EVIDENCE: CERTIFICATE. Claims for losses suffered by wife and children of *Lusitania* victim. Application of rules announced in *Lusitania* Opinion, see p. 32 *supra*, and in other decisions. Evidence: physicians certificate. *Held* that in death cases Commission empowered to make awards for loss of actual or probable contributions, which were fruits of personal efforts of decedent, not for loss of such contributions derived as income from decedent's estate, which on his death vested in claimants and yields to them same income as it yielded to decedent during life. Damages allowed on behalf of (1) claimant

in first case for personal injuries, (2) claimants in second case, a.o. for loss by children of care and supervision of father.

PARKER, *Umpire*, rendered the decision of the Commission.

The two cases numbered and styled as above¹ have been considered and will be disposed of together. They are before the Umpire for decision on a certificate of the two National Commissioners^a certifying their disagreement.

It appears from the records that Albert Clay Bilicke, then nearly 54 years of age, with his wife, Gladys Bilicke (a claimant herein), then 49 years of age, were passengers on the *Lusitania*. The former was lost. The latter was rescued, suffering from shock and exposure. They had been married about fifteen years. The deceased left surviving him, besides his widow, two sons and one daughter, Albert Constant, then 13 years of age, Nancy Caroline, then 11½ years of age, and Carl Archibald, then 8 years of age. The deceased and all of the claimants were born and have ever remained American nationals. The daughter married Henry de Roulet, also an American national, on July 17, 1923.

When the *Lusitania* went down Mrs. Bilicke was thrown into the water, where she remained for some time, but was finally rescued. Her experiences at and immediately following the wreck and for several days thereafter were most distressing. While she sustained several abrasions on her head and contusions on her body, these were of comparatively small moment. The testimony in the record is practically conclusive that she suffered almost complete nervous prostration as a direct result of the shock and exposure. This neurasthenic condition, which is real, persists, notwithstanding years of careful nursing and the best scientific advice. Several physicians of high standing who have treated her certify in the strongest terms that her injuries are permanent and in all probability she will never recover her former mental and nervous poise.

The deceased, Albert Clay Bilicke, had long been actively engaged in building, real estate, and hotel ventures in Los Angeles, California. The record discloses that on July 1, 1891, his net worth was only slightly in excess of \$16,000. His books disclose that his accumulations grew steadily until on his death his estate was conservatively valued at \$2,706,864. It consisted principally of California properties and securities and substantial real-estate holdings in Kansas City, Missouri. This estate was created through the exercise of the industry and sound business judgment of the deceased. For years prior to his death the personal expenditures of the deceased and the members of his family and the cost of maintaining their domestic establishments ranged from approximately \$35,000 to \$68,000 per annum.

There can be no doubt but that at the time of his death the deceased was active in the management of his properties and through his personal efforts was constantly contributing to the support and maintenance of his family and increasing the estate which they should ultimately inherit. It may be fairly inferred, however, from the record that for several years prior to his death the deceased had devoted himself less intensively to his business affairs and more to travel and other recreational pastimes, being to a greater extent than formerly content with the income from his already large properties. His books

¹ Original report: United States of America on behalf of Gladys Bilicke, Claimant, *v.* Germany, Docket No. 226; United States of America on behalf of Gladys Bilicke, individually and as Guardian of the Estate of Carl Archibald Bilicke, and Albert Constant Bilicke and Nancy Bilicke de Roulet, Claimants, *v.* Germany, Docket No. 272.

^a Dated September 23, 1924.

show a decrease in his net worth on December 31, 1913, from the same date of 1912 and a still further decrease on December 31, 1914, while his estate as of May 7, 1915, the date of his death, was valued at \$2,706,000 as against \$2,316,000 on December 31, 1912.

Under the terms of the will of the deceased the widow received a cash legacy of \$50,000 for distribution to friends and charities and the deceased's sister (not a claimant herein) a cash legacy of \$10,000, and the remainder he bequeathed one-third to the widow and two-ninths to each of his three children. These legacies of California properties are held by a family holding corporation, the gross annual income of which, generally speaking, has steadily increased since the death of the deceased, and the net annual income from it, with three exceptions, has been in excess of the deceased's net income for several years prior to his death. After paying the California State inheritance taxes and all other expenses, the net worth of the properties bequeathed by the deceased to the claimants and now held by them is somewhat in excess of their value at the time of his death.

The measure of the awards which this Commission is empowered to make in death cases is, not the value of a life, but the loss to claimants resulting from a death so far only as such losses are susceptible of being measured by pecuniary standards. To the extent that contributions by deceased to claimants (1) made during his life, and (2) those which would probably have been made but for Germany's act causing his death, were the fruits of the personal efforts of the deceased whose producing power was destroyed by death, the claimants have suffered pecuniary damages, which Germany is obligated to pay. But to the extent that such actual or probable contributions were derived as income from the estate of deceased which vested in the claimants on his death and yielded to them the same income as it yielded to him during his life, the claimants have suffered no pecuniary damages (*Pym v. G. N. Ry. Co.*, 4 Best & Smith's Reports, 396; *S. A. & A. P. Ry. Co. v. Long*, 87 Tex. Sup. Ct. Repts.).

The children of deceased, of tender years at the time of his death, have sustained pecuniary loss in being deprived of the care and supervision of a father of unusually strong character and sound judgment.

In neither case is any claim made for the value of personal property lost at sea.

Consolidating these two cases, the one for personal injuries suffered by Mrs. Bilicke, the other for pecuniary damages sustained by the claimants in the death of Mr. Bilicke, and applying the rules announced in the *Lusitania* Opinion and in the other decisions of this Commission to the facts as disclosed by the records, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of (1) Gladys Bilicke individually the sum of fifty thousand dollars (\$50,000.00), (2) Albert Constant Bilicke the sum of thirty thousand dollars (\$30,000.00), (3) Nancy Bilicke de Roulet the sum of thirty thousand dollars (\$30,000.00), and (4) Gladys Bilicke as Guardian of the Estate of Carl Archibald Bilicke the sum of thirty thousand dollars (\$30,000.00), with interest on each of said sums at the rate of five per cent per annum from November 1, 1923.

Done at Washington September 24, 1924.

Edwin B. PARKER
Umpire

RICHARD J. HICKSON AS ADMINISTRATOR *CUM TESTAMENTO*
ANNEXO OF CATHERINE J. HICKSON (UNITED STATES)
v. GERMANY;

RICHARD J. HICKSON AS ADMINISTRATOR *CUM TESTAMENTO*
ANNEXO OF CAROLINE HICKSON KENNEDY (UNITED STATES)
v. GERMANY

(September 24, 1924, pp. 439-444.)

DAMAGES IN DEATH CASES: UNINTENTIONAL TERMINATION OF CONTRACTS BETWEEN VICTIMS AND CLAIMANT, MUNICIPAL COURT DECISIONS; PERSONAL PROPERTY; RULE OF PROXIMATE CAUSE.—EVIDENCE: CLAIMANT'S TESTIMONY.—INTERPRETATION OF TREATIES: INTENTION OF NEGOTIATORS, DRAFTERS, EXECUTORS. Claims for alleged losses suffered by brother of two *Lusitania* victims, employed in brother's service on verbal contracts. Application of rules announced in Provident Mutual Life Insurance Company and Others case, see p. 91 *supra*, and in other decisions. Evidence: sworn statement by claimant. *Held* that, under Treaty of Berlin, Germany not obligated to pay losses suffered by claimant flowing directly from termination of contracts by sisters' death on *Lusitania*: (1) reference made to Provident case, *supra*, (2) American Courts, including Supreme Court of United States, uniformly rejected claims for such losses *unintentionally* brought about, and nothing indicates that such claims were within contemplation of those who negotiated, drafted, and executed Treaty of Berlin. Damages allowed for lost property only.

PARKER, *Umpire*, rendered the decision of the Commission.

These two related cases, which have been considered and will be decided together, are before the Umpire for decision on a certificate of the two National Commissioners^a certifying their disagreement. A brief statement of the facts as disclosed by the records follows:

The two sisters of Richard J. Hickson, claimant herein, namely, Catherine J. Hickson and Caroline Hickson Kennedy, then 57 and 53 years of age respectively, each of the three a citizen of the United States, took passage on and went down with the *Lusitania*. At that time claimant was 55 years of age and, save for a niece who died in 1916, the sole surviving heir and next of kin of his sisters, and upon the death of both of them and the niece became the sole and universal legatee under the terms of their respective wills. Catherine J. Hickson had never married. Caroline Hickson Kennedy, a widow, left no children surviving her.

It appears from the records that in 1902 the claimant embarked on a "ladies' apparel business" venture in New York City with a capital of \$800 advanced by his sister, Mrs. Kennedy. It was agreed between them that the business should belong to claimant and that Mrs. Kennedy should be employed by claimant and devote her entire time to the business during the remainder of her life, the claimant agreeing from the profits of the business to "pay her a salary plus a drawing account commensurate with her needs". This agreement was verbal. The business was conducted under the trade name of Hickson & Company but was owned by the claimant. During the early years of the business Mrs. Kennedy drew \$50 a week. Later her drawings increased until

^a Dated September 23, 1924.

in 1915, the year of her death, and for several years prior thereto she drew an average of \$5,000 per annum. The only legal interest she had in the business was this verbal contract of employment.

Catherine J. Hickson became identified with the claimant's business as an employee in the year 1910, under substantially the same contract with the claimant as that existing between the claimant and Mrs. Kennedy. In pursuance of this contract Miss Hickson from time to time drew from the business funds "commensurate with her needs" averaging from \$50 to \$75 per week.

Mrs. Kennedy and Miss Hickson resided together. Their brother, Richard J. Hickson, claimant herein, maintained a separate establishment, his wife and son, the latter 22 years old when the *Lusitania* was sunk, residing with him. During the years 1910, 1911, and 1912 the claimant drew from the business in excess of \$20,000 per year, and during the subsequent years up to 1915 he drew in excess of \$30,000 per year, all of which was absorbed in the living expenses of himself and family.

On January 1, 1910, the net assets of the business aggregated something over \$32,000, and on January 1, 1915, approximately \$ 61,500. The claimant states under oath that "The business at this time had gained such an impetus that in 1915, the year of Mrs. Kennedy's death, the profits earned amounted to \$125,587.56" and further that "on December 31st, 1915, the net assets of the business amounted to \$179,078.98 exclusive of goodwill".

The claim is made that because of Mrs. Kennedy's genius as a designer of women's apparel and her "peculiar and exceptional business abilities" the services she rendered the business, and for which she was paid by her brother, the owner of the business, \$5,000 per annum, "were worth at least \$50,000 a year" and that as a result of the loss of Mrs. Kennedy's services "difficulties soon set in and increased each year until 1920 when the business was unable to meet its obligations all of its liquid assets having been pledged to secure loans". It is by no means clear from the records that these difficulties resulted from the loss to the business of Mrs. Kennedy's genius. The strong inferences are that they resulted from the improvident financial ventures of the claimant. Shortly after the sinking of the *Lusitania*, when, according to claimant's statement, the net assets of the business, many of which were slow assets, aggregated only \$179,000, it appears that claimant withdrew from the business \$50,000 in cash which he invested in establishing a magazine to be managed by his son in connection with the business, which was a complete failure and the investment a total loss, and about the same time invested about \$100,000 in furniture and fixtures. However, in view of the disposition which will be made of these claims the cause of claimant's financial failure becomes immaterial.

The two sisters sailed on the *Lusitania* intending to remain in Paris a considerable time as buyers for their brother's business. Each of them carried with her wearing apparel, gowns, furs, jewelry, and \$1,000 in cash. While this personal property is not itemized, the statement is made that the value of each decedent's effects, including cash, was \$7,000, or a total of \$14,000. Under all the circumstances this is not regarded as excessive. All of this personal property was lost.

Mrs. Kennedy's estate consisted of cash in bank, \$15.00; a half interest in household effects, \$500; interest in real estate beyond the limits of the United States, \$5,865.61. Miss Hickson's estate consisted of \$5,000 cash in bank, \$23,000 value of real estate beyond the limits of the United States, and a half interest, valued at \$500, in household effects. Under their respective wills both of these estates were vested in the claimant herein.

With the exception of the item of personal property lost, the claim is expressly based on the alleged losses suffered by the claimant from the

termination of the two verbal contracts between the claimant and each of his sisters, by the terms of which they agreed to serve him during their respective lives; claimant in turn agreeing to pay them salaries, plus a drawing account, commensurate with their needs, the termination of which contracts, it is alleged, was directly and proximately caused by Germany's act in sinking the *Lusitania*.

The alleged contracts were entered into and were to be performed in the State of New York. The claimant in one breath contends that they were not void under the statute of frauds, since they *might* have been performed within one year, and in the next breath contends that the law of averages should be applied in measuring damages under the contracts and claimant has a right to recover on the assumption that the contracts would have remained in effect about 17 years longer but for Germany's act. Notwithstanding these apparently inconsistent contentions, for the purpose of this opinion each contract will be treated as one not contravening the statute of frauds.

The validity of the alleged contracts may well be challenged because of their uncertainty. What salaries and drawing expenses were commensurate with their respective needs must, in the nature of things, have depended largely on their own wills or wishes. Claimant's counsel meets this objection with the contention that this indefiniteness had been made definite by the actual construction given by the claimant and his sisters, so that in Mrs. Kennedy's case there was a positive agreement on her part "to render service to the claimant for \$5,000 a year" and the "service rendered was worth \$50,000 a year". Claimant's counsel contends that while the contract was perhaps not one that might be enforced through specific performance the courts would have enjoined Mrs. Kennedy from accepting employment from anyone engaged in a business similar to that of her brother. It may well be doubted if a court of equity would intervene to assist in the enforcement of a contract of employment, even though legal in its terms, where the employee had bound herself to work for life for her needs, placed by the claimant at \$5,000 per annum, when, according to the claimant, her services were reasonably worth not less than \$50,000 per annum. A court of conscience must decline to give its active aid to the enforcement of a contract which in its inherent nature is unfair, one-sided, and inequitable.

But brushing aside all the numerous obstacles to the establishment of valid contracts which beset claimant's path, and treating the two contracts declared on as valid, the question is presented: Under the terms of the Treaty of Berlin is Germany financially obligated to pay losses suffered by claimant flowing directly from the terminating of contracts between the claimant and his sisters, which termination resulted from their deaths on the *Lusitania*? The Umpire decides that she is not. The reasons therefor are set forth at length in the opinion of the Umpire in deciding the life-insurance cases (Decisions and Opinions, pages 121-140)^a and need not be repeated here. Claimant's counsel earnestly contends that where one without sufficient justification interferes with a contract sanctioned by law to the injury of a party to it, the wrongdoer must respond in damages to the injured party. In support of this proposition are cited numerous authorities in each of which it was made to appear that the third party inflicting the injury upon one of the parties to the contract did so with full knowledge of the contract and with the *intention* of interfering with it. The authorities cited in no wise conflict with the rule here announced. But the great diligence of claimant's counsel has pointed this Commission to no case, and it is safe to assert that none can be found, where any tribunal has

^a Note by the Secretariat, this volume, pp. *supra*.

awarded damages to one party to a contract claiming a loss as a result of the killing of the second party to such contract by a third party not privy to the contract without any *intention* of disturbing or destroying such contractual relations. The American courts, including the Supreme Court of the United States, have uniformly rejected such claims. The United States cannot now be heard to assert them against Germany. Certainly there is nothing in the Treaty of Berlin or in the records of these cases or of any of the cases before this Commission to indicate that claims of this class could have been within the contemplation of those who negotiated, drafted, and executed that Treaty.

For the reasons herein set forth and under the rules heretofore announced the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of (1) Richard J. Hickson as Administrator *cum testamento annexo* of Catherine J. Hickson the sum of seven thousand dollars (\$7,000.00) and (2) Richard J. Hickson as Administrator *cum testamento annexo* of Caroline Hickson Kennedy the sum of seven thousand dollars (\$7,000.00), with interest on each of said sums at the rate of five per cent per annum from May 7, 1915.

Done at Washington September 24, 1924.

Edwin B. PARKER
Umpire

DANIEL FROHMAN, INDIVIDUALLY, AS ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF CHARLES FROHMAN, DECEASED, AND AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF CARYL FROHMAN, DECEASED, AND OTHERS
(UNITED STATES) *v.* GERMANY

(September 24, 1924, pp. 444-447.)

DAMAGES IN DEATH CASES: ANTICIPATED FINANCIAL CONTRIBUTIONS. Claims for alleged losses suffered by brothers and sisters of *Lusitania* victim. Application of rules announced in *Lusitania* Opinion, see p. 32 *supra*, and in other decisions. No damages allowed, since probable contributions from decedent not greater than those actually received from his estate.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners^a certifying their disagreement.

From the records it appears that Charles Frohman, an American citizen, then 54 years of age, was a passenger on and went down with the *Lusitania*. He had never married. He left surviving him two brothers, Daniel and Gustave Frohman, then 63 and 60 years of age respectively, and four sisters, Caryl, Emma, and Etta Frohman and Mrs. Rachel Frohman Davison, then 62, 58, 50, and 56 years of age respectively, all of these survivors being American nationals at the time of and ever since his death.

^a Dated September 23, 1924.

Caryl Frohman died January 18, 1924, leaving no will. Daniel Frohman has been appointed and qualified as sole administrator of her estate. Her only heirs and next of kin are her surviving brothers and sisters above named.

Since 1893 Charles Frohman had been engaged in business on his own behalf as a theatrical producer. His productions on the whole were well received throughout the United States and in England. Many of America's and several of England's foremost artists appeared under his exclusive management. He had their confidence and good will, perhaps his most valuable asset. During the ten years next preceding his death his gross profits from theaters, companies, and other theatrical business in the United States and Canada amounted to in excess of \$1,250,000 and his net profits were in excess of \$350,000. For several years prior to his death the deceased was interested in theaters in London, England, which he maintained on a lavish scale and on which he sustained heavy losses, substantially reducing his profits from his American business. He had practically given up all save two of these London establishments shortly before his death, and these two were disposed of by his successor, Charles Frohman, Inc., shortly after his death.

Two administrators of his estate were appointed and qualified, of whom the claimant Daniel Frohman is the sole survivor. The funeral expenses and expenses of administration amounted to \$42,171.70. The principal items were administrators' bonds, expenses of London administration, administrators' commissions, and legal services. After these expenses were paid and after deducting the liabilities of \$876,760.09 from the inventoried value of the assets (which were by no means liquid), it appears that the net worth of the estate, exclusive of the goodwill, was \$451.78. The administrators and creditors of the estate formed a corporation designated Charles Frohman, Inc., to which was conveyed all of the assets including the goodwill, but expressly excluding all claims for damages by reason of the death of the deceased, which corporation assumed all of the liabilities of the estate. Preferred stock was issued by this corporation to the preferred creditors who would accept it in full payment of their claims against the estate, and the common stock was issued one-half to the promoter and manager of the corporation for his services and the other one-half divided among the six brothers and sisters of the deceased, 250 shares to each.

Later on all of the common stock of Charles Frohman, Inc., was acquired by the Famous Players-Lasky Corporation on the basis of the common stockholders of Charles Frohman, Inc., receiving for three shares of their stock five shares of the common stock of the Famous Players-Lasky Corporation. At the time this agreement was entered into the Famous Players common stock was selling on the New York Stock Exchange at approximately \$112.00 per share. On this basis the 5,000 shares of the Famous Players-Lasky Corporation stock received by the holders of the common stock of Charles Frohman, Inc., was worth \$560,000 and each of the brothers and sisters of Charles Frohman, six in number, received Famous Players stock of the value of \$46,666.

The deceased had never made a will. He left no life insurance. There is nothing in the record to indicate that he had made any provision for the maintenance or support of any of his relatives in the event of his death. He did not reside with them. There is nothing in the record to show that he ever made or intended to make any pecuniary contributions to his brother Daniel. There is a statement in the record by the man who had been the confidential clerk, bookkeeper, and auditor of deceased from 1903 to the time of his death to the effect that he knows of gifts made by the deceased to his sister Mrs. Davison aggregating \$600. What these gifts were or when they were made is not disclosed. The record indicates that Mrs. Davison has long been living

with and is supported by her husband and was in no wise dependent on deceased for her maintenance or support.

Gustave Frohman, a brother of deceased, had formerly been in the latter's employ as manager of theatrical companies *en tour* out of New York, receiving a fixed salary. During 1913-1914-1915 this brother managed a corporation which he himself organized, which it appears was not successful. He states that the deceased in addition to his salary from time to time made to him gratuitous payments varying in amount, but that from 1910 he (Gustave) "had no need of and, therefore, did not ask for or receive from Charles Frohman any additional financial assistance or gifts". The record indicates that the probabilities of the deceased, had he lived, making further financial contributions to his brother Gustave were remote. A claim is made on behalf of Louis H. Frohman under an assignment from his father, Gustave, dated July 25, 1916, purporting to assign and transfer to Louis all of Gustave's "right to recover damages on account of the death of Charles Frohman resulting from the sinking of the *Lusitania*". It will not be necessary to consider the terms or effect of this assignment in view of the disposition of this case.

Daniel Frohman, a claimant herein, provided a house for the use of his three unmarried sisters, Caryl, Emma, and Etta Frohman, who resided together in New York City, and the deceased contributed \$50 a week to their support and maintenance. This contribution, equivalent to \$2,600 a year, was cut off by Charles Frohman's death. In lieu of it each of these three sisters as an heir received from his estate stock of the value of \$46,666, or of the aggregate value of \$140,000. The record indicates that the stock so received by these three sisters is now paying dividends at the rate of \$10,000 per annum.

There is no doubt but that Charles Frohman had a large earning capacity. His producing power was destroyed by his death. His operations were on a large scale but his income therefrom variable and speculative. His life expectancy was greater than that of any of his brothers and sisters save that of his sister Etta, who was four years his junior.

The record negatives the claim that any of the brothers or sisters of deceased would but for Germany's act which resulted in his death have probably received from him greater pecuniary contributions than they have received from his estate as his heirs.

No claim is made for the value of the personal effects lost with the deceased on the *Lusitania*.

Applying the rules announced in the *Lusitania* Opinion and in the other decisions of this Commission to the facts as disclosed by this record, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimants herein or any of them.

Done at Washington September 24, 1924.

Edwin B. PARKER
Umpire

ELBERT HUBBARD II, INDIVIDUALLY AND AS EXECUTOR
OF THE LAST WILL AND TESTAMENT OF ELBERT HUBBARD,
AND OTHERS (UNITED STATES) *v.* GERMANY

ELBERT HUBBARD II, AS EXECUTOR OF THE LAST WILL
AND TESTAMENT OF ALICE HUBBARD, AND MIRIAM
HUBBARD ROELOFS (UNITED STATES) *v.* GERMANY

(October 2, 1924, pp. 452-456.)

DAMAGES IN DEATH CASES: PERSONAL SERVICES; ACTUAL CONTRIBUTIONS; PERSONAL PROPERTY. Claims for alleged losses suffered by children of *Lusitania* victims. Application of rules announced in *Lusitania* Opinion, see p. 32 *supra*, and in other decisions. *Held* that in death cases Commission empowered to make awards for loss of actual or probable contributions, which were fruits of personal efforts of decedent, not for loss of such contributions derived as income from decedent's estate, which on his death vested in claimants and yields to them same income as it yielded to decedent during life (cf. Gladys Bilicke case, p. 263 *supra*). Damages allowed on behalf of (1) son for lost business training, (2) married daughter for lost counsel and supervision, (3) unmarried daughter for lost pecuniary contributions; no damages allowed on behalf of two independent sons, neither of whom would ever have received any pecuniary contribution from their father or his estate; damages allowed for lost property.

PARKER, *Umpire*, rendered the decision of the Commission.

The two cases numbered and styled as above¹ have been considered and will be disposed of together. They are before the Umpire for decision on a certificate of the two National Commissioners^a certifying their disagreement.

It appears from the records that Elbert Hubbard, then nearly 59 years of age, and his wife, Alice Hubbard, then nearly 54 years of age, were passengers on and were lost with the *Lusitania*. Elbert Hubbard left surviving him as the issue of his first marriage three sons, Elbert Hubbard II, Ralph, and Sanford, then 32, 28, and 27 years of age respectively, and a daughter, Katherine, then 19 years of age. Elbert and Alice Hubbard left surviving them a daughter, Miriam, then 20 years of age, now the wife of H. D. Roelofs, to whom she was married in July, 1917. Both of the deceased, all of the claimants, and the husband of Mrs. Roelofs were born and have ever remained American nationals.

Elbert Hubbard as author, lecturer, and business man had carved for himself a unique position. He possessed to an unusual degree the faculty of finding apt words for the coinage of pregnant ideas. While not always orthodox, in his writings and on the lecture platform he persistently preached the gospel of industry, thrift, regular habits, simple living, fair dealing, and good will. These records indicate that in these respects he followed in practice his own

¹ Original report: United States of America on behalf of Elbert Hubbard II, individually and as Executor of the Last Will and Testament of Elbert Hubbard, and Ralph Hubbard, Sanford Hubbard, Miriam Hubbard Roelofs, and Katherine Hubbard, Claimants, *v.* Germany, Docket No. 437; United States of America on behalf of Elbert Hubbard II, as Executor of the Last Will and Testament of Alice Hubbard, and Miriam Hubbard Roelofs, Claimants, *v.* Germany, Docket No. 438.

^a Dated September 25, 1924.

precepts. As a result, through his own efforts he accumulated a competency and established a prosperous business, which he bequeathed to two of the claimants herein. That business, which was owned by The Roycrofters, a corporation established in East Aurora, Erie County, New York, was engaged principally in the printing and publishing business but also manufactured and sold various arts and crafts products in copper and leather as well as mission furniture and engaged in some other activities. Elbert Hubbard was president and general manager and Alice Hubbard was vice-president of the Roycrofters corporation. Of the 12,000 shares of that corporation Elbert Hubbard owned 9,909, Alice Hubbard 800, and the claimants herein 547 shares. A large part of the fortunes of both the deceased was represented by ownership in the stock of this corporation, which had paid no dividends prior to their deaths. The profits, which were substantial, were reinvested in and went toward the expansion of the business.

Elbert Hubbard devoted a considerable part of his time to the preparation of articles for and editing the Roycroft magazines, three in number, "The Philistine", "Little Journeys", and "The Fra". "The Philistine", which was launched in 1895, was discontinued on Hubbard's death. The publication of "Little Journeys" was started in 1900 and discontinued in 1909; the publication of "The Fra" started in 1908 and after an unsuccessful attempt to continue its publication following his death was discontinued in 1917. The publication of these magazines, most of the material for which was furnished by Hubbard himself, was an important factor in the success of the Roycrofters corporation.

About one-third of Elbert Hubbard's time was devoted to lecturing and the preparation of articles for magazines other than those published by his company. From the income derived from this purely personal source he paid all of his personal living expenses (save those paid by the application of \$2,500 per annum which he drew from the Roycrofters corporation), and the balance of his income from such sources, averaging slightly over \$18,000 per annum, he turned into the treasury of the Roycrofters.

Alice Hubbard made contributions to the Roycroft magazines and some books written by her were published by the Roycrofters corporation. She actively managed the Roycroft Shops and the Roycroft Inn. The corporation paid her also a salary of \$2,500 per annum.

Both Mr. and Mrs. Hubbard were in excellent health, strong, and unusually active. They had personal effects and cash with them on the *Lusitania* of the value of \$1,000 each, all of which was lost.

Each of the deceased left a will, both dated March 9, 1909, identical in their terms, each naming the other sole and universal legatee but providing in the alternative that if the testator should not survive the other spouse then their respective estates should be divided equally between Elbert Hubbard II and Miriam Hubbard. Both of these wills were in due time probated and their provisions carried into effect. Under their terms Elbert Hubbard II took as legatee under his father's will property valued under the statutes of New York for transfer-tax purposes at \$159,050.45 and Miriam Hubbard (now Roelofs) took property of a like value; while as beneficiaries under the will of Alice Hubbard each of them took property valued for transfer-tax purposes at \$50,614.71. From this it appears that the joint estates of decedents were of the value of \$419,330.32, of which Elbert Hubbard II and Miriam Hubbard Roelofs each took one half or \$209,665.16.

The domestic and business relations between Elbert Hubbard the elder and his son Elbert Hubbard II were unusually close. Through constant daily contact and supervision the elder man made many and varied contributions to his son, who was in training to succeed him, which had a pecuniary value.

At the time of the *Lusitania* disaster Ralph Hubbard, then 28 years of age, was attending the University of Colorado at Boulder, Colorado. He is a teacher by profession. To him his father had made no contributions of any nature for some years prior to his death. Sanford Hubbard, who was 27 years old at the time of his father's death, is a farmer and has a small income from property which he owns. To him Elbert Hubbard had made no contributions for some years prior to his death. The will of Elbert Hubbard, made more than six years prior to his death, did not mention these two sons and the clear inferences from the record are that neither of them would ever have received any pecuniary contributions from their father or from his estate.

Katherine Hubbard, who was then 19 years of age, was attending school at Buffalo, New York, at the time of and for several years prior to her father's death. He was accustomed to contribute from \$500 to \$1,000 per year to her support. She has never married and now lives with her mother in Boulder, Colorado, supplementing the very small income from her property by teaching music. The inferences from the record are that had Elbert Hubbard lived he would have continued to contribute funds to defray her living expenses.

Miriam Hubbard Roelofs is the only child of Elbert and Alice Hubbard. At the time of her parents' deaths she was a student 20 years of age, and she was graduated from the University of Michigan the following year. The third July following their deaths she married, and she has a happy home with four children and a husband. The latter has a small income as a university instructor. While both her parents were devoted to her and she has been deprived of their counsel and supervision, it is reasonably apparent from the record that she has not suffered any very great pecuniary injury through such deprivation.

It will be borne in mind that the measure of the awards which this Commission is empowered to make in these cases is not the value of the lives lost but the pecuniary losses suffered *by claimants* resulting from the deaths. To the extent that contributions by the deceased made during their lives and those which they would probably have made to claimants but for Germany's act causing their deaths were the direct fruits of the personal efforts of the deceased whose producing powers were destroyed by their deaths, the claimants have suffered pecuniary damages which Germany is obligated to pay. But to the extent that such actual or probable contributions were derived as income from the estates of deceased, which vested in the claimants on the deaths of deceased and yielded to the claimants the same income as it yielded to the deceased during their lives, the claimants have suffered no pecuniary damages (*Pym v. Great Northern Railway Co.*, 4 Best & Smith's Reports 396; *San Antonio & Aransas Pass Railway Co. v. Long*, 87 Texas Supreme Court Reports).

Applying the rules announced in the *Lusitania* Opinion and in the other decisions of this Commission to the facts as disclosed by the records herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of (1) Elbert Hubbard II individually the sum of twenty-five thousand dollars (\$25,000.00), (2) Miriam Hubbard Roelofs the sum of twenty-five thousand dollars (\$25,000.00), (3) Katherine Hubbard the sum of seven thousand five hundred dollars (\$7,500.00), with interest on each of said sums at the rate of five per cent per annum from November 1, 1923; (4) Elbert Hubbard II as Executor of the Estate of Elbert Hubbard, deceased, the sum of one thousand dollars (\$1,000.00) with interest thereon at the rate of five per cent per annum from May 7, 1915; and (5) Elbert Hubbard II as Executor of the Estate of Alice Hubbard, deceased, the sum of one thousand dollars (\$1,000.00) with interest

thereon at the rate of five per cent per annum from May 7, 1915; and further decrees that the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimants Ralph Hubbard and Sanford Hubbard.

Done at Washington October 2, 1924.

Edwin B. PARKER
Umpire

CHARLES AMBROSE PLAMONDON, JR., SOLE SURVIVING
ADMINISTRATOR OF THE ESTATE OF CHARLES A. PLAMONDON,
DECEASED, AND INDIVIDUALLY AND ON BEHALF OF HAROLD
MACKIN PLAMONDON AND OTHERS (UNITED STATES) *v.*
GERMANY; AND TWO OTHER CASES

(October 2, 1924, pp. 457-461.)

DAMAGES IN DEATH CASES: ACTUAL CONTRIBUTIONS; EDUCATION; UNINTENTIONAL TERMINATION OF CONTRACT BETWEEN CLAIMANT AND THIRD PARTY; EXPENSES. Claims for alleged losses suffered by children of *Lusitania* victims and by company of which one victim was vice-president, secretary and treasurer. Application of rules announced in *Lusitania* Opinion, see p. 32 *supra*, and in other decisions. *Held* that, under Treaty of Berlin, Germany not obligated to pay losses suffered by claimant company flowing directly from termination of its contract, if any, with other company on vice-president's death: reference made to Hickson case, p. 266 *supra*. *Held* also that in death cases Commission empowered to make awards for loss of actual or probable contributions, which were fruits of personal efforts of decedent, not for loss of such contributions derived as income from decedent's estate, which on his death vested in claimants and yields to them same income as it yielded to decedent during life (cf. Gladys Bilicke case, p. 263 *supra*). Damages allowed on behalf of (1) children for lost pecuniary contributions and education, (2) administrator of parents' estates for (a) expense, (b) lost property.

PARKER, *Umpire*, rendered the decision of the Commission.

These three cases, which have been considered and will be disposed of together, are before the Umpire for decision on a certificate of the two National Commissioners^a certifying their disagreement.

It appears from the records that Charles A. Plamondon and his wife, Mary Mackin Plamondon, both then 57 years of age, were passengers on and were lost with the *Lusitania*. They left surviving them two sons and three daughters, Charles A., Jr., then 25, Harold Mackin, then 23, Marie, then 34, Charlotte Plamondon Ripley, then 32, and Blanche Plamondon Smith, then 29 years of age. The daughter Marie has never married. The second daughter married Allen B. Ripley in April, 1910, and the third daughter married John Henry Smith in January, 1909. Both of the decedents, all of their children, and the husbands of the two married daughters were born and have ever remained American nationals.

The father of these claimants was strong physically, active in business as well as in civic affairs, and possessed a pleasing personality. He was the active

^a Dated September 28, 1924.

head of two manufacturing corporations: one founded by his father and controlled by members of his family, which was fairly successful, the other founded and owned principally by him and his brothers. The last named company, with a very small capital, had yielded large returns, but several years prior to Plamondon's death its earnings substantially declined. He received salaries aggregating \$17,200 per annum, and the stock owned by him in these two companies yielded him dividends bringing his average income from these two sources up to approximately \$30,000 per annum. In addition he had an income from an interest in his mother's estate of approximately \$20,000 per annum. On his death he left an estate of a value somewhat in excess of \$200,000, about one-half of which was an interest in real property inherited from his mother. It is apparent that the major part of his income, as well as his wife's individual income of between two and three thousand dollars from her separate property, was absorbed by the decedents and their five children, claimants herein, in living expenses.

To his spinster daughter, Marie, the decedent contributed about \$5,000 per annum and to each of his sons, who were then at college, about \$3,600 per annum. There is a statement in the record to the effect that the decedent made contributions and gifts to his two married daughters, but no attempt is made to fix the amount of such contributions or the value of such gifts. The inferences to be drawn from the records are that the husbands of these married daughters were amply able to support and did support them. There is no statement in the records from either of these married daughters or their respective husbands.

The mother of these claimants was physically strong and interested in social and civic activities. Her separate estate, from which she derived an income, was valued on her death at more than \$80,000.

The estate which the five children of the deceased, each taking a one-fifth interest, inherited from both of their parents aggregated in value approximately \$300,000, or some \$60,000 to each of them.

The money and personal effects lost with Mr. Plamondon were of the value of \$1,430.48, while the personal effects of Mrs. Plamondon which were lost were of the value of \$3,604.25.

The administrator of Mr. Plamondon's estate asserts a claim of \$758.62, the cost of recovering the two bodies, and \$53.95, the cost of their transportation to Chicago. These disbursements were made on or about August 6, 1915.

At the time of the loss of both of their parents the claimants Charles and Harold Plamondon, then 25 and 23 years of age respectively, were at college. They were deprived of the care, supervision, direction, and assistance of their parents in completing their education and launching on their respective careers.

The third case, Docket No. 477, is put forward by the United States on behalf of Charles A. Plamondon, Jr., representing all of the stockholders of The Saladin Pneumatic Malting Construction Company, which has been dissolved. The claim is made that the Saladin Co. had entered into a contract with Arthur Guinness Son and Company, Limited, of Dublin, Ireland, which would have proven very remunerative to it; that Charles A. Plamondon, decedent, was vice-president, secretary, and treasurer of that company and its active manager; that at the time of his death he was en route to Dublin with plans for extensive installations to be made for the Guinness Co.; and that on account of his death the Guinness Co. declined to perform the contract, to the great damage of the Saladin Co. The claim as presented is vague and unsatisfactory. In the record is found what purports to be a copy of a contract, signed by the Saladin Co. acting by its president and its vice-president and

secretary. It is *not* signed by the Guinness Co. There is nothing in the record to prove that the Guinness Co. had ever bound itself by contract to the Saladin Co. There is nothing in the draft of contract to indicate that it was contemplated that Charles A. Plamondon should be a party to it in his individual capacity or that it was contemplated that the Saladin Co. should contract that Charles A. Plamondon would act for it in the execution of the contract. The record indicates that the Guinness Co. is a responsible concern. If it has wrongfully breached a binding contract to the damage of the Saladin Co., the latter has its remedy against it. Although requested by the American Agent so to do, the claimant has failed to produce any evidence of the reasons assigned by the Guinness Co. for refusing to enter into the contract or to go forward with the execution of the contract already entered into, as the case may be. The claimant has wholly failed to establish the loss claimed. But even if it were clear that the claimant had suffered a loss flowing directly from the termination of the contract, if any ever existed between the Saladin Co. and the Guinness Co., and that such termination was induced by the loss of the life of Charles A. Plamondon on the *Lusitania*, still, under the terms of the Treaty of Berlin, Germany would not be obligated to pay such loss. The reasons for so holding are set forth at length in the opinion of the Umpire in deciding the Life-Insurance Claims (Decisions and Opinions, pages 121-140) and in the opinion of the Umpire in deciding Docket Nos. 417 and 418,^b put forward on behalf of Richard J. Hickson, etc., and these reasons need not be restated.

The measure of the awards which this Commission is empowered to make in the class of cases to which these claims belong is not the value of the lives lost but the pecuniary losses suffered *by claimants* resulting from the deaths. To the extent that contributions by deceased made during their lives and those which they would probably have made to claimants but for Germany's act causing their deaths were the direct fruits of the personal efforts of the deceased whose producing powers were destroyed by their deaths, the claimants have suffered pecuniary damages which Germany is obligated to pay. But to the extent that such actual or probable contributions were derived as income from the estates of deceased, which vested in the claimants on the deaths of deceased and yielded to the claimants the same income as they yielded to the deceased during their lives, the claimants have suffered no pecuniary damages (*Pym v. Great Northern Railway Co.*, 4 Best & Smith's Reports 396; *San Antonio & Aransas Pass Railway Co. v. Long*, 87 Texas Supreme Court Reports).

Applying the rules announced in the *Lusitania* Opinion and in the other decisions of this Commission to the facts as disclosed by the records herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of (1) Marie Plamondon the sum of twenty thousand dollars (\$20,000.00), (2) Charles Ambrose Plamondon, Jr., the sum of fifteen thousand dollars (\$15,000.00), (3) Harold Mackin Plamondon the sum of fifteen thousand dollars (\$15,000.00), (4) Charlotte Plamondon Ripley the sum of ten thousand dollars (\$10,000.00), and (5) Blanche Plamondon Smith the sum of ten thousand dollars (\$10,000.00), with interest on each of said sums at the rate of five per cent per annum from November 1, 1923, and (6) Charles Ambrose Plamondon, Jr., Administrator of the Estate of Charles A. Plamondon, deceased, the sum of eight hundred twelve dollars fifty-seven cents (\$812.57) with interest thereon at the rate of five per cent per annum from August 6, 1915, (7) Charles A. Plamondon, Jr..

^b Ante, pages 439-444. (*Note by the Secretariat*, this volume, pp. 266-269 *supra*.)

Administrator of the Estate of Charles A. Plamondon, deceased, the sum of one thousand four hundred thirty dollars forty-eight cents (\$1,430.48) with interest thereon at the rate of five per cent per annum from May 7, 1915, and (8) Charles A. Plamondon, Jr., Administrator of the Estate of Mary Mackin Plamondon, deceased, the sum of three thousand six hundred four dollars twenty-five cents (\$3,604.25) with interest thereon at the rate of five per cent per annum from May 7, 1915; and further decrees that the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the Saladin Pneumatic Malting Construction Company.

Done at Washington October 2, 1924.

Edwin B. PARKER
Umpire

JAMES F. BISHOP, ADMINISTRATOR OF THE ESTATE OF
WILLIAM MOUNSEY, DECEASED, AND OTHERS (UNITED STATES)
v. GERMANY

(*March 5, 1925, pp. 577-580.*)

NATIONALITY OF CLAIMS: PRIMARY, SECONDARY EVIDENCE.—NATURALIZATION: EFFECT OF DECLARATION OF INTENTION TO BECOME AMERICAN CITIZEN.—DAMAGES IN DEATH CASES: ACTUAL FINANCIAL CONTRIBUTIONS. Claim for alleged losses suffered by children of *Lusitania* victims. Application of rules announced in *Lusitania* Opinion and Administrative Decisions Nos. V and VI, see pp. 32, 119, and 155 *supra*. *Held* that decedent, who in 1886 made formal declaration of intention to become American citizen, nevertheless was British subject at time of death: no primary evidence of naturalization as American citizen (record of competent court or authenticated copy thereof) has been brought, only secondary, inconclusive, evidence (long residence in United States, exercising of right of vote and other privileges and rights of citizenship); and that, therefore, no claim for value of personal property lost can be asserted. Damages allowed on behalf of one (American) child for lost pecuniary contributions.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the two National Commissioners^a certifying their disagreement.

William Mounsey, 58 years of age, a second-cabin passenger, was lost with the *Lusitania*. He was born a British subject. It is contended that, through naturalization, he became a citizen of the United States. From the record it appears that he migrated to America in May, 1883, and that on January 23, 1886, he took the first step toward naturalization by formally declaring, in the manner prescribed by the statutes of the United States, "that it is bona fide his intention to reside in and become a citizen of the United States; and to renounce forever all allegiance and fidelity to every foreign" sovereignty. But this declaration of intention was far from constituting him a citizen of the United States, notwithstanding he resided therein continuously for a subsequent period of 29 years and continued to claim citizenship and to vote and to exercise other rights and privileges of citizenship. Such claim by him and the exercise of such privileges coupled with the declaration of intention to

^a Dated February 11, 1925.

become a citizen did not make him a citizen. (See opinion of Thornton, Umpire, under the Convention between the United States of America and Mexico of July 4, 1868, in the case of *Gatter v. Mexico*, III Moore's International Arbitrations, at page 2547.) The primary evidence of naturalization under the statutes of the United States is the record of a competent court or an authenticated copy thereof decreeing citizenship. In support of the contention that "final papers" had been issued to the decedent, evidence of a secondary nature has been placed in this record with respect to his long residence in the United States and his conduct in voting and exercising other privileges and rights of citizenship. As a basis for offering this secondary evidence, proof has been made of the most thorough and painstaking search of the records of every court having jurisdiction which could have entered a decree declaring the decedent a citizen of the United States and it has been affirmatively established that there is no evidence that such a decree was ever issued. There is no suggestion that the records of any court in which the decedent could have been admitted to citizenship have been lost, mutilated, or destroyed. The proof offered as a basis for the introduction of secondary evidence goes so far as to prove that no decree was ever entered by a competent court of the United States admitting the decedent to citizenship. In this state of the record the Umpire reluctantly holds that the decedent never became an American citizen and lived and died a British subject.

But in view of the rule announced in this Commission's Administrative Decision No. VI it is immaterial whether the decedent was a British or an American national, save as it affects the claim for the personal property lost with the decedent, valued at \$458.

The decedent, a widower, was survived by three sons and six daughters, all of whom had attained their majority except the daughters Myrtle, who had married in 1913, and Bertha, then 19 years of age, who married in October, 1916. There is no evidence that any of them suffered damages resulting from his death, as measured by pecuniary standards, save possibly his son George A., then 28 years of age, his son William E., then 26 years of age, his daughter Elizabeth, then 24 years of age, and his daughter Ethel, then 23 years of age. The last-named married Ralph A. Westlund, an American national, in December, 1916. The four children enumerated were all born in and have ever remained citizens of the United States.

From the year 1905 to the decedent's death in 1915 he and his son William E. Mounsey as copartners were engaged in a general coal, wood, and express business in the city of Chicago under the firm name of William Mounsey and Son. It would seem that when such partnership was first formed the son was only 16 years of age. For the five years last prior to the death of the decedent the net income from this business averaged \$4,200 per annum. How this income was divided as between the decedent and his son William is not clearly disclosed by the record, but from the statements therein it may be safely assumed that the decedent received the major portion thereof. The decedent owned a home which he shared with his daughter Elizabeth and his sons William and George. The latter apparently had no interest in the business of William Mounsey and Son but was sometimes employed by that firm. Elizabeth performed the ordinary duties of a housekeeper and was wholly dependent upon her father for support. Statements are found in the record to the effect that the decedent, during a period of 18 months prior to his death, contributed to his daughter Elizabeth \$150 per month and that prior to that period he contributed to her approximately \$1,000 per annum. How much of this was in the nature of compensation for services rendered by her as housekeeper is not disclosed by the record.

The evidence with respect to the damages, if any, resulting from the death of the decedent suffered by his daughter Ethel is meager and inconclusive and too indefinite to support an award in her behalf. While her testimony is not produced, the inferences from the record are that she was self-supporting, in part at least, and that she married the year following her father's death.

With respect to the two sons George A. and William E., the statement is made that the decedent furnished them "with a home and considerable support". It is evident that neither was dependent upon his father for support, and the son William had for 10 years been a member of his father's firm and active in the conduct of the business. The meager and unsatisfactory statements contained in the record are insufficient to support an award on behalf of either of these sons. But with respect to the daughter Elizabeth, while she doubtless earned her support through her services as keeper of her father's household, the record clearly indicates that her relations to her father, her dependency upon him, and the contributions which he made to her were such that she suffered pecuniary damages resulting from his death.

A claim is put forward on behalf of the administrator of the decedent's estate for \$458, the value of personal property belonging to and lost with him. As this property was impressed with the British nationality of the decedent a claim for its value can not be asserted here.

Applying the rules announced in the *Lusitania* Opinion, in Administrative Decisions No. V and No. VI, and in the other decisions of this Commission to the facts as disclosed by this record, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Elizabeth Mounsey the sum of seven thousand five hundred dollars (\$7,500.00) with interest thereon at the rate of five per cent per annum from November 1, 1923; and further decrees that the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the other claimants herein or any of them.

Done at Washington March 5, 1925.

Edwin B. PARKER
Umpire

ELIZABETH ANN HARRISON AND OTHERS
(UNITED STATES) *v.* GERMANY

(*March 11, 1925, pp. 586-589.*)

NATIONALITY OF CLAIMS.—NATURALIZATION: EFFECT OF DECLARATION OF INTENTION TO BECOME AMERICAN CITIZEN, "INCHOATE CITIZENSHIP". Claim for alleged losses suffered by brothers and sister of *Lusitania* victim. Application of rules announced in *Lusitania* Opinion and Administrative Decisions Nos. V and VI, see pp. 32, 119, and 155 *supra*. *Held* that brothers suffered no pecuniary damage and that no claim on behalf of sister can be asserted, since at time of decedent's death she was a British subject: 17 years before she made formal declaration of intention to become American citizen, but under Treaty of Berlin "inchoate citizenship" insufficient and permanent allegiance to United States required.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners^a certifying their disagreement.

Herbert K. Harrison, 39 years of age, went down with the *Lusitania* on which he was a passenger. He had never married. He was born a British subject and had on April 24, 1912, formally declared his intention to become a citizen of the United States but he never matured this intention by complying with the requirements of its statutes. He was survived by his father and mother, British nationals resident in the Isle of Man, both of whom have since died, and also by four brothers and one sister who, with the decedent, resided in Chicago.

Frank Edward Harrison, then a naturalized American citizen, 33 years of age, seems to have been the most prosperous of the brothers. He was married and maintained his own domestic establishment. The sister and the four unmarried brothers lived together in a house furnished to them by their brother Frank at a rental much less than its market value. In this way Frank contributed to the support of his sister, Elizabeth Ann, then 48 years of age, and of his four brothers, the decedent, George D., a British national, then 53 years of age, William, a British national, then 46 years of age, and Thomas, a naturalized American citizen, then 41 years of age.

The decedent was a driver and collector for a laundry company in Chicago, earning approximately \$100 per month, substantially all of which he gave to his sister to be used, with like funds contributed by his three unmarried brothers, for the maintenance of the household and for her personal expenses, including clothing.

A claim is asserted on behalf of Frank Edward Harrison, but the record indicates that this claimant and the decedent did not live together and that instead of the decedent contributing anything of pecuniary value to this claimant he made contributions to the decedent. All of the other surviving members of decedent's family were British subjects save Thomas, a naturalized American citizen and a claimant herein. The sole basis of his claim is that by reason of his brother's death his burden of supporting their sister was increased and it became necessary for him to increase the amount of his contributions to the support of that sister—a British subject—and the maintenance of the household kept by her. For the reasons announced in the previous decisions of this Commission this damage, if any, is too remote to support an award against Germany.

The record discloses no evidence of any pecuniary damages suffered by anyone resulting from the death of the decedent save to his sister, and a claim on her behalf can not be here asserted because she was at the time of her brother's death a British national.

This sister at the time of the sinking of the *Lusitania* had been continuously domiciled in the United States for more than 24 years and had more than 17 years prior to that time formally declared her intention of becoming an American citizen, but she has never been admitted to citizenship. During all of that time she had not exercised, or claimed the privilege of exercising, any of the rights of a subject of Great Britain. Private counsel for the claimant, with the consent of the American Agent, have filed a brief herein in which they urge with much earnestness that a *bona fide* formal declaration to become an American citizen, followed by a long-continued domicile in the United States, entitles the declarant to the protection of the Government of the United States and constitutes such declarant an American national within the meaning of the Treaty of Berlin. The Umpire has no hesitancy in rejecting this contention.

^a Dated February 11, 1925.

The Government of the United States was careful to incorporate in the Treaty of Berlin broad and far-reaching provisions for the protection of American nationals. But it was also careful to make such provisions applicable only to persons "who owe permanent allegiance to the United States". An expression of an intention to become a citizen does not make such declarant a citizen. The status of declarant has sometimes been described as "inchoate citizenship". The term between the filing of the declaration and the admission to citizenship has sometimes been referred to as "a probationary period" (Foreign Relations of the United States, 1890, page 695). But it has never been held that the mere declaration of an intention to become an American citizen constituted a tie permanently binding the declarant to the United States to which he should thenceforth owe permanent allegiance. The allegiance which a declarant owes to the United States is at most of a temporary nature. His declaration is a step toward the transfer of his allegiance, which is completed only when he has matured his "intention" to become a citizen by complying with all the requirements of the statutes of the United States (see Ehlers' Case. III Moore's Arbitrations 2551). Then, but not until then, does his allegiance become permanent. The Congress of the United States in its act approved July 9, 1918 (40 Statutes at Large, at page 885), recognized the soundness of the rule here announced by so amending the Selective Draft Act as to provide "That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States". It will be noted that the Congress there treated such a declarant as an alien to the United States and still a citizen or subject of the neutral country. Had such declarant owed permanent allegiance to the United States he would not have been permitted at his election to be relieved from the provisions of the draft law and from liability to military service at the price of withdrawing his declaration of intention and being thenceforth forever debarred from becoming an American citizen.

It will serve no useful purpose here further to pursue the inquiry with respect to the status—internationally and nationally—of one who has formally declared his intention to become an American citizen. While a declarant has sometimes been recognized as entitled to limited protection, all of the departments of the Government of the United States—executive, legislative, and judicial—have uniformly treated a declarant as remaining a foreign subject until he shall have complied with the requirements prescribed by the Congress of the United States as necessary to admit him to American citizenship (see *City of Minneapolis v. Reum*, 1893, 56 Federal Reporter 576; *In re Siem*, 1922, 284 Federal Reporter 868, at page 870, same case, 1924, 299 Federal Reporter 582; Ralston's *International Arbitral Law and Procedure*, sections 227-231; and Borchard's *Diplomatic Protection of Citizens Abroad*, sections 247, 248, and 249). But quite independent of the decisions of the courts of the United States and the practical constructions of its executive and legislative departments, it is clear that a declarant does not owe permanent allegiance to the United States, and hence a claim asserted on behalf of such declarant does not fall within the terms of the Treaty of Berlin.

It follows that the claimant Elizabeth Ann Harrison was at the time of her brother Herbert's death and has since remained a British subject.

Applying the rules announced in the *Lusitania* Opinion, in Administrative Decisions No. V and No. VI, and in the other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that

under the Treaty of Berlin of August 25, 1921. and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of any of the claimants herein.

Done at Washington March 11, 1925.

Edwin B. PARKER
Umpire

MARGARET EMERSON BAKER AND OTHERS, AND REGINALD C. VANDERBILT AND OTHERS AS EXECUTORS OF THE ESTATE OF ALFRED G. VANDERBILT, DECEASED (UNITED STATES)

v. GERMANY

(March 19, 1925, pp. 593-595.)

DAMAGES IN DEATH CASES: VALUE OF LIFE LOST, LOSS TO SURVIVORS; ACTUAL FINANCIAL CONTRIBUTIONS, DECEDENT'S PRODUCING POWER. Claims for alleged losses suffered by widow and children of *Lusitania* victim. Application of rules announced in *Lusitania* Opinion, see p. 32 *supra*, and in other decisions. *Held* that, since no evidence offered of producing power of decedent, and pecuniary returns to widow and children from his bequests to them are greater than contributions received from him during his life, no damages can be allowed: measure of awards is not value of life lost, but losses to claimants.

Bibliography: Kiesselbach, *Probleme*, p. 63.

PARKER, *Umpire*, rendered the decision of the Commission.

This case has been certified by the two National Commissioners^a to the Umpire for decision.

Alfred Gwynne Vanderbilt, an American national, 37 years of age, was lost with the *Lusitania*. He was survived by his wife, Margaret Emerson Vanderbilt, then 33 years of age, two sons, issue of their marriage, Alfred G., Jr., then two years seven months old, and George, then seven months old, and also by a son by a former marriage, William Henry, then 13 years of age, all American nationals. The claim put forward on behalf of the widow is in the name of Margaret Emerson Baker, she having married Raymond T. Baker, an American national, June 12, 1918.

Using as a basis the appraisals made for the purpose of fixing the transfer tax payable to the State of New York, the net value of the decedent's estate, after the payment of all debts and funeral and administration expenses, was \$15,594,836.32. By the terms of decedent's will bequests were made to sundry individuals aggregating \$1,180,098.18 and the balance was bequeathed to, or placed in trust for the use and benefit of, the decedent's widow and his three sons, all claimants herein. During his life Mr. Vanderbilt maintained for himself, wife, and children several country places and town residences both in the United States and in England. For their maintenance and for the support and comfort of his wife and children he expended and contributed approximately \$300,000 annually, or about two per cent of the amounts bequeathed to them and for their use and benefit.

The producing power, if any, of the decedent is not disclosed by the record. No evidence is offered of his having had any income other than the fruits of

^a In a certificate dated December 22, 1924.

the property disposed of by his will. Obviously the pecuniary returns to his widow and children from his bequests to them were greater than the contributions which they received from him during his life for their support and maintenance, which were made from the income from his estate the corpus of which on his death vested in them or for their use and benefit.

No claim is put forward on behalf of the executors of the decedent's estate for personal effects and other property belonging to and lost with him, nor is claim made for any expenses incurred by the estate resulting from his death.

Bearing in mind that the measure of the awards which this Commission is empowered to make in this case is not the value of the life lost but the losses *to claimants* resulting from the decedent's death, so far only as such losses are susceptible of being measured by pecuniary standards, and applying the rules announced in the *Lusitania* Opinion and in the other decisions of this Commission to the facts in this case, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimants herein or any of them.

Done at Washington March 19, 1925.

Edwin B. PARKER
Umpire

CAROLINE M. BRIDGE AND EDGAR G. BARRATT,
ADMINISTRATORS OF THE ESTATE OF JUSTUS MILES FORMAN,
ET AL. (UNITED STATES) *v.* GERMANY

(*March 19, 1925, pp. 595-597.*)

DAMAGES IN DEATH CASES; VALUE OF LIFE LOST, LOSS TO DECEDENT'S ESTATE, LOSS TO SURVIVORS; ACTUAL FINANCIAL CONTRIBUTIONS.—EVIDENCE: UNSUPPORTED ALLEGATION, CLAIMANTS' TESTIMONY. Claims for alleged losses suffered by relatives of *Lusitania* victim. Application of rules announced in *Lusitania* Opinion. see p. 32 *supra*, and in other decisions. *Held* that awards which Commission is empowered to make in death cases are not value of life lost (benefits of which decedent's estate was deprived), but losses to claimants themselves resulting from death, so far as susceptible being measured by pecuniary standards (see Administrative Decision No. VI, p. 155 *supra*). *Held* also that unsupported allegation by administrator of estate that decedent made money contributions to several claimants cannot be accepted as sufficient evidence, since claimants failed to offer personal testimony, though facts manifestly within their knowledge. No damages allowed.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the two National Commissioners^a certifying their disagreement.

Justus Miles Forman, an American national, 39 years of age, was a passenger on and went down with the *Lusitania*. While the record does not so expressly state, the inference is that he had never married. He was a man of culture and ability, a prolific writer of popular fiction and a playwright. His income from these sources was between \$10,000 and \$12,000 per annum.

^a Dated January 5, 1925.

In the petition filed herein on behalf of his administrators the statement is made that "As a result of his untimely death he was deprived of the earnings of his most fruitful years and his estate was likewise deprived of the benefits thereof." This Commission has repeatedly held that the awards which it is empowered to make in death cases is not the value of the life lost but the losses to claimants resulting from the death, so far only as such losses are susceptible of being measured by pecuniary standards. A right to recover damages resulting from death accrues when, but not until, the death occurs. Manifestly a decedent can not recover for his own death, nor can his estate in a representative capacity recover what the decedent could not have recovered had he lived.

No claim is put forward for the value of personal effects owned by the decedent and lost with him.

The ten claimants herein are his heirs-at-law, a half-sister, a nephew, three nieces, two grandnephews, and three grandnieces, who at the time of decedent's death were of ages varying from 83 to 21 years. Five of them resided in Minnesota, two in Wisconsin, two in Montana, and the other one in either Illinois or New Jersey. The extent of decedent's contact with claimants, through correspondence or otherwise, is not disclosed by the record. The decedent died intestate and these claimants inherited his estate, valued at something over \$19,000.

The second supplemental petition, sworn to in July, 1924, by Edgar G. Barratt, one of the two administrators of the decedent's estate, recites:

Justus Miles Forman, deceased, was accustomed to contribute from time to time sums of money to the support of Caroline M. Bridge and to John Griswold, Maud Griswold, Stanley Griswold, Alice Griswold and Sadie Griswold LaClaire. While your petitioner believes that these sums were substantial in amount, he is unable to supply definite evidence of their extent and frequency because Justus Miles Forman kept no books, and no check stubs covering these payments were discovered among his effects by your petitioner as administrator. However, your petitioner is informed that such payments were made from time to time.

The decedent resided several hundred miles from each of the claimants mentioned in the paragraph here quoted. Had he made money contributions to them such contributions would probably have been sent by check and a record thereof would have been found in decedent's bank-check stubs. Caroline M. Bridge, the half-sister of the decedent, as one of the administrators of his estate, has executed numerous legal documents in connection with the settlement of said estate by the administrators. The names and addresses of the other claimants appear in the record herein, but the testimony of none of them is offered. The fact that no documentary evidence could be found among the decedent's effects of any contributions made by him to these claimants is all the more reason why the testimony of the claimants themselves as to the extent of such contributions, if any, should have been offered.

In this state of the record, when the facts were manifestly within the knowledge of the claimants themselves and their testimony is not offered, the unsupported allegation of one of the administrators, made on information, can not be accepted by the Commission as evidence upon which to base an award. The record as submitted is barren of competent and convincing evidence in support of the contention that the claimants or any of them suffered damages, as measured by pecuniary standards, resulting from decedent's death.

Applying the rules announced in the *Lusitania* Opinion and in the other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to

pay to the Government of the United States any amount on behalf of the claimants herein or any of them.

Done at Washington March 19, 1925.

Edwin B. PARKER
Umpire

ROGER B. McMULLEN *ET AL.* (UNITED STATES) *v.* GERMANY

(*March 19, 1925, pp. 602-604.*)

USE OF INVENTIONS NOT COVERED BY GERMAN PATENTS. Claims for loss suffered by alleged use by German Government, without compensation, of inventions not covered by German patents. *Held* that such use not prohibited by German patent laws which strictly conform to Convention for Protection of Industrial Property, and that claim does not fall within Treaty of Berlin.

BY THE COMMISSION:

The cause styled as above¹ is submitted to the Commission on the following Agreed Statement:

AGREED STATEMENT

The American and German Agents present the following agreed statement, and make the following recommendation as to further proceedings to be had in the matter of this claim:

Amount demanded by claimant: \$100,000,000.00.

ESSENTIAL FACTS: Roger B. McMullen, a native citizen of the United States (Exhibit 1), has filed a petition in support of a claim on behalf of himself, Henrietta Gathmann, Emil Gathmann, Paul Gathmann, Otto Gathmann, Olga Gathmann Foley, Elman Gathmann, James B. McMullen, Daniel Y. McMullen, George W. McMullen and Davis S. McMullen, all of whom, it is alleged, are either native or naturalized citizens of the United States (Exhibit 2). It is alleged that Louis Gathmann, since deceased, had certain German patents covering high explosive shell and gun for projecting trench mortar projectiles; safety fuse for high explosive shell in which the priming charge was kept separated from the main charge of the high explosive charge contained in the shell upon the discharge of the projectile from the gun; compass for use with submarine or submersible vessels; and periscopes adapted to be adjustably projected above the hull structure of submarine or submersible vessels; and that said patents were infringed by the Government of Germany during the war period. The records of the German Government show that there were three patents granted to Louis Gathmann, of Chicago, in 1896 and 1897, corresponding to three American patents, and the German Patent Office reports that all three patents expired because the annual fees required under German law to be paid on German patents were not paid in compliance with the German patent law. It is further claimed by the German officials that these patents had expired for the reason above stated long before the beginning of the World War (Exhibit 3). The American Agent has furnished the claimant with the information thus obtained from the German Patent Office and no contention is made by the claimant that the annual fee was paid or that the information received from the German officials regarding the failure to pay the said annual fees is not correct. It is also alleged by the claimant that long before the beginning of the World War application had been made to the German Government for the issuance of additional patents covering the devices above referred to and that the German Government was familiar with the said inventions.

¹ Original report: United States of America on behalf of Roger B. McMullen *et al.*, Claimants, *v.* Germany, Docket No. 5004.

The claim on behalf of the petitioner is made that the invention, regardless of a patent, was a property right and that if the claimant can establish that the German Government made use of the said inventions, some of which were covered by American patents, without compensating the claimant for the use thereof, a valid claim can be presented against the Government of Germany for such compensation (Exhibits 4 and 5).

RECOMMENDATION: This claim is submitted to the Commission at this time for determination as to whether under the decisions of the Commission heretofore rendered the use by the German Government, if established by the claimant, of inventions not covered by patents in Germany, by the German Government, without paying compensation therefor to the claimant, constitutes a valid claim for damages for which Germany is financially obligated to make compensation to the claimant under the terms of the Treaty of Berlin.

The Umpire and both the National Commissioners have painstakingly examined the record in this case the substance of which is accurately reflected by the foregoing Agreed Statement of the American and German Agents. No serious effort has been made by the claimants or their private counsel to substantiate by competent evidence the allegations in the claimants' petition. On the contrary such private counsel states in substance that until this Commission has decided the question of the liability of the German Government for the use of inventions not covered by German patents "it would be useless to go to the great expense and effort required to offer technical proof".

Both prior to and since the World War American inventors have been entitled, on taking the measures prescribed by the German statutes, to have issued to them letters patent protecting their inventions. On the failure of the patentees, or those claiming under them, to pay to the German Government the annual fees required by these statutes, the rights acquired under the patents are lost. It appears from the record that during 1896 and 1897 three patents were granted by the German Government to Louis Gathmann, of Chicago, but the rights thereunder were forfeited long prior to the World War for failure of the patentee or his assigns to pay the fees required by the German statutes by virtue of which the patents issued. The laws of Germany provide and have long provided that should the German Government, under the restrictive provisions of its statutes, make use of any invention, by whomsoever owned, protected by the patent laws of Germany, it would be required to make compensation for such use and the courts of Germany are open to any such patentee, or those claiming under him, to recover from the German Government the value of any such use made by it. No distinction is made in this regard with respect to patents owned by German nationals and those owned by American nationals. The German statutes strictly conform to the provisions of the Convention between the United States and numerous other powers, including Germany, for the Protection of Industrial Property as last amended by the Convention signed at Washington June 2, 1911. In these circumstances the claimants are not in a position to complain of the use by Germany in German territory of inventions not protected by German patents, even if such use in fact occurred.

On the record submitted the Umpire and the two National Commissioners have no hesitation in deciding that the claimants herein have not suffered any loss, damage, or injury for which Germany is obligated to make compensation under the Treaty of Berlin.

Applying the rules and principles heretofore announced in the decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the

Government of the United States any amount on behalf of the claimants herein or any of them.

Done at Washington March 19, 1925.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESELBACH
German Commissioner

WILLIAM MACKENZIE, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF MARY A. MACKENZIE, DECEASED, AND
OTHERS (UNITED STATES) *v.* GERMANY

(October 30, 1925, pp. 628-633.)

NATIONALITY OF CLAIMS.—NATIONALITY: DETERMINATION BY MUNICIPAL LAW.
—DUAL NATIONALITY: EXPATRIATION. DOCTRINE OF ELECTION, DIPLOMATIC
PROTECTION.—INTERPRETATION OF MUNICIPAL LAW: STATE DEPARTMENT
PRACTICE.—DAMAGES IN DEATH CASES: PERSONAL PROPERTY. Claim for
alleged losses suffered by estate and children of *Lusitania* victim. Application
of rules announced in *Lusitania* Opinion, see p. 32 *supra*. and in other
decisions. Held that nationality determined by municipal law and that,
under United States law, decedent's husband, born a British subject in
the United States, had American nationality: (1) he never exercised right
of expatriation, (2) United States law did not recognize doctrine of election,
(3) actually, by residing for some time in England and Canada after
attaining his majority, he never elected to be a British subject only, though
for that period he might not have been entitled to an American passport
and American diplomatic protection under State Department practice; and
that, therefore, decedent herself and two sons were American citizens.
Damages allowed on behalf of decedent's estate for lost property.

Cross-references: A.J.I.L.. Vol. 20 (1926). pp. 595-599; Annual Digest,
1925-26, pp. 273-274; Witenberg, Vol. II, pp. 91-96 (French text).

Bibliography: Borchard. pp. 74-75.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National
Commissioners certifying their disagreement.

Mary A. Mackenzie, 58 years of age, widow of Robert A. G. Mackenzie,
was lost with the *Lusitania*. This claim is put forward on behalf of the adminis-
trator of her estate, her son, William Mackenzie, her married daughter, Ethel
A. Purrington, and the estate of her deceased son, James R. D. Mackenzie.

The German Agent challenges the American nationality of the claimants
and of the claim here presented. A determination of this issue turns on the
nationality of Robert A. G. Mackenzie, who, the Umpire finds, was born in
the United States of British parents on June 4, 1858. While still a minor his
parents with their children returned to England. There Robert married, on
February 10, 1879, during his twenty-first year, and there his first child,
James R. D. Mackenzie, was born. Soon thereafter he found employment at
Hamilton in the Province of Ontario, Canada, whither he went with his wife

and baby, and there his other two children, William and Ethel Annie, were born. The record is barren of evidence of any election made by him to adopt the British nationality of his parents or to renounce his American nationality by birth, save as such election might be inferred from his continued residence in England and in Canada after attaining his majority. In 1894 he, his wife, and their three children took up permanent residence in New Bedford, Massachusetts, where they lived until his death in 1901. So far as disclosed by the record it appears that he and the members of his family, by express declarations and by their course of conduct, consistently regarded and proclaimed him an American national. He repeatedly registered and voted at New Bedford as an American citizen and seems to have possessed to an unusual degree the qualities of good citizenship. His son William, though born in Canada (and hence possessing dual nationality if born of American parents), on attaining his majority, while residing at New Bedford as an American citizen, took the oath requisite to qualifying him to vote and has repeatedly voted as an American citizen.

Citizenship is determined by rules prescribed by municipal law. The issue here presented must be determined by the law obtaining and enforced within the jurisdiction of the United States. Under that law Robert A. G. Mackenzie, who was born in the United States of British parents, was by birth an American national,¹ notwithstanding the Fourteenth Amendment to the Constitution had not then been adopted and the statutes in pursuance thereof had not then been passed. Under the laws of Great Britain then in effect he also possessed British nationality by parentage. This created a conflict in citizenship, frequently described as "dual nationality". The American law makes no provision for the election of nationality by an American national by birth possessing dual nationality. As Robert A. G. Mackenzie was by birth an American national, he could neither divest himself of the duties and obligations of an American citizen nor be divested of the rights of an American citizen, save through expatriation by becoming a naturalized citizen of a foreign state in conformity with its laws or possibly² by taking an oath of allegiance to a foreign state. So far as disclosed by this record the right of expatriation was never exercised by him. He therefore remained an American citizen.

But the German Agent contends that the continued residence of Robert A. G. Mackenzie in England and Canada after attaining his majority amounted in law to an election by him to remain a British national and operated as a renunciation and a forfeiture of his American nationality. It is insisted that this is the American rule established by the executive branch of the Government of the United States and long recognized in its diplomatic correspondence. It may be that some of the instructions issued by the Department of State of the United States to its diplomatic and consular representatives are susceptible of the construction which the German Agent would place upon them,³ but it is believed that when carefully analyzed they should not

¹ *United States v. Wong Kim Ark* (1898), 169 U. S. 649.

² Prior to the Act of March 2, 1907, there was no statute expressly providing that the taking of an oath of allegiance to a foreign state would work expatriation.

³ Acting Secretary of State Porter to Mr. Winchester, Minister to Switzerland, Foreign Relations of the United States (hereinafter cited as "Foreign Relations") 1885, page 811; Secretary of State Bayard to Mr. Lee, Minister to Austria-Hungary, Foreign Relations 1886, page 12; Secretary of State Bayard to Mr. Vignaud, Minister to France, Foreign Relations 1886, page 303; Secretary of State Bayard to Count Sponneck, Minister to Denmark, Foreign Relations 1888, page 489; Acting Secretary of State Seward, December 31, 1878, to the American Minister at Paris concerning Henry Tirel, 20 MS. Instructions to France. 7.

be so construed. ⁴ The error into which the German Agent has quite naturally fallen arises through the use of loose language confusing the permanent loss of citizenship with the loss for the time being of diplomatic protection. This confusion is due to a failure to bear in mind that the right to protection does not necessarily follow the technical legal status of citizenship. ⁵ While the American Department of State may in the exercise of its sound discretion well decline to issue a passport to, or intervene on behalf of, or otherwise extend diplomatic protection to an American by birth of foreign parents so long as he resides in the country of the nationality of his parents, it is not believed that it has, by departmental rule or otherwise, asserted the power to strip of American citizenship one so born. At all events the Umpire holds that the American State Department does not possess and has never possessed such power, and that the Congress of the United States has not as yet seen fit through legislation to adopt the rule adopted by numerous other countries under which the anomalous status of dual nationality must be terminated through election by the party possessing it within a reasonable fixed time after becoming *sui juris*. Much might be said in favor of adoption by the United States and other nations of a multilateral treaty, supplemented by municipal legislation, looking to the abolition of dual nationality or its termination through enforced election under appropriate restrictions. But it is not competent for this international tribunal to consider what the municipal law of the United States with respect to its citizenship should be, but only to find and declare that law as it is, to the extent necessary to determine the jurisdiction of this Commission and the liability of Germany under the Treaty of Berlin.

The Umpire holds that as Robert A. G. Mackenzie was born an American citizen and never exercised his right of expatriation by the only methods prescribed by the law of the United States he remained an American citizen to the time of his death. But even if the American law had during the life of Robert A. G. Mackenzie recognized the doctrine of election as applicable to one born an American citizen and possessing dual nationality, still this would not change the Umpire's disposition of this case on the record presented. In each case cited by the German Agent the American State Department was dealing with a person, born in the United States of alien parents, who had gone to the country of which they were nationals and had continued to reside therein after attaining his majority, and held that such continuing residence constituted such strong *evidence* of his having elected to take the nationality of his parents as to justify the Department, in the exercise of its discretion and during the continuance of his residence in the country of the nationality of his parents, in declining to issue to him a passport or extend to him diplomatic protection. But the German Agent has confused evidence of an election with

⁴ See particularly General Instruction No. 919 (Diplomatic Serial No. 225-A) issued to the diplomatic and consular officers of the United States on November 24, 1923, by Secretary of State Hughes.

See also Secretary of State Evarts to Mr. Cramer, Minister to Denmark (1880), III Moore's Digest of International Law (hereinafter cited as "Moore's Digest"), page 544; Acting Secretary of State Porter to Mr. Winchester, Minister to Switzerland, Foreign Relations 1885, page 811, and III Moore's Digest, pages 545-546; Secretary of State Olney to Mr. Uhl, Ambassador to Germany (1896), III Moore's Digest, at page 551; Secretary of State Olney to Mr. von Reichenau, Foreign Relations 1897, at page 183; *Ex parte Chin King* (Circuit court, District of Oregon, 1888), 35 Federal Reporter 354.

⁵ Secretary of State Fish to Mr. Niles, October 30, 1871, 91 MS. Dom. Letters 211, III Moore's Digest, page 762.

the fact of election. Continued residence in the country of which the parents were nationals is strong evidence from which may be inferred an election of the nationality of the parents by one born in the United States of aliens. But such inference is by no means conclusive, nor is such evidence of election exclusive, but it may be rebutted by other competent evidence. Such election is a fact and may be established as any other fact. In the event of conflict in the evidence with respect to the election, if any, actually made, the evidence must be weighed and the conflict decided as any other issue of fact.

The diligence of the German Agent has pointed the Umpire to no instance where an American national by birth has been denied diplomatic protection by the American Department of State where he was residing in and had a permanent residence in the United States, notwithstanding the fact that, after attaining his majority, he may have continued to reside for a term of years in the country of his alien parents. Such inferences as may be drawn from the instructions of the State Department tend toward a recognition not only of American citizenship but the right to diplomatic protection in such a case.⁶ This is the case here presented. The American Department of State, through the American Agent before this Commission, is contending that Robert A. G. Mackenzie never elected to become a British national but at all times elected to remain and did remain an American national. The Umpire finds as a fact that the record here presented sustains this contention.

It follows that Mary A. Mackenzie, widow of Robert A. G. Mackenzie, was an American national when she met her death on the *Lusitania*. It likewise follows that James R. D. and William Mackenzie, who were born abroad of American parents, and who on attaining their majority were residing in the United States and continued to reside therein, were American nationals at the time of their mother's death. The contention of the German Agent that the decedent and her two sons did not possess American nationality at the time of her death is therefore rejected. Ethel Annie Mackenzie married Ralph Forbes Purrington, an American national, in 1908. Her American nationality is not challenged. James R. D. Mackenzie died on January 12, 1921, and was survived by his wife and daughter, Hattie May Warner Mackenzie and Margaret L. C. Mackenzie.

Mary A. Mackenzie was 58 years of age at the time of her death. She had no earning capacity. No one was dependent upon her and she made no contributions to anyone which are susceptible of measurement by pecuniary standards. Her children all maintained establishments of their own. She resided with her married daughter, and the inference from the record is that she was dependent upon her children for support.

The personal property, including cash, belonging to the decedent and lost with her was of the value of \$300.

Applying the rules announced in the *Lusitania* Opinion and in other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of William Mackenzie, Administrator of the Estate of Mary A. Mackenzie, Deceased, the sum of three hundred dollars (\$300.00) with interest thereon at the rate of five per cent per annum from May 7, 1915; and further decrees that the Government of Germany is

⁶ See particularly instruction by Secretary of State Hughes and other authorities cited in note 4 *supra*.

not obligated to pay to the Government of the United States any amount on behalf of the other claimants herein.

Done at Washington October 30, 1925.

Edwin B. PARKER
Umpire

HENRY CACHARD AND H. HERMAN HARJES, EXECUTORS OF
THE ESTATE OF MEDORA DE MORES (UNITED STATES)
v. GERMANY

(October 30, 1925, pp. 633-635.)

NATIONALITY OF CLAIMS: DETERMINATION BY NATIONALITY OF BENEFICIARIES, NOT OF CLAIMANTS IN REPRESENTATIVE CAPACITY. *Held* that claim not impressed with American nationality: though executors of estate, claimants herein, are American citizens, possible beneficiaries of award are French. *Bibliography*: Kiesselbach, *Probleme*, pp. 161-163.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

Medora de Mores, an American national, the widow of the Marquis de Mores, was the beneficiary of a trust fund, held by a German financial institution as trustee, which, during the years 1917 to 1919, was subjected to exceptional war measures by the Government of Germany, to her damage. She died on March 1, 1921, leaving two wills, one a holographic will made on November 1, 1917, disposing of all of her property in Europe; the other made December 14, 1917, disposing of her property in the United States and Canada. Her European estate, in which there is no interest impressed with American nationality, is being administered under the first will by two executors, one of whom is an American citizen residing in Paris, and the nationality of the other is not disclosed. Her estate in the United States and Canada is being administered under the second will by the two executors claimants herein, both of whom on March 1, 1921, and November 11, 1921, were, and since have remained, American nationals and residents of Paris. The testatrix bequeathed the sum of \$20,000.00 to an American national residing in the United States and the residue of her estate to her two sons, Louis and Paul Manca de Vallombrosa, who were on her death and have ever since remained residents and nationals of France. The American beneficiary has been paid in full by the executors from the proceeds of the American estate, which is amply sufficient for the payment of all succession taxes, expenses of administration, commissions, and liabilities generally of the American estate. The entire amount of any award made in this case would therefore inure to the benefit of French nationals—the testatrix's sons, Louis and Paul Manca de Vallombrosa.

The fact that this claim is put forward on behalf of executors acting in their representative capacities and that these executors are American nationals does not in itself impress the claim with American nationality.¹ The contrary

¹ Halley, Administrator, and Grayson, Administrator, British-American Commission under Treaty of May 8, 1871, Hale's Report 19, Howard's Report 15, III Moore's Arbitrations 2241-2242; Wulff v. Mexico (1876), reported in II

rule contended for by the claimants has been rejected by the Mixed Arbitral Tribunals constituted under the Economic Clauses of the Treaty of Versailles.² The entire beneficial interest in the claim is in French nationals, and the Mixed Arbitral Tribunals to which France is a party have uniformly held that the nationality of the claim must be determined by the nationality of the beneficiary and have carried this rule to the extent of applying it to corporations, rejecting the juridical theory of the impenetrability of corporations for the purpose of determining the true nationality encased in the corporate shell.³ The Umpire holds that the claim as here presented was not impressed with American nationality on November 11, 1921, when the Treaty of Berlin became effective, and under the rule announced in Administrative Decision No. V Germany is not under that Treaty obligated to pay it.

Applying the rules announced in Administrative Decision No. V and in the other decisions of this Commission to the facts as disclosed by the record

(Footnote continued from page 292.)

Moore's Arbitrations 1353-1354; *Wiltz v. United States* (1882), III Moore's Arbitrations at page 2254; *Ralston's International Arbitral Law and Procedure*, section 188; *Borchard's Diplomatic Protection of Citizens Abroad*, section 288.

² Decisions of Anglo-German Mixed Arbitral Tribunal in the cases of *Executors of Lederer v. German Government*, Volume III of Decisions of Mixed Arbitral Tribunals (hereinafter cited as "Dec. M. A. T.") at pages 765, 766, and 770, *Dewhurst and Others v. German Government*, III Dec. M. A. T. at page 528, and *E. A. Rehder v. Langesellschaft "Wannsee"*, IV Dec. M. A. T., page 201. The decision of the same tribunal in the case of *Executors of W. Klingenstein v. Maier*, IV Dec. M. A. T., page 6, announced the same rule as in the case of *Eckstein and Another v. Deutsche Bank*, III Dec. M. A. T. at page 760, which expressly refers to and differentiates that case, arising under Article 296 of the Treaty of Versailles, from the *Lederer* and similar cases arising under Article 297 of that Treaty.

³ Decision of Franco-German Mixed Arbitral Tribunal in the case of *Société du Chemin de fer de Damas-Hamah c. la Compagnie du Chemin de fer de Bagdad*, I Dec. M. A. T., pages 401-407. In this case both the claimant and defendant were by their incorporation Turkish. The jurisdiction of the tribunal was challenged by both the defendant company and the German Agent because the claimant company was not French and the defendant company was not German. The tribunal held that as the claimant company was French-controlled and the defendant company was German-controlled the tribunal had jurisdiction. In the course of the opinion it was said: "Moreover, it is thoroughly in accord with the spirit of the Peace Treaty to pay less attention to questions purely formal than to palpable economic realities; consequently, when the nationality of a corporation is to be determined more weight must be given to the interests represented therein than to the outward appearance which may conceal such interests. In the present case the circumstance that both corporations are described as Ottoman (Turkish) and that their charter seat is in Turkey must be considered as purely formal and not of decisive importance."

Decisions of Franco-German Mixed Arbitral Tribunal in the cases of *Société anonyme du Charbonnage Frédéric Henri c. Etat Allemand*, I Dec. M. A. T., pages 422-433, and *Wenz et Co. c. Etat Allemand*, II Dec. M. A. T., pages 780-784.

Decision of Franco-German Mixed Arbitral Tribunal in the case of *Jordaen et Co. c. Etat Allemand*, III Dec. M. A. T., pages 889-894. There the claimant was a joint stock company existing in Paris. The majority of its stock was owned by Dutch nationals. The tribunal held that under subdivision (*e*) of Article 297 of the Treaty of Versailles the claimant was not a French national and as such entitled to be compensated by Germany in respect of damage or injury inflicted upon its property, rights, or interests in German territory.

Decision of Franco-Bulgarian Mixed Arbitral Tribunal in the case of *Régie générale de Chemins de fer et Travaux publics et Cie des Chemins de fer Jonction Salonique-Constantinople c. Etat bulgare*, III Dec. M. A. T., pages 954-962.

herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimants herein.

Done at Washington October 30, 1925.

Edwin B. PARKER
Umpire

THOMAS H. RICHARDS AND OTHERS
(UNITED STATES) *v.* GERMANY

(November 11, 1925, pp. 637-639.)

NATIONALITY OF CLAIMS, EVIDENCE: EXPATRIATION, REBUTTABLE STATUTORY PRESUMPTION. Claim for alleged losses suffered by relatives of *Lusitania* victim. Naturalization as American citizen of British-born first claimant, father of decedent, in 1906. Residence with other claimants (wife and children) in England, since May, 1915, without registering as American citizen and without definite intention to return to United States. Application of rules announced in *Lusitania* Opinion and Administrative Decision No. V, see pp. 32 and 119 *supra*, and in other decisions. *Held* that claimants no longer have American nationality: though in time of war statutory presumption of expatriation because of residence for two years or more in land of alien parents does not arise, statute nevertheless runs; when United States entered war (April 6, 1917), statute therefore continued to run against first claimant and at war's end (July 2, 1921) presumption arose, which since has not been rebutted.

Cross-references: A.J.I.L., Vol. 20 (1926), pp. 599-601; Annual Digest, 1925-26, pp. 271-272.

Bibliography: Annual Digest, 1925-26, p. 272; Borchard, p. 75.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

Dora Millicent Richards, an infant 19 months of age, born in the United States, lost her life on the *Lusitania* while traveling with her father, mother, and two older brothers, all claimants herein, from Butte, Montana, to England. The claim is put forward for pecuniary damages alleged to have been suffered resulting from the decedent's death. No claim is made for any personal injuries sustained or property lost.

The decedent's father, Thomas H. Richards, born a British subject, became an American citizen through naturalization in Montana in 1906. The very meager and unsatisfactory evidence submitted fails to disclose the purpose of Richards in returning with his entire family to his native land. Since May, 1915, he and his family have resided in England, apparently engaged in agriculture. Under date of May 5, 1925, 10 years after the sinking of the *Lusitania*, he states that the lease which he had taken on the farm upon which he and his family are living still had six years to run and he declined to follow the advice of the American Consul at Plymouth that he make application for passport to the United States or for registration as an American citizen. He expressed the hope that he would "some day" return to the United States but is apparently unwilling to state with greater definiteness when, if at all, he

will return, and, while admitting that he has failed to register as an American citizen, maintains that he still is an American citizen and has not registered otherwise or voted in England.

The German Agent challenges the American nationality of the claimants and of the claim. This presents a very different question than that in the case submitted on behalf of William Mackenzie and others,¹ where the citizenship of the decedent and of the claimants turned on the nationality of the husband of decedent, Robert A. G. Mackenzie, a native American citizen, who during most of his minority and for several years after attaining his majority resided within the jurisdiction of Great Britain, to which his parents owed allegiance, and then returned and established a permanent residence in the United States, where he died and where his widow and children continued to live. In that case there was no statutory presumption of expatriation arising from residence within the jurisdiction of the land of alien parents. In the instant case section 2 of the Act of the Congress of the United States approved March 2, 1907, applies. That statute, still in effect, provides that:

“When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.”

Under this statute the continued residence of Thomas H. Richards in his native land did not *ipso facto* operate to deprive him of American citizenship, but it raised a rebuttable presumption of his expatriation. However, the rights of American citizenship carry with them correlative duties, and while the American rule clearly recognizes the general right of expatriation that right does not exist while the United States is at war. Since Richards had not resided in his native land—England—for the full period of two years when the United States on April 6, 1917, entered the war, no statutory presumption of his expatriation had up to that moment arisen. Thereafter he was not *allowed*, under the statute, to expatriate himself while the United States was at war. But this statutory limitation on his right of expatriation did not toll the running of the statute against him, and when on July 2, 1921, the United States ceased to be at war the statutory presumption of expatriation arising from a residence in his native land of two years or more, including the war period, did obtain.² It is not seriously contended by the American Agent that this presumption has been rebutted. The clear inference from the record is that it can not be rebutted. On the record as submitted the Umpire decides that the claimants have failed to discharge the burden resting upon them to prove American nationality entitling the United States to put forward this claim under the rule announced in Administrative Decision No. V.

Applying the rules announced in the *Lusitania* Opinion, in Administrative Decision No. V, and in other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty

¹ Docket No. 2482, decided by the Umpire on October 30, 1925. (*Note by the Secretariat*, this volume, p. 288 *supra*.)

² General Instruction No. 919 (Diplomatic Serial No. 225-A), issued by the Department of State of the United States on November 24, 1923, compilation of “Circulars Relating to Citizenship, Etc.”, 1925, at page 120.

of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay any amount to the claimants herein or any of them.

Done at Washington November 11, 1925.

Edwin B. PARKER
Umpire

Alice E. AND BerTE Scholborg
(UNITED STATES) *v.* GERMANY

(January 20, 1926, pp. 646-648.)

ESTATE CLAIMS: EXCEPTIONAL WAR MEASURES.—DAMAGE: DEPRECIATION OF SECURITIES. Claim for damage resulting from prevention by German exceptional war measures of transmission of interest to American heirs in German estate. Claim allowed: application of rules announced in Administrative Decision No. IV, see p. 117 *supra*. *Held* that claimant not, in addition, entitled to recover amount equal to depreciation of securities voluntarily left in Germany.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

The claimants, Alice E. Scholborg and BerTE Scholborg, sisters, were on July 17, 1914, and have since remained American nationals. On that date their aunt, Bertha Scholborg, died in Germany. Her death released a legacy bequeathed to the claimants by their uncle, George Scholborg, the income from which Bertha Scholborg was entitled to receive during her life. This legacy was in the form of securities held by Dr. C. Bulling, executor of the estate of George Scholborg. On October 27, 1914, Dr. Bulling wrote to the claimants, then residing in the State of New York, stating that he was prepared to deliver the securities bequeathed to them by George Scholborg to such person as they might authorize to receive them. The claimants, however, instructed Dr. Bulling to hold these securities "until the war is over" and added: "Any interest which accumulates I should like you to send". In accordance with these instructions, Dr. Bulling as executor continued to hold these securities and from time to time remitted the income therefrom to the claimants, the last remittance made being on October 18, 1916. The war legislation enacted by the German Government prohibited his remitting the claimants subsequent to that date the amounts collected by him, either as income or as principal of the maturing securities which he would have remitted but for this restraining legislation.

Under the rules announced by this Commission in Administrative Decision No. IV the claimants are entitled to recover, in terms of dollars, the amounts paid in marks to the executor valorized at the rate of exchange existing on the several dates when he would have paid them over to the claimants had he not been prevented from so doing by the German exceptional war measures, less the value, in terms of dollars, of these marks on January 10, 1920, when this war legislation was repealed and the statutory obstacle to making remittance removed.

The claimants, however, are not entitled to recover an amount equal to the depreciation in value of the securities which they voluntarily left in the hands of Dr. Bulling, executor, and which had not matured or been converted into cash prior to January 10, 1920, which securities were neither actually nor constructively seized or administered by or through the Treuhaender or any other German governmental agency. Claimants have failed to prove that the exceptional war measures of Germany had any application to the unmatured securities voluntarily left by them in Germany.

Applying the rules announced in Administrative Decision No. IV and in other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Alice E. Scholborg and Berte Scholborg jointly the following sums:

(1) Ninety-seven dollars thirty-three cents (\$97.33) with interest from May 1, 1917,

(2) Sixty-six dollars ninety-four cents (\$66.94) with interest from October 1, 1917,

(3) Four hundred nineteen dollars twenty-eight cents (\$419.28) with interest from May 1, 1918,

(4) Sixty-seven dollars seventy-one cents (\$67.71) with interest from October 1, 1918.

(5) Two hundred forty-five dollars thirty-nine cents (\$245.39) with interest from May 1, 1919, and

(6) Twenty-eight dollars forty-nine cents (\$28.49) with interest from October 1, 1919,

all interest at the rate of five per cent per annum.

Done at Washington January 20, 1926.

Edwin B. PARKER
Umpire

GEORGE L. HAWLEY (UNITED STATES) *v.* GERMANY

(*March 17, 1926, pp. 650-652.*)

WAR: TREATMENT OF PRISONERS OF WAR, RESPONSIBILITY UNDER TREATY OF BERLIN.—DAMAGE: PROPERTY TAKEN AND NOT RETURNED. Claim for damages on account of improper medical and surgical treatment received, and personal property lost, by American private when a prisoner of war. *Held* that no evidence submitted of maltreatment or other act for which Germany liable under Treaty of Berlin. Damages allowed for property taken and not returned, plus interest at 5% per annum from November 11, 1918.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

George L. Hawley, an American national, while a private soldier in Company C, 102nd Infantry, United States Army, was taken prisoner by the German military forces on April 20, 1918. When captured he was suffering from wounds in both legs and from the effects of gas. He was held prisoner for some weeks in the hospital at Conflans, France, where he claims to have

received improper medical and surgical treatment. He was removed in June to Prison Camp Munster No. 3, thence put to work in coal mines, and, after another stay in the prison camp, was removed in September to the American Prison Camp at Rastatt, Germany, where he received better treatment. Claimant was undoubtedly wounded. He complains that the German surgeons did not remove the pieces of shrapnel from the wounds in his left ankle, but it appears that after his return to the United States an X-ray examination of this ankle disclosed two pieces of shrapnel very deeply embedded in the small bones which the American surgeon of claimant advised against attempting to remove for fear that an operation might cause permanent disability of the joint. There is nothing in the record indicating that the German surgeons were guilty of any malpractice or even of an error in judgment in failing to operate to remove the bits of shrapnel.

It appears that from the effect of the gas the claimant was nearly blinded when captured and that since then the functions of his eyes, nose, and throat have been seriously impaired. After his return to the United States he had several pieces of bone taken from his nose, his tonsils removed, and several teeth extracted. So far as disclosed by the record his impaired physical condition is due to injuries inflicted in combat and not to any maltreatment at the hands of the German authorities.

The claimant applied to the United States Veterans' Bureau for compensation and received from it vocational training for about three years, which in his own language, was given "to overcome my physical handicap of impaired eyesight and wounded ankle which prevented me from returning to my pre-war occupation of street car motorman".

As an evidence of maltreatment emphasis is laid by the claimant on the use of paper bandages by the German hospital authorities in dressing his wounds, but there is no evidence that any other bandages were available, and it appears from the records in other cases before this Commission that German authorities were forced to use paper bandages in the dressing of wounds of German soldiers. This was one of the hardships of the war, in which the claimant was engaged as a combatant, and for which Germany cannot be held liable under the Treaty. The claimant undoubtedly sustained serious injuries as a consequence of the war, but a careful consideration of the record before the Commission fails to disclose that he has suffered any pecuniary damage resulting from any maltreatment or other act for which Germany can be held liable under the Treaty.

The claimant stated that personal effects, of the value of \$12.50, were taken from him while a prisoner by the German authorities and not returned.

Applying the rules and principles heretofore announced in the decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of George L. Hawley the sum of twelve dollars fifty cents (\$12.50) with interest thereon at the rate of five per cent per annum from November 11, 1918.

Done at Washington March 17, 1926.

Edwin B. PARKER
Umpire

WILLIAM J. QUILLIN *ET AL.* (UNITED STATES)
v. GERMANY

(April 21, 1926, pp. 654-657.)

DESTRUCTION OF VESSELS. DAMAGES: INSURER'S INTEREST, DEPRECIATION OF AMOUNT OWED BY INSURER, MARKET VALUE. Sinking on August 29, 1917, of American . . . vessel insured with French Government to amount of 348,000 French francs, which amount between date of loss and date of payment depreciated considerably. *Held* that, under Treaty of Berlin, damage sustained is fair market value of vessel at time of loss less 348,000 francs converted at rate prevailing at time of payment (reference made to awards in American underwriters claims, see p. IV of original report).

Cross-reference: A.J.I.L., Vol. 20 (1926), pp. 791-793.

Bibliography: Kiesselbach, *Probleme*, pp. 78-87.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

On August 29, 1917, the Schooner *Laura C. Anderson*, licensed under the laws of the United States and registered at the port of Philadelphia, Pennsylvania, while engaged in private commerce was captured by a German submarine and sunk about 30 miles from the port of Le Havre, France.

The claimants herein, William J. Quillin and 27 others, who were at the time of the loss and have since remained American nationals, were in the aggregate the owners of the legal title of a 52/64 interest in the vessel and have since been and now are the owners of this claim for a like interest in the value of the vessel and stores lost. The owners of the legal title of the remaining 12/64 interest have not established their American nationality.

The American and German Agents agree—confirmed by the National Commissioners—that at the time of her loss the fair market value of the *Laura C. Anderson* was \$120,000 and that there were also lost with her stores of the value of \$1,805.23.

The American and German Agents further agree—confirmed by the National Commissioners—that at the time of the loss of the schooner the owners of her legal title carried French Government insurance indemnifying them against the risks of war to the amount of 348,000 French francs, which converted into dollars at the rate of exchange prevailing at the date of the loss, namely, 17.359 francs to the dollar, equaled \$60,409.32; that although promptly notified of her loss the French Government did not make payment under this policy of insurance until February, 1921, at which time the amount paid, converted into dollars at the rate of exchange then prevailing, namely, 7.17ø to the franc, equaled \$24,951.60.

The sole question certified to the Umpire for decision is, Which rate of exchange, that prevailing at the date of the loss or that prevailing at the date of payment, shall be applied in converting into dollars the French francs actually received by the owners of the vessel? The German Agent contends for the former basis and the American Agent for the latter.

When the schooner was sunk her fair market value, fixed at \$120,000, was lost. Under the Treaty of Berlin it becomes material to determine who suffered that loss and the extent to which it was impressed with American nationality.

The tangible thing destroyed was the schooner. The owners of the legal title to that schooner suffered no loss to the extent of the payments made to them by the insurer, who was the real loser to the extent of such payments. At the time of the loss the insurer had a contingent or conditional property interest in the tangible thing destroyed—the schooner—which interest became absolute and fixed upon payment by the insurer. The extent of the insurer's interest was measured, not by the amount of the maximum indemnity stipulated for in the policy, but by the amount actually paid by the insurer and received by the insured. The aggregate loss sustained, measured in terms of American dollars, is fixed at \$120,000. This loss Germany is obligated to pay under the Treaty of Berlin to the extent—but only to the extent—that it was impressed with American nationality. Germany's interest in allocating this loss as between the owners of the legal title of the schooner and the insurer thereof is due to their diverse nationalities. To the extent of the damage sustained by the insurer—the French Government—resulting from the loss of the schooner, Germany is not liable under the Treaty of Berlin. What, then, was that damage measured in terms of American dollars? Manifestly it was the 348,000 francs which were paid to the owners of the legal title by the insurer converted into dollars at the rate of exchange prevailing at the date of payment, namely, \$24,951.60. The sum remaining after deducting this payment, so converted, from the \$120,000, the fair market value of the schooner at the time of her loss, represents the net loss to the claimants and their associates from the loss of the hull, namely, \$95,048.40. The stores lost were not insured. Their agreed value was \$1,805.23, which added to the net loss on the hull makes a total loss to the *owners* of the vessel of \$96,853.63, of which these *claimants* own a 52/64 interest. It follows that the net loss suffered by these claimants was \$78,693.58.

The rule here announced is in entire harmony with the decisions heretofore rendered by this Commission and with the awards made in the American underwriters' claims. The basis of such awards was "the actual net out of pocket payments of the American underwriters * * * after deducting all sums, if any, received by such underwriters under policies of reinsurance". It will be noted that those awards were based, not on the amount of maximum indemnity stipulated to be paid in the policies of insurance, but rather on the amount actually *paid* by the American underwriters measured in terms of American dollars at the time of payment.

Applying the principles above announced and the rules and principles announced in other decisions of this Commission to the facts in this case, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of the claimants herein the sum of seventy-eight thousand six hundred ninety-three dollars fifty-eight cents (\$78,693.58) with interest thereon at the rate of five per cent per annum from November 11, 1918, distributed as follows:

<i>Claimant</i>	<i>Proportional share</i>	<i>Net hull loss</i>	<i>Stores, etc.</i>	<i>Total award</i>
William J. Quillin.....	11/128	\$8,168.26	\$155.17	\$8,323.43
Oscar Bell.....	1/128	742.56	14.11	756.67
John W. Callaway.....	1/64	1,485.13	28.20	1,513.33
Annie S. Carey.....	1/64	1,485.13	28.20	1,513.33
James G. Conwell.....	1/64	1,485.13	28.20	1,513.33
Mary S. Coulbourn, Trustee of Joseph N. Coulbourn.....	1/64	1,485.13	28.20	1,513.33
A. D. Cummins.....	8/64	11,881.06	225.67	12,106.73
Alverda Elsey.....	1/64	1,485.13	28.20	1,513.33
S. J. Furniss.....	1/64	1,485.13	28.20	1,513.33
Harlan E. Goodell.....	1/64	1,485.13	28.20	1,513.33
Ethel Hastings.....	2/64	2,970.26	56.42	3,026.68
C. L. Horsey.....	1/128	742.56	14.11	756.67
Charles M. Kelley.....	1/64	1,485.13	28.20	1,513.33
S. Crowley Loveland.....	1/64	1,485.13	28.20	1,513.33
Francis J. McDonald.....	4/64	5,940.52	112.83	6,053.35
William Martino.....	1/64	1,485.13	28.20	1,513.33
Jonathan May & Sons.....	8/64	11,881.06	225.67	12,106.73
C. W. Riffin.....	1/64	1,485.13	28.20	1,513.33
F. H. Small.....	1/128	742.56	14.11	756.67
John Sullivan.....	1/64	1,485.13	28.20	1,513.33
Edward G. Taulane.....	2/64	2,970.26	56.42	3,026.68
George Taulane.....	2/64	2,970.26	56.42	3,026.68
Lewis B. Taulane.....	2/64	2,970.26	56.42	3,026.68
Herbert L. Black.....	1/64	1,485.13	28.20	1,513.33
Harold G. Foss.....	1/64	1,485.13	28.20	1,513.33
Arthur D. Foster.....	1/64	1,485.13	28.20	1,513.33
Joseph O'Brien.....	1/64	1,485.13	28.20	1,513.33
David Baird Company.....	1/64	1,485.13	28.20	1,513.33
TOTAL	52/64	77,226.83	1,466.75	78,693.58

Done at Washington April 21, 1926.

Edwin B. PARKER
Umpire

STANDARD OIL COMPANY OF NEW YORK
(UNITED STATES) *v.* GERMANY

SUN OIL COMPANY (UNITED STATES)
v. GERMANY

PIERCE OIL COMPANY (UNITED STATES)
v. GERMANY

(April 21, 1926, pp. 660-669.)

WAR: DESTRUCTION OF CHARTERED VESSEL.—ESPOUSAL OF CLAIMS.—DAMAGE:
(1) EXCEPTIONAL WAR MEASURES APPLIED TO PROPERTY OF AMERICAN-OWNED ALLIED CORPORATION IN ALLIED COUNTRY, (2) DETERMINATION OF DAMAGE BY MUNICIPAL LAW, (3) DEPRECIATION BY REQUISITION, (4) RULE

OF PROXIMATE CAUSE. Destruction by Germany, during period of belligerency, of seven vessels owned by British subsidiaries of claimants and requisitioned by Great Britain. Payment by Great Britain to subsidiaries of value of vessels as *requisitioned* vessels at time of loss. Claims brought for value of *free* vessels less amount paid by Great Britain. *Held* that, under Treaty of Berlin, Germany obligated to compensate for damage resulting from her acts indirectly suffered by American shareholders in British corporations, and that claims are, therefore, properly espoused and properly presented by United States; but that subsidiaries recovered all damages actually suffered by them through *destruction* of vessels: under British law, they lost requisitioned vessels, and under Treaty of Berlin Germany not obligated to compensate for damage (depreciation) through *requisition*, which was Great Britain's act, not attributable to destruction as proximate cause. *Cross-references*: A.J.I.L., Vol. 20 (1926), pp. 782-789; Witenberg, Vol. II, pp. 165-173 (French text).

Bibliography: Kiesselbach, *Probleme*, pp. 119-120, 153.

PARKER, *Umpire*, rendered the decision of the Commission.

These three cases, which have been submitted, argued, and considered together, are before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement. They are put forward by the United States on behalf of the Standard Oil Company of New York, the Sun Oil Company, and the Pierce Oil Corporation, all American nationals, for losses alleged to have been suffered by them through the sinking by German submarines of seven steamships (tankers) owned by British subsidiaries of the claimants. All of these tankers were sunk during the period of America's belligerency, the first on April 6, 1917, and the last on October 3, 1918. At the time of their destruction they were all under requisition by Great Britain and operated for her by the owners for hire fixed by her. They were all laden with cargoes of oils which were being transported under the directions of the British Government. Under the requisitions Great Britain assumed the risks of war to each vessel and in the event of its total loss from such a risk undertook to pay the owner therefor the ascertained value of the vessel at the time of such loss. It was provided that any dispute arising between the British Government and the owner in the ascertainment of such value should be settled by arbitrators selected by a prescribed method under the provisions of the British Arbitration Act.

By agreements reached between the British Government and the British corporations owning these seven tankers the value of each as a requisitioned vessel as of the time of its loss was arrived at¹ and the amounts so ascertained paid by Great Britain to the owners.² The amounts so paid aggregated \$6,030,668.00. The claimants allege that as free ships in a free market at the time of the loss of each their aggregate value was \$10,607,500.00. Subtracting from this value of free ships the value of requisitioned ships which the owners

¹ In Docket No. 5323 see Exhibit II, "Proof of Claim" and affidavit of George D. Ali; affidavits of Montagu Piesse, Exhibits J, H-1, and H-2; Director of Ship Purchases, Exhibit J.

In Docket No. 5434 see affidavit of J. Howard Pew, Exhibit I.

In Docket No. 5469 see affidavit of Clay Arthur Pierce, Exhibit III, page 3. See original Consolidated Brief in support of claims, pages 17, 30, and 73.

² The British Reparation Claim against Germany included the value of these tankers with the exception of the *Tatarax*, which should have been included but was omitted for the reasons explained in the record (Exhibit J in Docket No. 5323 and Claimants' Consolidated Brief, pages 104 and 105).

have received from the British Government leaves a balance of \$4,576,832.00, which is the total of the claims here put forward against Germany. A detailed tabulation of these claims is in the margin.³

In the last analysis, the basis of the claims here put forward is that as the American shareholders of their British subsidiaries the claimants were damaged through the sinking of these seven vessels by Germany to the extent of \$10,607,500.00, being the money equivalent of these ships as free ships at the time of their loss; that the British subsidiaries of claimants have been paid by Great Britain the sum of \$6,030,668.00, being the money equivalent of these ships as requisitioned ships; and that the balance of \$4,576,832.00 represents the uncompensated damage suffered by claimants, American nationals, resulting from Germany's act, and for which it is claimed that Germany is obligated to make compensation under the terms of the Treaty of Berlin.

Under the terms of that Treaty Germany is obligated to compensate for damages resulting from her acts indirectly suffered by an American national through the ownership of shares of stock in a British corporation. In other words, if through Germany's act the property of a British corporation has been damaged or destroyed resulting in an American national suffering damage through his ownership of shares therein, then under the Treaty of Berlin Germany is obligated to make compensation to the extent of the damage so suffered by him. No claim for such damage can be espoused by the United States on behalf of the British corporation as such, because (leaving out of consideration Government-owned claims) only claims for damages suffered by American nationals fall within the Treaty. But, in order to fully protect American nationals who had an interest in the property destroyed and who

³ Note:

Claimant	Date of sinking and name of tanker ^a	Owner of vessel British	Alleged value of vessel	Amount paid to owner by Great Britain	Balance claimed here by claimant against Germany
			\$	\$	\$
Standard Oil Co. of New York	1917 Apr. 6 <i>Powhatan</i>	Tank Storage & Carriage Co., Limited	1,275,000 00	751,685.00	523,315.00
	1917 June 15 <i>Wapello</i>	Standard Transportation Co., Ltd., of Hong Kong	1,518,000 00	1,039,513.00	478,487.00
	1918 Mai. 20 <i>Samoset</i>	Ditto	1,398,400.00	884,895.00	513,505.00
	1918 May 30 <i>Waneta</i>	Ditto	442,000.00	440,068.00	1,932 00
	1918 Aug. 10 <i>Tatarraz</i>	Ditto	1,800,000.00	1,336,917 00	463,083 00
			6,433,400.00	4,453,078 00	1,980,322 00
Sun Oil Co.	1917 May 1 <i>British Sur</i>	British Sur Co., Limited	2,674,100.00	892,080.00	1,782,020 00
Pierce Oil Corp.	1918 Oct. 3 <i>Eupion</i>	Eupion Steamship Co., Ltd., of London	1,500,000.00	685,520.00	814,480.00
Total:					
3 claimants . . .	7 tankers . . .	4 owners	10,607,500 00	6,030,668.00	4,576,832.00

^a Each of the 7 vessels was a British registered steamship, was sunk during America's belligerency, and when sunk was in pay of the British Government and had a cargo of fuel oil, spirits, or kerosene.

^b After deducting expense of 2,356 pounds sterling.

suffered from its destruction, no matter in what capacity they suffered, whether directly or indirectly through the ownership of shares of stock in foreign corporations or otherwise, they are, under the Treaty, protected to the extent of their interest. It follows that these claims are properly espoused and properly presented here by the United States on behalf of these claimants for damages, if any, which they have sustained as shareholders in their British subsidiaries.

The question then arises. What, if any, damage has been sustained by these British subsidiaries through which as shareholders claimants are alleged to have suffered? There is no pretense that these claimants have been directly damaged by Germany's act in sinking the seven ships in question, all of which were owned by British corporations. But the claim is that as shareholders in such British corporations these claimants have been indirectly damaged. The burden, therefore, rests on the claimants to prove that the British corporations suffered damages through the act of Germany and the amount thereof and the extent to which such damages have fallen on the claimants as stockholders of such corporations, and that as such stockholders they have not already been indirectly compensated therefor through payment to the corporations. While one of the results of the provision obligating Germany to make compensation for indirect damages suffered by American nationals as owners of shares of stock in foreign corporations was to give such American nationals the right, through espousal by their Government, to assert their claims against Germany before this Commission, notwithstanding claims of the foreign corporations as such could not be presented here, nevertheless there was no purpose to confer upon American shareholders any right to recover damages in excess of those actually suffered by the foreign corporations themselves.

In determining the damage, if any, suffered by the British corporations who owned the seven ships which were sunk by Germany, the status of these ships must be examined and the facts as they existed at the time of their destruction, entering as factors into the determination of their value, ascertained. Without undertaking to enumerate all of those factors, it will suffice to note the following: (1) The ships were tankers in great demand by Great Britain and her allies. (2) They were of British ownership and registry and therefore subject to being and had in fact been requisitioned by Great Britain under her exceptional war powers. (3) The authority for such requisitioning was the Royal Proclamation of August 3, 1914, one of the conditions of which was "that the owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government service, and compensation for loss or damage thereby occasioned". (4) The British Government at the time of requisitioning these ships submitted to their owners a form of charterparty known as "T-99" which the owners refused to sign. Nevertheless Great Britain took the ships from their owners and the owners operated, managed, and navigated the ships for her account at the rates of hire fixed by her under this form of charter.⁴ (5) Clause 19 of this charter provided that the British Government should take the risks of war incident to the operation of each ship and in the event of its total loss from such a risk should pay to the owner its ascertained value at the time of such loss and that should a dispute arise as to such value the same should be settled by arbitration under the provisions of the British Arbitration Act. (6) The owners and the ships, the persons and the subject matter, were under the jurisdiction of Great Britain and subject to her laws. Under these laws Great Britain could and did, as an exceptional war measure, requisition the ships for her use and fix a compensation in the nature of hire and an undertaking to

⁴ See original Consolidated Brief in support of claims, pages 8 and 9.

compensate in the event of loss on a basis which operated as an onerous burden or encumbrance on the ships, substantially reducing their value, without any legal obligation or undertaking on her part to compensate the owners for such depreciation in value. (7) At the time of the loss the British owners of these ships did not own free ships but encumbered ships, burdened with the onerous terms of the British requisitions, which encumbered ships were being operated by them for the British Government. The British owners were not free to offer them for sale as free ships but only as encumbered ships.

The British courts have found as a fact that the value of a British ship during the war period varied according as it was or was not under requisition or subject to requisition; that if not under requisition, but with a possible chance of being requisitioned, it would not command as large a price as it would if free from requisition under a guarantee from the Government not to requisition it; and if actually under requisition but with a possible chance of being released therefrom it would not command as large a price as it would if free from requisition but with a possible chance of being requisitioned.⁵ In the *Longbenton* case a British vessel was requisitioned by the British Government and operated by the owners under the terms of the official charterparty known as "T-99", under which the ships with which we are here concerned were being operated. The *Longbenton* was lost by enemy action on June 27, 1917. Its owners contended that clause 19 of this charterparty, which provided that in the event of its total loss from risks of war the British Government should pay the owners "the ascertained value of the steamer * * * at the time of such loss", was in effect a contract of indemnity against any requisition, and that they were entitled to recover on the basis of its value had it been free from requisition, and that the Government in assessing its value was not entitled to take into account the fact that it was under requisition at the time of its loss. The British High Court of Justice rejected this contention and held that for the purpose of assessing the value of the vessel at the time of its loss all of the facts must be taken into consideration, and one of the most material facts was that the vessel was at the time of its loss under requisition. In other words, at the time of its loss the vessel was a requisitioned vessel, not a free vessel, and its value must be ascertained accordingly. In that case the umpire in the arbitration found as facts that the *Longbenton*, which was under requisition at the time of its loss, had a value of £28,500; that had it not been under requisition but subject to requisition it would have had a value of £44,500; and that had it not been under or subject to requisition it would have commanded a still higher price. The court held that the fact of its being under requisition was one of the most important facts to consider in determining its value at the time of its loss, and that the Government was only obligated to pay the owners the sum of £28,500, its value as a requisitioned ship at the time of its loss. The owners of the seven tankers here under consideration dealt and settled with the British Government on the basis of the rule laid down in this *Longbenton* case.⁶

The British law, and its application to the owners of these vessels and to the vessels themselves, are facts to be taken into account in determining what it was that the owners lost. It is the subject matter of their losses which is here dealt with. The value of that subject matter will be considered later. For some time prior to and at the time the ships were sunk by Germany the British

⁵ See award of umpire in the arbitration of the *Longbenton* case in *Harries v. Shipping Controller* (1918), 34 *The Times Law Reports* 446, 118 *Law Times Reports* 603, and 88 *Law Journal Reports* 1919 (N. S. 88, K. B.) 576.

⁶ See affidavit of Montagu Piesse. page 3, Exhibit H-1 in Docket No. 5323.

subsidiaries of the claimants were not the owners of free ships. Hence they could not have lost free ships through Germany's act in destroying them. What they did in fact lose were ships encumbered with British requisitions. Such requisitions imposed burdens on the ships, which under the British law were lawfully imposed. It is undisputed that these ships, burdened with requisitions, had a value very substantially less than they would have had if they had been free ships in a free market. But they were not free ships, and the fact that they were not results from the claimants herein having voluntarily placed the title to them in British corporations, registering them as British ships, and subjecting them to British requisitions. As such they were treated by Great Britain as all other British-owned ships were treated. Presumably the claimants derived, or expected to derive, advantage through the British ownership and the British registry of these ships. But they cannot here complain of the disadvantages resulting therefrom.

The claimants earnestly contend that they are entitled to recover the value of free ships as of the time of the loss, and rely on numerous decisions of American courts.⁷ These cases hold in effect that under the Constitution of the United States the Government of the United States is obligated to make compensation for property taken by it, and the measure of such compensation is the value of the property taken at the time of the taking, which must be ascertained by the exercise of "a reasonable judgment having its basis in a proper consideration of all relevant facts".⁸ In ascertaining such value, the United States in taking property for public use can not confine the compensation to a market restricted or controlled by the Government itself; but the test is, what is the value in a free market, one which would result from "fair negotiations between an owner willing to sell and a purchaser desiring to buy".⁹ In all of these American cases relied on by the claimants' counsel it will be noted that the question presented was the amount of compensation which the Government of the United States under the Constitution of the United States was required to pay to the owner of property taken for public use, and that the property taken through requisition was free property at the time of taking. The owners lost free, not encumbered, property. If these arguments, supported by the sound principles announced by the American courts, had been addressed by the British subsidiaries of claimants to the competent authorities of Great Britain, whose duty it was to fix a basis for compensating the owners for the use of requisitioned ships, they would have been pertinent. But obviously they can have no application here nor prove helpful in determining the nature of the subject matter which the British subsidiaries of claimants lost when their ships were destroyed, which must be determined by the laws of Great Britain lawfully exercising jurisdiction over both the person of the owners and the subject matter lost. The controlling fact is that the rules announced in these American decisions did not obtain in Great Britain prior to and at the time the ships were destroyed, and therefore can have no application in determining the status or the value of the ships which were actually destroyed by Germany, namely, requisitioned ships.

⁷ *Hudson Navigation Co. v. United States* (1922), 57 Court of Claims 411; *United States v. New River Collieries Co.* (1923), 262 U. S. 341; *National City Bank v. United States* (1921), 275 Federal Reporter 855; *Standard Oil Company of New Jersey v. Southern Pacific Company* (1925), 268 U. S. 146; *Brooks-Scanlon Corporation v. United States* (1924), 265 U. S. 106.

⁸ *Standard Oil Company of New Jersey v. Southern Pacific Company* (1925), 268 U. S. 146.

⁹ *Brooks-Scanlon Corporation v. United States* (1924), 265 U. S. 106.

The claimants confuse two distinct losses suffered by their British subsidiaries, namely: (1) the damages which such subsidiaries sustained as a result of Great Britain's act in requisitioning their ships and (2) the damages which such subsidiaries sustained by Germany's act in destroying their ships.

The act of Great Britain in requisitioning the ships unquestionably resulted in very materially depreciating their value, to the damage of claimants' British subsidiaries. In the last analysis it is the amount of this damage for which claimants are seeking an award against Germany; that is, the difference between the value these ships would have had if at the time of their destruction they had been free ships and their actual value at the time of their destruction as requisitioned ships. The real question, therefore, presented to this Commission for decision is, Under the Treaty of Berlin is Germany obligated to compensate for damages resulting from the act of Great Britain in exercising her exceptional war powers and requisitioning these ships—British property—for war purposes? From expressions in their briefs it would seem that the claimants would answer this question in the affirmative.¹⁰ For the reasons heretofore announced in the decisions of this Commission the Umpire has no hesitation in answering it in the negative.¹¹ The act of Great Britain in requisitioning these British ships, and in fixing the hire thereof at substantially less than the current market hire, resulted in damages to the British owners, but such damages belong to that large class suffered by thousands of British nationals as a consequence of the war for which no redress has been provided. This act of Great Britain and the damages flowing therefrom are not attributable to Germany's act as a proximate cause.

Under the Treaty of Berlin Germany's liability, if any, for damages suffered by American nationals resulting from exceptional war measures is limited territorially to such measures as were applied "in German territory as it existed on August 1, 1914".¹² For all damages sustained by American nationals during America's belligerency outside of German territory as thus defined Germany's obligation to make compensation is limited to "physical or material damage to tangible things" resulting from "acts of Germany or her allies" or "directly in consequence of hostilities or of any operations of war".¹³

Under the Treaty of Berlin Germany is obligated to compensate the claimants as American shareholders in British corporations to the extent of the losses if any they have suffered as such shareholders due to the act of Germany in destroying the seven ships owned by such corporations. But what did Germany destroy? She destroyed seven ships encumbered with British requisitions. Her liability therefor under the Treaty is limited to the value at the time of the loss of the ships so encumbered, less the amount which the owners of the ships have already received as indemnity for such loss. But the claimants admit¹⁴ that, following the *Longbenton* case, Great Britain has paid to their British subsidiaries the money equivalent of the value of these vessels as requisitioned vessels, so that it follows that these British subsidiaries have

¹⁰ See original Consolidated Brief in support of claims, pages 31, 35, and 36.

¹¹ See Opinion in War-Risk Insurance Premium Claims, Decisions and Opinions, pages 33 *et seq.*, and in United States of America on behalf of the Eastern Steamship Lines, Inc., Claimant, *v.* Germany, *ibid.*, pages 71 *et seq.* (*Note by the Secretariat*, this volume, pp. 44 and 71 *supra*, respectively.)

¹² Article 297 (*e*) of the Treaty of Versailles carried into the Treaty of Berlin.

¹³ Paragraph 9 of Annex I to Section I of Part VIII of the Treaty of Versailles carried into the Treaty of Berlin and also Administrative Decision No. VII, Decisions and Opinions, at pages 319 and 320. (*Note by the Secretariat*, this volume, pp. 234 and 235 *supra*.)

¹⁴ See footnote 1, page 302.

already received the money equivalent of all that they had to lose, and all that they in fact did lose, namely, requisitioned ships.

It follows that the claimants herein, the American shareholders of the British corporations owning these ships, have failed to establish any loss or damage suffered by them as such shareholders and resulting from Germany's acts in destroying these vessels.

Wherefore the Commission decrees that the Government of Germany is not, under the Treaty of Berlin of August 25, 1921, obligated to pay to the Government of the United States any amount on behalf of the claimants herein or any of them on account of the claims asserted in these three cases.

Done at Washington April 21, 1926.

Edwin B. PARKER
Umpire

WINTHROP C. NEILSON (UNITED STATES) *v.* GERMANY

(April 21, 1926, pp. 670-674.)

DAMAGE: RULE OF PROXIMATE CAUSE.—EVIDENCE: REPORT OF SURVEY, AFFIDAVIT, EVIDENCE TAKEN IN MUNICIPAL COURT, MARINE PROTEST BEFORE CONSULAR AGENT. Alleged damage to American vessel through strain while escaping from German submarine on August 6, 1918. *Held* that damage, if any, was direct result of German attack (proximate cause); but that no evidence brought of actual damage to vessel. Evidence: see *supra*.

Cross-references: A.J.I.L., Vol. 20 (1926), pp. 790-791; Annual Digest, 1925-26, pp. 254-255.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

The claim is put forward on behalf of Winthrop C. Neilson, an American national, who is alleged to have been the owner of the American Steamship *Mohegan*, which he claims was damaged while escaping from a German submarine off the coast of Virginia on August 6, 1918. From the record it appears, however, that only the naked legal title to this ship was in Neilson, who held it for and in the interest of the Republic Mining & Manufacturing Company, an American corporation, of which Neilson is president, the entire capital stock of which is, and in 1918 was, owned by the Aluminum Company of America. In view of the disposition which will be made of this case, this variance between the allegations and the proof as to the true ownership of the vessel is not material.

From the record as now presented, including the evidence filed on April 15, 1926, it appears that the *Mohegan* was a wooden vessel originally built in Michigan in 1894, rebuilt in 1917, and brought down from the Great Lakes and placed in the South American trade. On August 6, 1918, the *Mohegan*, while on her fifth voyage for claimant, bound from New York for Paramaribo, Dutch Guiana, heard firing not far from Diamond Shoals Lightship at 2.25 o'clock p. m. At 2.30 p. m. the *Mohegan* saw a steamer in ballast running toward the light vessel, which was about eight miles distant. The officers of the *Mohegan* then saw flashes from the submarine's guns but the outline of the submarine was very indistinct. The master of the *Mohegan* turned the ship instantly and increased her speed to the limit, starting for Cape Hatteras

and getting as close to the shoals as possible, intending to beach his ship rather than abandon her. About 2.45 p. m. the steamer in ballast which had been attacked by the submarine blew up and disappeared. Immediately thereafter two shells struck close to the *Mohegan*; about 15 shells were sent after her, the last about 3.10 p. m. The submarine could then be seen about three or four miles astern, pushing a great wake ahead of her. The *Mohegan* was then getting into shoal water, and the submarine evidently concluded that it could not safely pursue her farther. The *Mohegan* turned back and put into Norfolk, where temporary repairs were made by her crew; on the fourth day she resumed the voyage to Paramaribo, where the crew made other minor repairs; and she reached New York again in October, 1918.

The claim is made that in escaping from the submarine, which the record identifies as German Submarine U-140, it was necessary for the *Mohegan* to increase the speed of her engines from 64 revolutions per minute with a steam pressure of 135 pounds to 95 revolutions per minute with a steam pressure far beyond the point of safety and that as a result of the strain to which the engines, boilers, and in fact the whole vessel were subjected she was greatly damaged, her seaworthiness impaired, and her market value greatly reduced, to the claimant's damage in the sum of \$65,889.87.

The German Agent contends that the damage complained of can not be attributed to Germany's act as the proximate cause and hence that under the Treaty of Berlin, as heretofore construed by this Commission, Germany is not obligated to make compensation for such damage.

This contention is rejected. If the allegations with respect to damage are true, then the damage was a direct result of the act of the German U-boat in attacking the *Mohegan*. The fact that the U-boat failed to overhaul and destroy the *Mohegan* is immaterial. It is obvious that the master of the *Mohegan* exercised good judgment in running away in an attempt to save his ship, which proved successful, even though she may have been damaged in the attempt. Had one of the shells struck and damaged the *Mohegan*, it would not be contended that this damage did not result from Germany's act. By the same token, whatever damage the *Mohegan* sustained through strain in escaping from the pursuit of the German U-boat under a running fire of shells is clearly attributable to Germany's act.

The question remains, To what extent, if at all, was the *Mohegan* damaged in escaping from the German submarine?

The evidence first submitted on this issue was meager and unsatisfactory. The claim is made that the condition of the ship resulting from the strain imposed in escaping from the submarine was such as to necessitate extensive repairs and rather than incur these expenses the owner sold her in the latter part of 1918 for \$150,000.00. The difference between the selling price and the book value of the vessel prior to the damage complained of is the principal amount claimed. Obviously this does not meet any accepted rule for measuring damages. At the time of the sale of the *Mohegan* by the claimant, shortly after the signing of the Armistice, wooden ships, especially those of the age of this one, not equipped for trans-Atlantic service, were not in great demand. Her sale for \$150,000.00 does not in itself imply that she was in a damaged condition.

There was submitted, however, the report of a survey made by Cox & Stevens under date of October 25, 1918, reciting that "the vessel is not in seaworthy condition, and could not be put in such shape without very considerable expense, if at all". There has lately been submitted a recent affidavit of Irving Cox, of the firm of Cox & Stevens, giving an estimate of the cost of placing the vessel in a seaworthy condition and expressing the opinion as an

expert that the condition of the vessel in October, 1918, might to a material extent be due to strains incurred while escaping from the submarine. There is also in the record a statement from one Peter Baumer, a lawyer, that "After the vessel returned to New York a survey was held, and it was found that it would cost more than \$50,000 to put the vessel in the same condition she was in before she was chased by the submarine, and that it would take more than two months to make the said repairs." The record is significantly silent with respect to the name and address of the individual making this survey and the report thereof is not in the record and its absence is unaccounted for.

It does not appear that the claimant made any material repairs to the *Mohegan* between August 6, 1918 (the date of her encounter with the submarine), and the date of her sale by him; nor does it appear that the Northland Navigation Company, Incorporated, the purchaser of this vessel from the claimant, made any substantial repairs to her subsequent to her purchase and prior to her sailing from New York on her last voyage. She was placed by her purchaser in the South American trade and on her first voyage out of New York was burned in the harbor of Rio de Janeiro in August, 1919, becoming a total loss. At the time of her loss she was insured, and her owners became involved in litigation over this insurance in the courts of New York (see *Northland Navigation Company, Inc., v. American Merchant Marine Insurance Company of New York* (1925), 214 N. Y. App. Div. 571). The evidence taken in that litigation throws a flood of light on the condition of the *Mohegan* following her escape from the German submarine. Her master testified that when the ship left New York she was "to all appearances in first-class condition"; that after the ship sailed from New York for Rio de Janeiro she encountered heavy weather and as a result sprung a leak and was compelled to put in to Paramaribo for repairs. The chief engineer, who was also chief engineer at the time of the *Mohegan's* encounter with the German submarine, testified that when near Trinidad the ship ran into a hurricane and turned about and went with the weather for something like 36 or 37 hours. In his testimony he referred to the ship's experience with the German submarine as follows: "When we came down to the Virginia Capes, a German submarine chased us, and we got back into Newport News again. * * * We laid in there something like six or seven days, until the coast was clear, and then we started off again". There is not a suggestion here that the ship suffered any damage as a result of her encounter with the submarine.

John W. Brewster, a marine surveyor and appraiser of New York, testified to having made a survey of this vessel on December 11, 1918, prior to her sale by the present claimant, and to having found her "in A-1 condition for a ship of her age, and she did not show any strain". He stated unequivocally that she was then in a seaworthy condition.

The marine protest made by the master and signed also by the first officer, the chief engineer, and the boatswain, before the American Consular Agent at Paramaribo on February 24, 1919, when she was on her last voyage, recites that when she sailed from New York "the said ship was then tight, staunch, and strong" and so forth. A similar recital is found in the marine protest made before the United States Consul at Rio de Janeiro.

After carefully weighing all of the testimony presented, the Umpire decides that the claimant has failed to discharge the burden resting upon him to prove that the *Mohegan* sustained any damage from the attempt to escape from the German submarine on August 6, 1918.

Wherefore the Commission decrees that the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of Winthrop C. Neilson, the claimant herein, or on behalf of the

Republic Mining and Manufacturing Company, for whose account and benefit he held title to the *Mohegan*, because of the damages alleged to have been sustained by the *Mohegan*.

Done at Washington April 21, 1926.

Edwin B. PARKER
Umpire

ARTHUR SEWALL AND COMPANY *ET AL.*
(UNITED STATES) *v.* GERMANY

(*April 21, 1926, pp. 681-685; Certificate of Disagreement by the National Commissioners, February 17, 1926, pp. 674-681.*)

PROCEDURE: MOTION TO RECONSIDER AWARD; CONFIRMATION OF AWARD.—
DAMAGE: (1) MATERIAL DAMAGE, (2) FRUSTRATION OF CONTRACT OBLIGATIONS, (3) FREIGHT MONEY LOST, (4) DESTRUCTION OF LIEN, PROPERTY INTEREST IN CARGO.—DAMAGES: MARKET-VALUE.—APPLICABLE LAW: TREATY OF BERLIN, MUNICIPAL LAW FICTIONS. Sinking by German cruiser on January 28, 1915, of American vessel. Award on October 30, 1925, by American and German Commissioner for market-value of vessel less amount paid by insurers. Motion by American and German Agent to reconsider award and determine whether Germany also liable for freight money lost less amount received from insurer. *Held* that, under Treaty of Berlin, Germany liable for material (physical) damage to tangible things, not for consequential damage through frustration of contract obligations (reference made to Administrative Decision No. VII, see p. 203 *supra*); and that, since freight money due only on delivery of cargo, claimants at time of sinking had yet no lien on cargo for freight money and, thus, no property interest in cargo itself, for destruction of which they can recover (*cf.* Administrative Decision No. VII); and that Germany, in destroying vessel, did not accept delivery or assume contract: Treaty of Berlin applicable, not municipal law fiction. Award of October 30, 1925, confirmed.

Cross-reference: A.J.I.L., Vol. 20 (1926), pp. 601-605.

Bibliography: Kiesselbach, *Probleme*, p. 121.

Certificate of disagreement by the National Commissioners

The Agent of the United States and the Agent of Germany have submitted to the Commission for its determination the claim in this case for loss of freight in the sum of \$39,759.54, and the American Commissioner and the German Commissioner, having been unable to agree on the question of the liability of Germany for this loss or any part of it under the Treaty of Berlin, hereby certify that question to the Umpire for decision.

The facts upon which this question arises are briefly as follows:

On November 19, 1925, the Agents of the two Governments joined in a request to the Commission which reads as follows:

“The Agent of the United States and the Agent of Germany respectfully request that the Honorable Commission reconsider the award entered under date of October 30, 1925, in the amount of \$91,450.00, with interest thereon at the rate of five per cent per annum from January 27, 1915, in a claim of the United States of America on behalf of Arthur Sewall and Company, a co-partnership, individually

and as attorneys in fact for the remaining claimants, v. Germany, Docket No. 6070, List No. 11,113, in order that the Commission may determine whether the Government of Germany is liable for the additional sum of \$39,759.54, for loss to the claimants of freight monies, the payment of which was controlled by the terms of an existing charter party.

"The award entered as of October 30, 1925, was premised upon an agreed statement presented to the Commission, in which there was set forth only the facts relating to the loss of the Ship *William P. Frye*, but did not present to the Commission the facts relating to the claim for the loss of the freight monies claimed."

It appears from the agreed statement of facts submitted by the two Agents that:

"The claimants had executed a charter party dated October 13, 1914, for a voyage from Tacoma or Seattle, in the State of Washington, to a port in England, with a cargo of wheat, which in part provided as follows: i.e. 'Freight payable in cash without discount, on true and faithful delivery of cargo at port of discharge per ton of 2,240 lbs., English gross weight delivered.'

"There was loaded upon the ship *William P. Frye* a cargo of approximately 5,034 tons of wheat which, upon completion of the voyage, would have secured to the claimants the payment of \$39,759.54 as freight monies'".

It further appears from the record in this case and from the agreed statement of facts that the ship *William P. Frye* sailed from Seattle in the State of Washington on or about the 4th day of November, 1914, and that:

"On or about the 27th day of January, 1915, the *William P. Frye*, while proceeding upon a private, peaceful, commercial voyage, and when approximately in Latitude 29° 53' S., Longitude 26° 47' W., she was sunk by a cruiser of the German Navy and became a total loss."

The German Government admits liability for the fair market value of the *William P. Frye* at the date of loss. The award of the Commission in this case, entered October 30, 1925, is based on a valuation of \$150,000.00 as the "fair market value of the *William P. Frye*, at the date of loss", but in making that award as stated in the above-quoted joint request of the two Agents the Commission did not have before it the present claim and it was not taken into consideration by the Agents in presenting their agreed statement of facts nor by the Commission in making its award.

On the facts above stated, the German Commissioner is of the opinion that this additional claim must be dismissed because he considers that Administrative Decision No. VII applies to it and that under that decision Germany is not liable for freight charges which were not due, as in this case, until the arrival of the vessel at the port of destination and therefore not due at the time the vessel was sunk.

In support of this contention the German Commissioner points out that one of the questions certified to the Umpire on May 12, 1925, by the two National Commissioners and which was decided by the Umpire in Administrative Decision No. VII is whether or not Germany is liable under the Treaty of Berlin for "claims for loss of *earnings* or *profits* of persons or *property* and for loss or damage in respect of intangible property".

The German Commissioner further points out that this question was decided by the Umpire adversely to the present claim, as appears from the following extracts from Administrative Decision No. VII:

" * * * The Umpire further decides that, save in certain excepted cases, the provisions of the Treaty of Berlin dealing with damage to property are limited to physical or material damage to tangible things." (Page 308.)^a

^a Note by the Secretariat, this volume, p. 228 *supra*.

" * * * This does not change the rule that so far as Germany is concerned her obligation is limited to making compensation for the tangible property destroyed—the ship—and that such compensation is measured by the reasonable market value of the ship at the time and place of its destruction plus interest thereon computed in accordance with the rules announced in Administrative Decision No. III." (Page 337.)^b

"Germany is not obligated to pay on behalf of the owner of a destroyed ship—

* * *

"(e) the amount he would have earned *under pending contracts* of affreightment, or under an existing charter-party, which amount represents prospective profits lost to him by the destruction of the ship". (Page 344.)^c

The German Commissioner further states that although he concurs with the Umpire's decision that in determining the market value of a ship its "earning power and the then value of [its] use" has to be taken into account, he cannot concur with the American Commissioner that the item of a specific charter, as such, can have a bearing on the ship's valuation. He further does not admit that a distinction should be drawn between a case where the ship chartered and lost has started on the voyage and a case where such a start has not been made. In both cases the freight is not earned until after the full and final completion of the voyage, subject of course to an agreement of the parties altering this rule. Both cases, therefore, in the German Commissioner's opinion are covered by the Umpire's decision that "In arriving at the market value of the whole ship, it is a *free ship* that is valued, and no account is taken of the independent market value of *any charter* that may exist thereon" (page 337),^d and that the "amount of Germany's obligations * * * is *not affected by the existence of a charter* or charters" (page 338).^e

The German Commissioner points out that under the law of all civilized nations, and especially under American law as laid down by the Supreme Court of the United States, "the net freight pending at the time of the collision" (see Mr. Justice Brown in the *Iberia* case, cited at page 53 of the American Brief in the claim on behalf of the West India Steamship Co., Docket No. 24) does not constitute an item to be taken into account in determining the *market value* of the ship, but is an independent item to be compensated for *besides* the value of the ship, that is, besides the material damage as such (see the decisions cited at page 40 of the American Brief).

The German Commissioner, referring to his Opinion dealing with claims for loss of earnings or profits, etc., Decisions and Opinions, pages 292-93,^f therefore, argues that, since under the provisions of the Treaty of Berlin and under Administrative Decision No. VII Germany's liability is *restricted* to the material damage, the pending net freight could not be added to the value of the ship.

The American Commissioner, on the other hand, is of the opinion that the question here presented is not a question of prospective earnings or profits, but merely a question of the measure of damages to be applied in ascertaining the market value of the *William P. Frye* at the time she was sunk, for which Germany's liability under the Treaty of Berlin is admitted, and the American Commissioner is further of the opinion that this question of the measure of damages is not one of the questions certified for the decision of the Umpire in Administrative Decision No. VII.

^b Note by the Secretariat, this volume, p. 246 *supra*.

^c Note by the Secretariat, this volume, p. 251 *supra*.

^d Note by the Secretariat, this volume, p. 247 *supra*.

^e Note by the Secretariat, this volume, p. 247 *supra*.

^f Note by the Secretariat, this volume, pp. 217-218 *supra*.

Furthermore, even if Administrative Decision No. VII should be applied in this case, the opinion expressed by the Umpire in that decision supports the contention of the American Commissioner in this case.

The Umpire stated in that decision:

“The Umpire decides that, save in certain excepted cases, Germany is not obligated under the Treaty of Berlin to make compensation for loss by American nationals (1) of prospective personal earnings as such or (2) of prospective profits as such growing out of the destruction of property, but holds that the earning power and the then value of the use of the property destroyed may be taken into account with numerous other factors in determining the reasonable market value of such property at the time and place of destruction, which value, with interest thereon as heretofore prescribed by this Commission, is the measure of Germany’s liability.” (Page 308.)⁸

As above stated, the present question does not concern prospective profits or earnings, but merely the market value of the property destroyed—the *William P. Frye*—at the time and place of destruction. The American Commissioner’s contention is that although the freight charges for the *William P. Frye* cargo were not payable under the charter until delivery at the port of destination, nevertheless a substantial part of the charges had been earned before the vessel was sunk, consequently, if the vessel had been sold the day before she was sunk, the proportion of the freight charges earned up to that time would have been added to the hull value of the vessel in fixing the purchase price, and accordingly should be now added in determining the market value of the vessel.

As stated by the Umpire in the extract above quoted from Administrative Decision No. VII:

“... the earning power and the then value of the use of the property destroyed may be taken into account with numerous other factors in determining the reasonable market value of such property at the time and place of destruction”, etc.

The point is well illustrated by the custom which prevails both in Germany and in the United States of adding interest earned up to the date of purchase in fixing the market value of a bond, although under the bond contract itself the interest so earned is not due and payable until a later date.

In other words, in determining the market value of a bond, the market value of the current coupon attached to it must be included and the market value of the current coupon is always the proportion of the interest on the bond which has already been earned during the period covered by the coupon, although such interest is not payable until the end of that period.

In the present case the *William P. Frye* had earned at the time she was sunk the proportion of the freight charges which the distance traveled from Seattle, Washington, around Cape Horn to the place where she was sunk, bears to the total distance from Seattle to her port of destination. The American Commissioner is, accordingly, of the opinion that this proportionate part, which can be ascertained by computation, should be awarded to these claimants.

The American Commissioner is also of the opinion that a proportionate part of this claim should be sustained to the amount above indicated, because the freight earned up to the time the vessel was sunk represented a part ownership in the cargo by the owners of the vessel by reason of the lien

⁸ Note by the Secretariat, this volume, pp. 227-228 *supra*.

which was created and attached to the cargo upon the execution of the charter party and the issuance of the bills of lading.

Under the terms of the charter party possession of the cargo was not obtainable by anyone except and until payment had been made to the master—the agent of the owners—of the charter hire. This stipulation, as well as the maritime law, gave to the shipowners a lien upon the cargo, and thereby an interest in tangible property. Such property having been destroyed by an act of the German Government, the claimants have suffered a loss of property, which is measured by the rule above suggested.

The German Commissioner does not admit that a lien of the carrier was created and attached to the cargo already upon the execution of the charter party and the issuance of the bill of lading. The existence of a lien is premised upon the existence of a claim for freight. Under charter contracts of the character here under consideration freight is not earned step by step according to the performance of the voyage but solely and exclusively upon the completion of the transport. There existed, therefore, at the time of loss neither a claim for freight nor, consequently, a lien.

The German Commissioner further denies that, assuming that a lien existed at the time of loss, such lien would represent a part ownership in the cargo. Says Carver (*Carriage of Goods by Sea*, Sixth Edition, page 866): “[The lien] does not give the shipowner any property in the goods.”

The opinion of the American Commissioner is, moreover, at variance with the leading idea of Administrative Decision No. VII. Under this decision the charterer's right to use the chartered vessel constitutes an asset (or a liability) chiefly through “the relation of the stipulated hire to the current market hire”. Applying this principle, the carrier would have a recoverable asset in the cargo only if and to the extent he can show that the stipulated freight was below the current market rate.

Besides, recovery for freight as advised by the American Commissioner would operate to reintroduce the principle of compensation for loss of profit, which is expressly excluded by the Treaty as interpreted in Administrative Decision No. VII.

Compensation awarded for the reason of the loss of lien attached to a cargo would, finally, be wholly inconsistent with the practice of the Commission in cargo cases. A large number of American-owned cargoes were lost on board of foreign vessels. Under the American Commissioner's theory the claim for freight of the foreign carrier would constitute a part ownership in the cargo and would work a reduction of the value of the American interest therein. Nevertheless, the Commission has consistently awarded the full market value of the cargoes as of the time and place of loss, totally disregarding a possible alien interest.

Finally, the German Commissioner calls attention to the Commission's award on behalf of John W. deKay and Shaun Kelly as executors of the estate of Edmond Kelly, deceased, Docket No. 496, where, notwithstanding a lien of \$40,000 held by the vendor, the American citizen John W. deKay, the formal award was to the full amount for the owner of the property only.

As to this point the American Commissioner points out that the award on behalf of deKay was subject to the payment of the vendor's lien out of the amount awarded.

In certifying this question to the Umpire for decision, the National Commissioners agree that, whatever the decision of the Umpire, it is unnecessary to reopen the award entered under date of October 30, 1925, but if the Umpire should decide that Germany is liable for all or any part of the present claim

then a supplemental award should be entered in favor of the claimants for the amount fixed by the Umpire's decision.

Done at Washington February 17, 1926.

Chandler P. ANDERSON
American Commissioner
 W. KIESSELBACH
German Commissioner

Decision

PARKER. *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

The facts as disclosed by the record follow:

The claimants herein, all American nationals, were the owners of the *William P. Frye*, a steel, four-masted, square-rigged sailing ship duly licensed under the laws of the United States and registered at the port of Bath, Maine. On October 13, 1914, the owners of that ship entered into a contract of affreightment for the carriage of a cargo of wheat from Tacoma and/or Seattle, in the State of Washington, obligating them to proceed to Queenstown, Falmouth, or Plymouth "for orders * * * to discharge at a safe port in the United Kingdom * * * and there deliver the same and be paid freight, as herein provided". The charterparty further stipulated for the payment of freight to the claimants "in cash without discount, on true and faithful delivery of cargo at port of discharge". The cargo was loaded in accordance with the charterparty, the vessel cleared from Seattle November 4, 1914, and the voyage was more than one-half completed when, on January 27, 1915, the vessel with her cargo was captured and on the following morning sunk by the Cruiser *Prinz Eitel Friedrich* of the German Navy in the South Atlantic Ocean. Claimants received indemnification from American insurers under five war-risk insurance policies on the hull in amounts aggregating \$58,550.00 and also received from a Canadian insurer \$10,000.00 under a war-risk insurance policy as indemnity for the loss of freight.

On September 11, 1925, the American and German Agents filed with the Commission an agreed statement of facts, in which it was recited that "The fair market value of the *William P. Frye*, at the date of loss, was the sum of \$150,000.00, and the claimants have therefore suffered a loss in the sum of \$91,450.00", being the agreed fair market value of the vessel lost less the \$58,550.00 which the war-risk insurers paid to claimants for the loss of the hull. On this agreed statement the National Commissioners on October 30, 1925, entered an award on behalf of the claimants in the sum of \$91,450.00 with interest thereon at the rate of five per cent per annum from the date of the loss to the date of payment.

Thereafter, on November 19, 1925, the American and German Agents joined in a motion requesting this Commission to reconsider that award

"... in order that the Commission may determine whether the Government of Germany is liable for the additional sum of \$39,759.54, for loss to the claimants of freight monies, the payment of which was controlled by the terms of an existing charter party."

This motion was accompanied by a corrected agreed statement of the two Agents reciting that—

“There was loaded upon the ship *William P. Frye* a cargo of approximately 5,034 tons of wheat which, upon completion of the voyage, would have secured to the claimants, the payment of \$39,759.54 as freight monies.”

“The Agent of the United States and the Agent of Germany submit to the Commission for its determination, the claim for loss of freight in the sum of \$39,759.54.”

From that sum the \$10,000 received from the Canadian insurer must be deducted.

In certifying to the Umpire for decision the question thus put by the two Agents, the National Commissioners stated that they have “been unable to agree on the question of the liability of Germany for this loss or any part of it under the Treaty of Berlin”.

For the reasons fully set forth in Administrative Decision No. VII, this Commission has held that under the Treaty of Berlin Germany's liability arising out of the destruction of ships and their cargoes is limited to physical or material damage to tangible things and does not extend to consequential damages growing out of the frustration of contract obligations resulting from such destruction. In the case here presented the only tangible things destroyed by Germany's act were (a) the ship, its equipment and stores, all owned by claimants and for which an award equal to their fair market value as stipulated by the Agents has already been entered on claimants' behalf, and (b) the cargo of wheat, which was British-owned and for which no claim is here presented.

It is urged that the claimants were by Germany's act in destroying the ship deprived of their right to continue with the voyage and thus completely to earn the freight money due them only on the completion of the voyage and delivery of the cargo. The argument advanced and the authorities cited by the counsel for both parties are interesting and would be pertinent if Germany's liability had to be determined either by rules of municipal law obtaining in the jurisdiction of the cases cited or by rules of international law in the absence of a treaty fixing the basis of liability. But, as has been repeatedly pointed out, Germany's obligations are fixed by the Treaty provisions without regard to the legality or illegality or the other qualities of the act resulting in the damage complained of. After very mature and painstaking consideration, this Commission has held that under the terms of the Treaty of Berlin, Germany's liability in a case of this nature is limited to the reasonable market value of the tangible property destroyed at the time and place of destruction with interest thereon.

But it is contended that the claimants (American nationals) had a lien on the cargo (which was impressed with the British nationality of its owners) for their freight money and that this claim was a property interest in the cargo itself, for the destruction of which the claimants can recover under the rule announced in Administrative Decision No. VII.

While there is no doubt that as between claimants and the owner of the cargo the former had a right to retain possession of the cargo pending the completion of the voyage and the payment of the freight, this was the extent of the claimants' rights. Under the express terms of the contract the freight was not earned or payable *pro rata itineris*. There never was a time when the claimants could demand the payment of the freight or any part of it. The contract was an entire contract under the terms of which the freight was to be earned and paid only on delivery of the cargo at destination.

The so-called lien for freight amounts to nothing more nor less than a right to hold the cargo until the freight *when earned* shall have been paid. Until so earned the lien to secure its payment does not mature. Such lien attaches only while the cargo remains in the possession of the shipowner. When it passes out of the shipowner's possession the lien does not follow the cargo, or inhere in it, or remain a charge upon it.

While, therefore, at the time the cargo involved in this case was destroyed, the claimants under their contract of affreightment had a right to possess it for the purpose of performing their contract and to collect the freight due thereunder, if, and when, that performance should be completed, further than this their interest in the cargo did not extend. The contract was frustrated by the destruction of the cargo. The freight was never earned and the lien to secure its payment never matured.

It is further contended on behalf of the claimants that in destroying the ship and the cargo Germany in effect stepped into the shoes of the cargo owner and accepted full delivery of the cargo at the place of destruction, and hence became liable to the claimants for the full amount of the freight stipulated for in the contract. Here again the rules for determining Germany's liability laid down in the Treaty of Berlin are lost sight of in an effort to apply rules prescribed by municipal law. Under the terms of the Treaty there is no room for the legal fiction that Germany accepted delivery of the cargo which she destroyed or that she assumed *cum onere* the contract which was frustrated by her act. Her liability is fixed by the terms of the Treaty as applied to the actual facts, not to legal fictions, and the facts are that Germany destroyed the cargo upon which the claimants' lien never matured and frustrated the contract which was never performed. The sole question presented is, Was Germany's act in destroying the British-owned cargo, which resulted in frustrating the claimants' contract to carry and deliver it to destination, a damage for which Germany is liable under the Treaty of Berlin? For the reasons pointed out in Administrative Decision No. VII this question must be answered in the negative.

Wherefore, as the American and German Agents have agreed that, measuring the damages suffered by claimants resulting from the act of Germany in sinking the *William P. Frye* on the basis of the fair market value of that vessel on the date of her destruction, the claimants herein have suffered damages in the sum of \$91,450.00 and no more, and as the National Commissioners on October 30, 1925, entered an award herein on behalf of the claimants for that amount with interest thereon at the rate of five per cent per annum from the date of the loss to the date of payment, the Commission decrees that the said award be, and it is hereby, in all things confirmed; and the Commission further decrees that the Government of Germany is not obligated to pay to the Government of the United States any further or additional amount on behalf of the claimants herein because of any loss or damage alleged to have been sustained by them connected with or growing out of the destruction of the *William P. Frye*.

Done at Washington April 21, 1926.

Edwin B. PARKER
Umpire

WEST INDIA STEAMSHIP COMPANY
(UNITED STATES) *v.* GERMANY
(*May 14, 1926, pp. 687-689.*)

WAR: DESTRUCTION OF CHARTERED VESSEL.—DAMAGE: CHARTERER'S INTEREST IN VESSEL, FREIGHT MONEY LOST, TANGIBLE PROPERTY LOST. Sinking by German submarine on June 5, 1918, of Norwegian vessel chartered by American corporation. Claim for freight money less amount received from insurer, and for value of lost coal. *Held* that claimant failed to prove that charter was asset in its hands (reference made to Administrative Decision No. VII and award in Sewall case, see pp. 203 and 311 *supra*). Award made for lost coal belonging to claimant.

Bibliography: Kiesselbach, *Probleme*, p. 111.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

On June 5, 1918, the Steamship *Vinland*, of Norwegian registry and ownership and operated by a Norwegian master and crew under the directions of the charterer, the West India Steamship Company, an American corporation, claimant herein, was stopped and sunk by a German submarine. The charter-party under which the *Vinland* was being operated was executed at New York January 29, 1918, on cable authority from the owner dated Bergen, Norway, January 28, 1918. She was delivered on March 16, 1918, under this charter-party, which by its terms became effective for a period of three calendar months from that date, and therefore by its terms would have expired on June 16 had the ship not been destroyed on June 5.

This claim is put forward for the net amount which the charterer would have earned from the carriage of freight under the charter had the ship not been destroyed, less \$11,000.00 war-risk insurance collected by the charterer carried by it to protect against the loss of freight moneys.

For the reasons set forth in Administrative Decision No. VII, handed down May 25, 1925 (Decisions and Opinions, pages 308-345), and in Docket No. 6070, Arthur Sewall and Company *et al.*, handed down April 21, 1926,^a the claim as so presented must be rejected.

There is no evidence in the record that the hire stipulated to be paid by the claimant for the use of the ship was less than the current market hire at which similar ships could have been chartered at the time the *Vinland* was destroyed, or that the charter operated as a burden or an encumbrance on the ship so as to affect the price which a purchaser desiring and able to buy would have paid for her subject to the charter at the time she was destroyed. It follows that under the record as presented the claimant herein has failed to discharge the burden resting upon it to prove that at the time the *Vinland* was destroyed the charter was an asset in its hands which operated as an encumbrance on the ship, and also the extent of such encumbrance and the value of such asset, so as to entitle it to recover under the rules laid down by this Commission in Administrative Decision No. VII.

There was destroyed with the ship coal belonging to the claimant of the value of \$336.00.

Applying the rules announced in Administrative Decision No. VII and other decisions of this Commission to the facts in this case as disclosed by the

^a *Note by the Secretariat*, this volume, pp. 203 and 311 *supra*, respectively.

record, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of the West India Steamship Company the sum of three hundred thirty-six dollars (\$336.00) with interest thereon at the rate of five per cent per annum from November 11, 1918.

Done at Washington May 14, 1926.

Edwin B. PARKER
Umpire

HOUSATONIC STEAMSHIP COMPANY, INC.
(UNITED STATES) *v.* GERMANY
(*May 14, 1926, pp. 689-694.*)

WAR: DESTRUCTION OF CHARTERED VESSEL.—DAMAGE: OWNER'S INTEREST IN VESSEL. TANGIBLE PROPERTY LOST.—DAMAGES: (1) REPLACEMENT VALUE, (2) FACTORS FOR DETERMINATION OF MARKET VALUE OF CHARTERED VESSELS.—EVIDENCE: AFFIDAVITS, NORWEGIAN SALES TABLE, EVIDENCE TAKEN FROM OTHER CASES. Sinking by German submarine on February 3, 1917, of American vessel chartered by British firm for term of war at less than one-fourth of current rate. Claim for replacement value of vessel less amount received from insurer, and for value of lost stores and supplies. *Held* that normally cost, age, physical condition and cost of replacement are important factors in arriving at market-value of vessel, but that at time of sinking availability for immediate use was of controlling importance; and that at that time owner's interest in vessel was highly speculative: vessel not available, but chartered at hire little if any in excess of operating costs; and that there is no evidence that claimant could have sold vessel on or about date of sinking for as much as collected insurance. Award made for lost stores and supplies. Evidence used: see *supra*.

Bibliography: Kiesselbach, *Probleme*, p. 120.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of the National Commissioners certifying their disagreement.

From the facts as disclosed by the record it appears that the Housatonic Steamship Company, Inc., was incorporated under the laws of the State of New York in March, 1915, with an authorized capital stock of \$125,000. It purchased from a German corporation the Steamship *Georgia*, of German registry, which had, following the outbreak of the war in 1914, sought an American port of refuge from which it was unable safely to issue. After the purchase this vessel was renamed the *Housatonic*. She was a single screw steamer built of steel at Glasgow in 1891, of 3,143 gross tons, 2,022 net tons, and about 4,880 deadweight tons. Her original cost of construction was \$210,000. Her German owner had from time to time written off for depreciation so that her book value was \$83,000 when her German owner sold her to the claimant herein for \$85,000. On February 23, 1916, the claimant entered into a charter-party with Brown, Jenkinson & Company, of London, British nationals, whereby the latter chartered the *Housatonic* "for the term of the present war" with a provision "that on the cessation of the present war, prompt redelivery of the steamer shall be given by the Charterers to the Owners".

The charter also contained a clause reading:

“Charterers undertake to secure the Allied Governments’ guarantee that, notwithstanding the transfer of this steamer from the German to the American Register during the present war, the steamer shall be immune from warlike proceedings on the part of the British and Allied Governments.”

This charter was entered into during the period of American neutrality. At that time Great Britain and the other Allied Powers were asserting the right to capture and condemn vessels transferred subsequent to the outbreak of war from German to neutral registry. The existence of this condition at the time of entering into this charter made the *Housatonic* of little more value to the claimant than she had been to her previous German owner because, notwithstanding her change of ownership, name, registry and flag, she was still subject to the risk of capture and condemnation. Obviously it was for this reason that the claimant entered into a charter-party with a British firm at the stipulated hire of 11 shillings per gross ton or about 7 shillings per deadweight ton per calendar month at a time when the current charter rate was about 32 shillings per deadweight ton. The effect of this charter was to give to a British firm throughout the war period the exclusive right to use the former German vessel which had been transferred to American registry, at a rate of hire less than one-quarter of the then current rate. Manifestly one of the principal considerations moving the claimant to enter into this charter-party was the obligation of the British charterers to secure immunity against attack or seizure on the part of the British and Allied Governments. Those Governments were naturally anxious to secure for themselves or for their nationals the right to use ships transferred from German registry, and the guarantee stipulated for in the charter-party could be readily procured by a British national but not by an American or other neutral national.

With the exception of the special provisions above noted and others not material to note here, the charter was the ordinary form of time charter for the “term of the present war”. The owner (claimant herein) was obligated to provide and pay for provisions and wages of the captain, officers, engineers, firemen, and crew and to provide and pay for the necessary equipment and for insurance, save as otherwise specially stipulated. Marine insurance on hull and machinery for \$180,000, or its British equivalent, was to be carried, the premiums for which were to be borne by the owner except that any premiums in excess of stipulated rates were to be borne by the charterer. The premiums for war-risk insurance, “based on the valuation of £58,000”, were to be paid by the charterer.

This was the status of the *Housatonic* when she was sunk by a German submarine on February 3, 1917. The sole question here presented is, What was the reasonable market value of the claimant’s interest in the *Housatonic* on that date? The owners claim her replacement value was \$839,600.

Under normal conditions the cost of a vessel, her age and physical condition, and the cost of replacement are important factors in arriving at her market value. Even in February, 1917, these factors were given some weight in arriving at the value of a ship, but the great demand for tonnage at that time rendered availability for immediate use of controlling importance. Therefore, the affidavits in the record of two witnesses that the replacement value of the *Housatonic* at the time of her destruction was \$839,600 in the opinion of one and about \$900,000 in the opinion of the other, based in each instance both on “the cost of building a vessel” of the same type and on sales of similar vessels, are not very helpful in determining her reasonable market value at the time of her loss encumbered with the charter. However, substantially the

same result is obtained by using as a basis the Norwegian value of free ships during the first quarter of 1917. According to the Norwegian schedule the *Housatonic* had a value at that time of about \$855,839. But the *Housatonic* was not a free ship. She was under charter to a British firm until "the cessation of the present war", at a stipulated hire of about 7 shillings per month per deadweight ton, while at the time of her loss the current rate was 46 shillings 6 pence per month per deadweight ton. Since that charter had been entered into the cost of operation of the *Housatonic*, which was borne by the claimant herein, such as wages of the master and crew, the cost of provisions, stores, repairs, etc., had greatly increased but the income from the hire was stationary, fixed by a charter of uncertain duration at a rate of less than one-fourth of the current rate at the time the charter was entered into and less than one-sixth the current rate at the time the ship was destroyed. These abnormally high charter rates were caused by the abnormal demand for tonnage for immediate use far in excess of the available supply. While ordinarily the prevailing freight rates were a controlling factor in determining the reasonable value of a free ship, they had little influence in determining the value of the owner's interest in the *Housatonic*, which was not a free ship. The fact that she was not free, the fact that she was not available to the owner so that he might take advantage of the abnormally high freight rates and charter rates but must be operated exclusively in the interest of a British firm until the "cessation of the present war" at charter hire little if any in excess of the operating costs which must be borne by the owner, render the owner's interest in her of a highly speculative and doubtful value.

If, then, the claimant had been willing to sell the *Housatonic* encumbered with this charter on February 3, 1917, and had sought a purchaser willing to buy, where could it have found such purchaser and at what price could a sale have been made?

The claimant concedes that "at the charter rate * * *—11 - — per d. w. ton—the steamer could make very little profit in operation". As a matter of fact the stipulated charter hire was 11 shillings per *gross* ton or about 7 shillings per *deadweight* ton. From the evidence before this Commission in other cases it appears that the costs of operation had so increased between the year which had elapsed from the date of the making of the charter to the date of the loss of the ship that it is doubtful if the stipulated charter hire yielded any return to the owner above operating costs borne by it. It is certain that the net income, if any, which the *Housatonic* was yielding to her owner at the time of her loss did not amount to a reasonable interest return on \$273,353.30, the amount of the insurance actually collected by the claimant. The vessel had no or practically no net earning capacity during the continuance of the war. At the time of her loss the United States was still neutral. The issue of the great conflict was doubtful. No one could foreshadow how long the war would last. The speculators were willing to speculate on the purchase of tonnage when they could procure immediate or early delivery. But even the speculators would have hesitated to invest a substantial sum in a vessel the possession of which could not be delivered them, which would have yielded them no returns during the war, and the value of which after the war was dependent on numerous uncertain factors.

In view of the conditions existing on February 3, 1917, it may well be doubted if the claimant could have realized on the *Housatonic*, encumbered with her charter, any substantial amount. Doubtless there were in America and in other countries many adventurers willing to take great risks for the chance of reaping large rewards. But all such as a rule confined their activities to garnering war profits where large and quick returns were promised; they

were not interested in tying up their cash resources without any return during the war, where the after-war profits were at best uncertain and highly speculative. As heretofore noted, the charter provided that the charterer should pay the premiums for war-risk insurance on a valuation of £58,000 (which, converted into dollars at the prevailing rate of exchange, equaled \$275,772.60), and from this insurance the claimant received \$273,353.30, the proceeds after deducting the 1% commission of the insurance broker. Considering the transaction as a whole, it seems reasonably apparent that the chance of collecting this insurance, amounting to approximately \$190,000.00 in excess of the purchase price, was at least one of the factors influencing the claimant to purchase and let the vessel. However this may be, there is no evidence in the record to justify the conclusion that the claimant could probably have sold the *Housatonic* encumbered by her charter on or about February 3, 1917, for as much as the insurance which it collected. It follows that the claimant has failed to discharge the burden resting upon it to establish a net loss suffered by it resulting from Germany's act in destroying the *Housatonic*.

It appears from the record that the claimant had upon the *Housatonic* at the time of her loss stores and supplies of the value of \$4,500.00 for which it has not been reimbursed by insurance or otherwise.

Applying the rules announced in Administrative Decision No. VII and other decisions of this Commission to the facts in this case as disclosed by the record, the Commission decrees that under the terms of the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of the Housatonic Steamship Company, Inc., the sum of four thousand five hundred dollars (\$4,500.00) with interest thereon at the rate of five per cent per annum from February 3, 1917.

Done at Washington May 14, 1926.

Edwin B. PARKER
Umpire

HARBY STEAMSHIP COMPANY, INC.
(UNITED STATES) *v.* GERMANY
(*May 14, 1926, pp. 694-697.*)

WAR: DESTRUCTION OF VESSEL.—DAMAGES: MARKET-VALUE.—EVIDENCE: AFFIDAVITS, INTERESTED PARTY, BRITISH SHIPPING PERIODICAL, NORWEGIAN SALES TABLE, EVIDENCE TAKEN FROM OTHER CASES. Sinking by German submarine on November 26, 1916, of American vessel. Claim for value of vessel less amount received from insurer, and for value of lost stores and supplies. *Held* that there is no evidence that at date of loss, vessel had reasonable market-value in excess of insurance collected. Evidence used: see *supra*. Award made for lost stores and supplies.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

On November 26, 1916, the Steamship *Chemung*, of American registry, owned by the Harby Steamship Company, Inc., an American corporation, claimant herein, while engaged in private commerce was sunk in the Mediterranean by a German submarine. She was bound for Genoa and

Naples with a cargo of electrical and other machinery, machine tools, blasting caps, cotton, foodstuffs, etc.

Germany admits liability under the Treaty of Berlin for the net loss, if any, which the claimant has sustained resulting from the destruction of the *Chemung*. The sole question here presented is the value of the property destroyed at the time of its destruction.

The only evidence offered by the claimant of the value of the *Chemung* at the time she was destroyed consists of two affidavits, one that of a principal stockholder in and the president of the claimant corporation, who testified: "In my opinion the said Steamship *Chemung* had a market value at New York of \$814,650 on November 27, 1916." This witness—an interested party—does not proffer any explanation whatever of his method of reaching this estimate but contents himself with the meager statement quoted. He has not qualified as an expert and from the records in another case before this Commission it appears that he is a cotton broker and exporter.

The second witness does not go into much greater detail, but gives his opinion of the reasonable market value of the *Chemung* on November 26, 1915, exactly one year prior to her destruction. This date is repeated three times in his short affidavit. The value which he placed upon the ship is exactly the figure given by the president of the claimant company. The date may be explained as a clerical error, but it suggests a want of accuracy on the part of this witness and does not stimulate confidence in his testimony as an expert, especially in the absence of any suggestion as to how he reached this estimate.

By bill of sale dated April 22, 1916, executed in pursuance of an assignment dated March 7, 1916, of a contract entered into on February 11, 1916, the claimant acquired from the Erie Railroad Company through Charles W. Morse the Steamship *Chemung* for a cash consideration of \$400,000.00. This vessel of 3061 gross and 1848 net tons was built of steel in 1888 at Buffalo, New York, where she was registered, and had been engaged in lake trade by the Erie Railroad Company. After her purchase by claimant she was transferred to New York registry and engaged in trans-Atlantic trade. At the time of her loss she was 28 years old. The record is silent with respect to her condition both at the time of her purchase by claimant and at the time of her loss. Claimant contracted for her purchase on March 7, 1916, for \$400,000 and the purchase was consummated in accordance with the contract and delivery effected on or about April 22, 1916. There is no suggestion in the record that the purchase price paid by claimant was under the market and it may be safely assumed that this price represented not less than the fair market value of the vessel in her condition at that time, especially when the experience and business acumen of the veteran dealer in shipping from whom claimant purchased are taken into account. This price was at the rate of approximately \$131 per gross ton. The records of this Commission in other cases disclose the sale of one ship made in January, 1916, at \$115 per gross ton; another in February, 1916, at \$124 per gross ton; one in March, 1916, at \$123 per gross ton; and one in April, 1916, at \$128 per gross ton. None of these vessels was as old as the *Chemung*. Those sales tend to indicate that the price paid by the claimant was slightly above the market at the time of the contract of purchase.

Following the loss of the *Chemung* the claimant collected war-risk insurance, partly from American and partly from French underwriters, which aggregated \$584,650, at the rate of nearly \$191 per gross ton. The insurance collected was equivalent to an increase of practically 46% over the purchase price paid by claimant. During the eight months and 19 days which intervened between the claimant's contract to purchase this vessel and the date of her loss there

had been a substantial increase in the market value of tonnage, but no testimony has been brought to the attention of this Commission indicating that during this period the percentage of increase in value of vessels of the class to which the *Chemung* belonged was as great as 46%.

"Fairplay", a British shipping periodical published weekly, gives statistical data purporting to show the fluctuations in the price of tonnage based on actual sales of cargo steamers of 7,500 deadweight tons, new, available, and ready for use, a type much larger and of a higher class than that of the 28-year-old *Chemung*. Such a steamer, according to "Fairplay" (January 3, 1924) sold in March, 1916, at £160,000, and it is estimated that by the middle of December, 1916, such a vessel was worth £187,500, or an increase of 17+ %.

From the table compiled from actual sales in Norway of free ships in a free market, which was used by Great Britain as the basis of her shipping reparation claim against Germany, it appears that ships of the age of the *Chemung* increased in value the last half of 1916 over the first half of that year approximately 26%.

In view of the meager and wholly unsatisfactory evidence presented by the claimant on the issue of value, the Umpire has been forced to take into account evidence before this Commission in other cases which, taken as a whole, does not justify a finding that at the date of her loss the *Chemung* had a reasonable market value in excess of the insurance collected by the claimant. It follows that, on the record as presented, the claimant has failed to discharge the burden resting on it to establish a net loss suffered by it resulting from the destruction of the *Chemung*.

A claim is put forward for the value of fuel, food, and other stores and supplies claimed to have been lost with the ship. The only evidence offered in support of this claim is a statement signed by the New York port captain of the claimant that he caused to be placed on board the *Chemung* at the port of New York for her last voyage beginning November 8, 1916, stores and supplies of the value of \$5,102.33. The principal items in this statement are 300 tons of coal of the value of \$2,400 and groceries, meats, vegetables, etc., of the value of approximately \$2,000. These had all been drawn upon during the 19 or 20 days elapsing between the date on which the *Chemung* cleared the port of New York and the date of her destruction when she was nearing her destinations in Italy, where presumably she was planning to take on fresh supplies for her return trip. Two affidavits of the master of the *Chemung* are in the record but no reference is made by him or anyone else to the amount of the stores and supplies remaining unconsumed at the time of her destruction. In this state of the record the Umpire would be justified in holding that the claimant had failed to discharge the burden resting on it to prove its case. However, the Umpire will assume that practically one-fifth in value of the supplies taken on at New York remained unconsumed when the *Chemung* went down, and with respect to this item an award will be entered on behalf of the claimant for \$1,000.00 and interest.

Applying the rules announced in previous decisions of this Commission to the facts disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of the Harby Steamship Company, Inc., the sum of one thousand dollars (\$1,000.00) with interest thereon at the rate of five per cent per annum from November 26, 1916.

Done at Washington May 14, 1926.

Edwin B. PARKER
Umpire

UNIVERSAL TRANSPORTATION COMPANY
(UNITED STATES) v. GERMANY

(May 14, 1926, pp. 698-701.)

EVIDENCE: WITNESS, DIARY OF GERMAN CRUISER, FAILURE TO CO-OPERATE IN COLLECTING EVIDENCE. Loss of American vessel after departure on December 24, 1915 from New York to Algiers. *Held* that there is no evidence that vessel destroyed by act of Germany or her agents. Evidence: see *supra*; failure to comply with Commission's request to furnish information.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

From the record it appears that the claimant herein, the Universal Transportation Company, Inc., an American corporation, acquired the American Steamship *Orleanian* by purchase on or about November 30, 1915, paying therefor the sum of \$150,000. She was an iron vessel built at Glasgow in 1880, rebuilt and re-engined in 1892, of 2293 gross and 1482 net tons. On December 10, 1915, the claimant entered into a trip charter-party with the agent of an Italian petroleum society under which the *Orleanian* sailed from the port of New York on December 24, 1915, bound for Algiers and Malta, with a full cargo of case oil and naphtha. So far as appears from the record she has not been heard from since. The secretary and treasurer of the claimant testified September 1, 1925, that "he has had no advice of the steamer, and is of the opinion that she was sunk 'without trace' by Germany".

The record is absolutely barren of evidence to support this opinion unless certain testimony of a master mariner with 37 years varied experience at sea be considered such. This sea captain, Barlow by name, testified in 1925 that he had been a licensed master since 1912 and had made at least 12 trips as master of steamers sailing from the port of New York to Mediterranean ports at all seasons, had been in command of ships traveling the war zones from 1914 to 1918, and had been master of vessels similar to the *Orleanian*. In the light of his experience and his knowledge of weather and other conditions to be encountered on such a voyage, he expressed the opinion that a steamship of the type of the *Orleanian* making such a voyage in the latter part of December or the first part of January would have followed a course on the latitude of 36° N.; that on this course the steamer would have encountered less of the easterly gales prevailing in the winter, although the distance would have been increased and a slight negative current would have been encountered; and that some of the ships of this type seeking better weather would have taken an even more southerly course, thus increasing the distance. This witness expresses the opinion that the *Orleanian* "would have been in latitude 36°, Longitude 10° about January 14th, 1916". He incorporates in his testimony a schedule of the reported operations of the German Cruiser *Moewe* from January 11 to January 16, 1916, inclusive, from which it appears that the *Moewe* was very active during this period in capturing and in most instances destroying British ships and their cargoes, operating between latitude 43° 40' N., longitude 12° 30' W., on January 11, and latitude 30° 40' N., longitude 17° 15' W., on January 16. This schedule does not record the activities of the *Moewe* on January 14, but on January 12 and 13 she was operating in approximately latitude 38° 44' N., longitude 13° 58' W., and on January 15 she was operating in latitude 33° 7' N., longitude 14° 9' W. From this claimant deduces that the

Moewe was probably in the vicinity of latitude 36° N., longitude 10° W., about January 14, 1916, where she might have encountered the *Orleanian* had the latter followed the course suggested by Captain Barlow and not encountered any other marine risks or war-risks after sailing from New York 21 days earlier.

As against these highly speculative and inconclusive conjectures, it appears that the *Orleanian* was a neutral vessel, of American registry, flying the American flag, a ship 35 years old, with a cargo of petroleum oils; and from the record of the *Moewe* it appears that throughout her war activities she never sunk a merchant vessel without identifying such vessel by name and without first taking therefrom the officers and crew. From her record as incorporated in part in Captain Barlow's testimony it appears that on January 16, 1916, the *Moewe* transferred members of crews of captured vessels which she then had on board to the British Steamship *Appam*, which, in charge of a prize crew, was later sent to Newport News, Virginia, where it arrived safely on February 1, 1916.

In view of the record of the *Moewe* it may fairly be assumed that had she encountered the neutral *Orleanian* on January 14, she would not have captured or sunk her; and even if she had done so she would, as was her custom, have ascertained the name of the ship, taken the crew on board, and transferred them with the members of the other crews of captured vessels to the *Appam*. It is highly improbable that the raider *Moewe* would have taken such pains to preserve the lives of her British enemies and then have ruthlessly destroyed a neutral American ship without rescuing any member of her crew.

But this Commission is not left to speculate with respect to a possible encounter between the *Moewe* and the *Orleanian*. The war diary of the *Moewe* covering the period of January 4 to January 16, 1916, has been submitted to the Commission by the German Agent and there is no record of the *Moewe* ever having sighted the *Orleanian*. The German Admiralty certified that in all of the adventures of the *Moewe* no ship was captured and sunk by her without the accurate establishment of the name and nationality thereof, and that "The American ship *Orleanian* was not sunk by the *Moewe*". The German Admiralty further certifies that "During December [1915] and January 1916 there were no German U-boats operating in the Atlantic or in the western Mediterranean" and that no American ship was destroyed by Germany in December, 1915, or in January, 1916.

There is in the record a letter from claimant's private counsel addressed to the American Secretary of State, dated January 11, 1919, referring to the loss of the *Orleanian*, in which this statement occurs:

" * * * It is believed that she was sunk off Gibraltar as the submarines were very active at that point at the time the vessel was due there. The company has received no report whatsoever of the vessel since her sailing. Would it be possible to ascertain from the German records whether or not the vessel was sunk by one of their submarines?"

This was written two months after the Armistice and more than three years after the *Orleanian* was last heard from. It seems that it had not occurred to the claimant at that time to attribute the loss of the *Orleanian* to the German raider *Moewe*.

It is also significant that this same counsel appeared before the American courts in 1916 on behalf of the British owner and master of the *Appam* and presumably had ample opportunity to learn of the activities of the *Moewe* from the 150 officers and members of the crews of certain vessels captured by the *Moewe*, who were transferred to the *Appam* on or about January 16, 1916, and landed at Newport News, Virginia, some of whom were on the *Moewe* on

January 14, 1916, and for several days prior and subsequent thereto. Yet apparently it did not occur to the claimant or its counsel to attribute the loss of the *Orleanian* to the *Moewe* until several years thereafter.

From this same communication from claimant's counsel dated January 11, 1919, it appears that the owner collected insurance for the loss of the *Orleanian* in the amount of \$100,000. The proof of loss upon which such insurance was paid to the claimant should throw some light on the time and place and cause of the loss and whether it was due to the ordinary marine risks or to risks of war. Though requested so to do, the claimant has failed to furnish full information with respect to the nature and amount of this insurance and the evidence upon which \$100,000 was paid. Excepting that letter, there is no word in the record about the *Orleanian* having been insured.

In this state of the record the Umpire finds that the claimant has failed to discharge the burden resting upon it to prove that the *Orleanian* was destroyed by an act or acts of Germany or her agents in the prosecution of the war.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein because of any loss or damage alleged to have been sustained by it connected with or growing out of the destruction of the Steamship *Orleanian*.

Done at Washington May 14, 1926.

Edwin B. PARKER
Umpire

ROBERT E. O'ROURKE, AS RECEIVER OF THE
MISSISSIPPI VALLEY, SOUTH AMERICAN & ORIENT
STEAMSHIP COMPANY (UNITED STATES) *v.* GERMANY

(May 25, 1926, pp. 702-704.)

PROCEDURE: PRELIMINARY QUESTION.—JURISDICTION: DEBTS, TORT. *Held* that claim based upon alleged wrongful acts of German nationals, outside of Germany and prior to war, falls outside terms of Treaty of Berlin.

BY THE COMMISSION:

This claim has been submitted to the Commission for the determination, as a preliminary question, of whether or not on the facts alleged in this case it comes within the jurisdiction of the Commission as a debt for which the Government of Germany is financially obligated under the terms of the Treaty of Berlin.

The essential facts alleged, as presented in an agreed statement signed by the Agents of the two Governments, are as follows:

"The Mississippi Valley, South American and Orient Steamship Company is an American corporation organized under the laws of the State of Louisiana (Exhibit 1). The claimant, Robert E. O'Rourke, is receiver of said Company, appointed such receiver by the United States District Court for the Southern District of New York (Exhibit 2). This claim is based upon the allegation that the Hamburg-American Line, and the North German Lloyd Lines, German nationals, with nationals of other countries, did some time in 1911, contrary to the provisions of the law of the United States known as the Sherman Anti-Trust Act of July 2,

1890, enter into a conspiracy to control American shipping and stifle American competition with the alleged conspirators, or either of them, whereby it is alleged, as set forth in the petition filed by claimant (Exhibit 2), that the claimant suffered damages in the sum of \$250,000.00, and claimant asks for an award under the provisions of the Sherman Anti-Trust Act against the Government of Germany, as a debt, for treble the amount of said damages, to wit, the sum of \$750,000.00. The claimant herein, on or about June 2, 1920, commenced an action in the District Court of the United States for the Southern District of New York against Hamburg-Amerikanische Packetfahrt Aktien-Gesellschaft and Hamburg-Südamerikanische Dampfschiffahrts-Gesellschaft, for treble damages for the alleged violation of provisions of the Sherman Anti-Trust Law, which said action is pending and undetermined in said court, and a copy of the complaint in said action is hereto attached."

On the facts above stated this is not a claim arising since July 31, 1914, in respect of damage to or seizure of the claimant's property, rights, and interests within German territory as it existed on August 1, 1914. Consequently the claim does not come within the first category of claims submitted to this Commission under Article I of the Agreement of August 10, 1922, between the United States and Germany, under which this Commission was organized.

It further appears from this statement of facts that this is not a claim for loss or damage to which the claimant has been subjected with respect to injuries to persons, or to property, rights, and interests, since July 31, 1914, as a consequence of the war, within the meaning of the Treaty of Berlin under the decisions of this Commission. Consequently the claim does not come within the second category of claims submitted to this Commission under the Agreement of August 10, 1922.

It further appears that this is not a claim for damages suffered through acts of Germany or its agents since July 31, 1914, and therefore it does not come within the provisions of the Knox-Porter Resolution, which are embodied in the Treaty of Berlin, and furthermore as the claim did not arise during the period of the belligerency of the United States it does not come within the provisions of the reparation clauses of the Treaty of Versailles, which are embodied in the Treaty of Berlin.

Apparently it is admitted by the claimant that this claim does not come within any of the above-mentioned categories or provisions, because the claim as presented is described as a debt owing to an American citizen by a German national for the purpose of bringing the claim within the third category of claims submitted to this Commission under Article I of the Agreement of August 10, 1922, above-mentioned. Article I of that Agreement provides:

"The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

" * * *

"(3) Debts owing to American citizens by the German Government or by German nationals."

It remains to be considered whether this claim comes within this category.

This claim, although termed a debt by the claimant, is actually a claim for damages arising from alleged wrongful acts of German nationals, outside of Germany and prior to the beginning of the war, the liability for which acts depends upon an Act of the Congress of the United States.

The Commission has been unable to find any authority under the Treaty

of Berlin, as interpreted by this Commission, for taking jurisdiction over this claim and holds that it must be dismissed for lack of jurisdiction.

Done at Washington May 25, 1926.

Edwin B. PARKER
Umpire

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

ADMINISTRATIVE DECISION NO. VII -- A

(*Claims of American Charterers of Foreign Ships and American Owners of Ships Chartered to Aliens [Tanker Cases]*, August 7, 1926, pp. 704-715.)

WAR: DESTRUCTION OF CHARTERED VESSEL.—DAMAGE(S): FACTORS FOR DETERMINATION OF MARKET VALUE OF VESSELS AND OF VALUE OF CHARTERER'S INTEREST IN VESSEL; MARKET VALUE OF CHARTERS.—EVIDENCE: LAW OF AVERAGES, BURDEN OF PROOF. *Held* that, to measure estate or interest of charterer in vessel at time and place of destruction (*cf.* Administrative Decision No. VII, see p. 203 *supra*), Commission must: (1) ascertain reasonable market value of vessel as *free* ship at time and place of destruction: (*a*) relative importance of general averages; (*b*) normal and war-time factors in arriving at market value (availability, cargo capacity, nationality of registry, of ownership and of charterer, class, original and reproduction costs, speed, age, draft, adaptability for particular trades); and (2) determine relative interest of owner and charterer: (*a*) burden of proof: Germany must ordinarily establish foreign interest in American-owned vessels, claimant American interest in foreign-owned vessels; (*b*) no market value of charter exists: charters ordinarily not sold and purchased; (*c*) value of charterer's estate or interest in vessel: ordinarily represented by excess, if any, of current charter hire over stipulated hire, measured over period (not exceeding charter term) that vessel would have survived and also escaped requisition frustrating charter (law of averages), and subject to certain other limiting factors as may obtain in each particular case.

Cross-references: A.J.I.L., Vol. 20 (1926), pp. 782-789; Annual Digest, 1925-26, pp. 249-251; Kiesselbach, *Probleme*, pp. 431-439 (German text); Witenberg, Vol. II, pp. 148-159 (French text).

Bibliography: Annual Digest, 1925-26, p. 251; Kiesselbach, *Probleme*, pp. 118, 119.

PARKER, *Umpire*, rendered the decision of the Commission.

Numerous cases have been submitted to the Commission by American charterers of foreign ships and several by American owners of ships chartered to aliens. In each case of both of these classes it becomes necessary to ascertain what, if any, estate or interest the charterer had in the vessel at the time she was destroyed and the value of such estate or interest in order to determine the value of the American interest therein, whether such interest be that of owner or charterer.

This Commission's Administrative Decision No. VII¹ established the broad rule that the provisions of the Treaty of Berlin dealing with damage to property are (save in certain cases arising in German territory) limited to physical or material damage to tangible things and that under that Treaty Germany is not obligated to make compensation for losses sustained by American nationals of prospective profits as such growing out of the destruction of tangible things. As applied to the loss of shipping, it is clear, the tangible thing destroyed was the vessel, in which, through the existence of a charter² or charters or otherwise, several estates or interests may have inhered at the same time.

As was said in Administrative Decision No. VII:³

"When the whole ship destroyed was American-owned the aggregate amount of Germany's obligations for its loss is not affected by the existence of a charter or charters. But if any estate or interest in the ship was foreign-owned and the remainder American-owned, then Germany's obligations may be affected by the existence of a charter."

" * * * Germany is obligated * * * to pay the reasonable market value of the whole ship, including all estates or interests therein, provided they were on the requisite dates impressed with American nationality. In arriving at the market value of the whole ship, it is a *free ship* that is valued, and no account is taken of the independent market value of any charter that may exist thereon. Such charter may at a given time be an asset or a liability as determined by several factors, chief among which is the relation of the stipulated hire to the current market hire."

In each case in the group dealt with in the present decision Germany's obligation is under the Treaty limited to making compensation for the

¹ Decisions and Opinions, pages 308-345. (*Note by the Secretariat*, this volume, pp. 227-252 *supra*.)

² Administrative Decision No. VII was rendered May 25, 1925. At page 336 therein (*Note by the Secretariat*, this volume, p. 246 *supra*.) it was held that a charterparty might under certain conditions constitute "a property interest or property right the subject matter of which was the ship, an interest entering into and inhering in the ship itself. Such a right and interest is an encumbrance on the ship in the sense of constituting a limitation on the owner's right to possess, control, and use it and as affecting the price at which it could be disposed of in the market burdened with the charter. It is an interest in the subject matter which the municipal courts will protect against both the owner and those claiming under him with notice thereof". In support of this statement there was cited among others (note 21) the old case of *De Mattos v. Gibson* (1859), 4 De Gex & Jones' Reports 276. On November 17, 1925, the Judicial Committee of the British Privy Council in the case of *Lord Strathcona Steamship Company, Limited, and Dominion Coal Company, Limited*, I (1926) Appeal Cases 108, on appeal from the Supreme Court of Nova Scotia, approved, reaffirmed, and applied the principle laid down by Knight Bruce, L. J., in *De Mattos v. Gibson*. The decision was unanimous. The strong opinion which was read by Lord Shaw announced in no uncertain terms that equity will restrain the purchaser of a ship burdened with a charter of which he had notice from making use of the ship in violation of the charter to the prejudice of the charterer or its assigns. In the course of the opinion it was pointed out that the vessel "was not bought or paid for as a *free ship*, but it is maintained that the buyer can thus extinguish the charterer's rights in the vessel, of which he had notice, and that the charterer has no means, legal or equitable, of preventing this in law". Elsewhere in the opinion it was said that, although the assignee of the charterer could not enforce specific performance of the charter obligation, such an action would fail "only on the broad ground that the Court of equity had no machinery by means of which to enforce the contract". Again it was said that such purchaser "appears to be plainly in the position of a constructive trustee with obligations which a Court of equity will not permit him to violate."

³ Decisions and Opinions, pages 338 and 337. (*Note by the Secretariat*, this volume, p. 247 *supra*.)

American-owned estate or interest in the tangible property destroyed—the ship—and such compensation is measured by the reasonable market value of that ship as of the time and place of her destruction, less the value of the foreign estate or interest if any therein, plus damages by way of interest on the remainder in accordance with those rules laid down in Administrative Decision No. III.⁴ The first step, therefore, in measuring the damages, if any, sustained by an American claimant resulting from the loss of a vessel in which his estate or interest was less than the whole is to ascertain the reasonable market value of that ship as a *free* ship at the time and place of her destruction.

The Commission has had procured and laid before it much data dealing with the relative demand and supply of ships; charts purporting to reflect the market prices of vessels with the fluctuations in those prices graphically expressed; and tabulated statements of actual sales of bottoms made during periods prior to, throughout, and subsequent to the World War, compiled from evidence filed in numerous cases before the Commission. From these it is possible to evolve a fairly accurate composite of tonnage values at any particular time during the war period. But at best this presents merely a composite picture, a general average, and while helpful as a general guide it cannot safely be used as a standard of measurement without making particular adjustments for the actual conditions which obtained in each particular case. Ships are in a sense living things, created to move and to carry, not to be consumed. Food and fuel may be measured on a unit of value per ton, but a ship's value must be measured according to her ability to perform—to carry safely in volume with dispatch and economy.

There are many factors which must be taken into account in arriving at the fair market value of any vessel at any particular time and place, and the weighted value of each factor varies, of course, from time to time as the conditions change. This is especially true with respect to the abnormal and kaleidoscopic conditions created by the World War, as a result of which the trade in which a vessel was engaged, or the particular seas to which her use was restricted, or her nationality (as affecting the extent of her exposure to regulation, requisition, or destruction), considered in connection with the laws of the nation to which she was subject, may, singly or together, have had an influence more or less controlling in determining her market value, although in normal times they would have been much less important. Normally the cost of a vessel, her age and physical condition, and the cost of replacement are important factors in arriving at her market value. Some of the shipping experts whose testimony has been presented to the Commission go so far as to declare that during the war period those factors were without influence in determining the value of a ship, which was measured *solely* by her availability for use. While the evidence before the Commission of actual sales made and of charters actually entered into, involving bottoms of varying ages and classes, does not justify those extreme statements,⁵ nevertheless there were times

⁴ Decisions and Opinions, pages 61-70. (*Note by the Secretariat*, this volume, pp. 64-71 *supra*.)

⁵ For instance, in the agreement for compensating Dutch shipowners by the United States and Great Britain, it will be noted, age was a material factor in fixing ship values. Bottoms up to 10 years of age were valued at \$237.50, 10 to 30 years at \$190.00, and 30 years and over at \$167.25 per deadweight ton. And in February, 1918, under the new scale for rates and insurance fixed for vessels plying between United Kingdom and French ports the values for war-risk insurance on steamers 10 years old or less was fixed at £40 and over 30 years old at £30 per d. w. t. Elsewhere there have been many other recognitions of age as a factor in determining values during the war period.

during the war period when the demands for tonnage so far exceeded the available supply, and those demands were so imperative, that factors normally controlling were so far outweighed by the consideration of availability for use as to become comparatively insignificant. But even that condition was not constant, and conditions existing at the particular time must be looked to in determining the relative importance of the various elements obtaining in each case.

Speaking generally, the factors which must be taken into account during the war period in fixing the value of the whole ship including all estates therein are availability for use, cargo capacity, nationality of registry and of ownership, nationality of charterer, class, original and reproduction costs, speed, age, draft, and adaptability for particular trades.

The nationality of registry and of ownership and the charterer's nationality are important in determining generally the degree of exposure to requisition and to regulation both as to use and rates. For example, it will be recalled that Great Britain did not hesitate to assert and to exercise jurisdiction for the purpose of requisitioning ships of British registry operating even outside of British waters while under charter to Americans during American neutrality.⁶ It will also be recalled that the far-reaching regulations applied by the Allied Powers, and later by the United States after it had entered the war, affected not only the tonnage of the nation issuing them but indirectly, to a great extent, neutral tonnage as well. Witness the British regulation of January 12, 1917, forbidding the chartering of any vessel of over 1,000 tons deadweight cargo capacity to or from an Allied port, except with the license of the Board of Trade; the later regulation of March, 1917, forbidding the purchase or sale in England of any foreign vessel; the regulation of chartering and of charter rates on vessels of both American and foreign registry by the United States Shipping Board; the arrangement devised by Great Britain, sometimes referred to as the "bunker pressure", made possible by the need of Norway, Sweden, and Denmark for British coal, whereby those Scandinavian countries provided for the chartering or requisitioning at reduced rates of certain tonnage of their nationals to the Allied Powers in consideration of the latter's arranging to deliver them coal and other supplies; the requisitioning by the Allied Powers and by the United States of Dutch tonnage; and the agreement entered into between the United States and Japan in March, 1918, whereby the latter nation undertook to furnish the former with 150,000 deadweight tons of steam shipping for warzone trade in exchange for steel to be used principally in shipbuilding. The influence exerted by the inter-Allied ship control over tonnage values, chartering, and charter rates, even as applied to neutral vessels while indirect, was substantial, but it varied from time to time; and this influence at any particular moment must be considered in determining the value of a vessel or the value of a charter thereof at that time.

While it is true that vessels of neutrals and vessels of some belligerents were less subject to these restrictions than those of other belligerents, nevertheless it is a mistake to assume, as several of the shipping experts have assumed in their testimony before this Commission, that neutral bottoms were throughout the period of the war free from all restrictions and hence that American charters on such vessels must be valued accordingly. We are not here concerned with

⁶ *Earn Line Steamship Co. v. Sutherland Steamship Co., Ltd.* (British S. S. *Claveresk*), 254 Federal 126 (1918), affirmed 264 Federal 276 (1920); *Isle of Mull*, 257 Federal 798 (1916), reversed 278 Federal 131 (1921), certiorari denied, 257 U. S. 662 (1922); and *The Frankmere*, 262 Federal 819 (1920), affirmed 278 Federal 139 (1921), certiorari denied, 257 U. S. 662 (1922).

any question of the *right* of a particular government to enforce restrictions and regulations without compensation, but only with the fact of their existence and enforcement and the effect which they *actually had* on the market value of the vessels at the time of destruction.

After the amount of the reasonable market value of a free ship has been established, the next practical step is to determine the relative interest in such amount of the owner and the charterer respectively to the end that the American and foreign interests may be segregated. If the ship was American-owned the burden will ordinarily be on Germany to establish the extent of the foreign interest and the amount of the encumbrance imposed by the charter held by the foreigner. But if the ship was foreign-owned the burden will ordinarily be on the claimant to establish the extent of the American interest and the amount of the encumbrance imposed by the charter held by the American national.

In discharging these burdens resort cannot be had to determining the cash market value of a charter as such established through transfer and assignment as distinguished from subchartering, for charters have never to any considerable extent been sold and purchased for a present out-of-pocket cash consideration. In normal times there was no occasion for such a practice, as ordinarily the free tonnage supply was adequate to meet all demands. During the World War, at times when demands for tonnage were greater than the supply, the risk of the termination of the charter through the destruction of the ship was too great to justify the hazarding of a considerable out-of-pocket payment in the purchase of a charter. There is but one case before this Commission (and no similar cases have been cited in the testimony of the shipping experts) where a charter was assigned and transferred for a cash consideration, the assignee stepping into the shoes of the charterer and assuming his obligations. Rather than take the risk of such an investment the shipper preferred through subchartering to obligate himself to pay a higher rate when and as the ship was used without making any out-of-pocket investment or obligating himself to make any payment in the event of her loss. Ordinarily the charterer's investment is the hire stipulated for in the charter which he pays if, when, and as earned, coupled with his obligation to make such payment to the owner (or if a subcharterer to the time-chartered owner) from time to time even though it may be substantially more than the current charter hire. While insurers were, under the law of averages, justified in taking the risk of insuring a charterer against loss of the vessel, each risk was, in accordance with established insurance practice, distributed and participated in by a number of insurers instead of being carried by one only.

But the absence of any established cash market value for charters as such does not imply that the charterer had not a substantial pecuniary interest in the ship constituting an encumbrance on her and susceptible of being measured by standards other than the market value, and such other standards must be found for determining the value of the respective estates or interests of the owner and the charterer in a vessel at any particular time. As a basis for the application of such standards all of the terms of the charter must be fully developed and carefully considered in connection with the several factors hereinbefore enumerated which affect the value of a ship otherwise free. As pointed out in Administrative Decision No. VII (page 338)^a the chief factor which will ordinarily obtain in determining whether a charter is at a given time an asset or a liability to the charterer "is the relation of the stipulated hire to the current market hire." After a most painstaking examination by the

^a Note by the Secretariat, this volume, p. 247 *supra*.

Commission it has been found impossible to lay down any fixed rule or mathematical formula for measuring in every case the extent and value of the charter encumbrance, if any such is found to exist. But under conditions usually obtaining in the cases before this Commission this measure can be fairly taken by ascertaining the excess, if any of the current charter hire at the time of loss over the hire stipulated for in the charter and extending such excess hire over that period (never exceeding the charter term) during which, under the law of averages, the ship under the conditions then existing would probably have survived and also probably have escaped requisition under circumstances working a frustration of the charter. The amount so arrived at (subject to the application of such other of the limiting factors hereinafter mentioned as may obtain in that particular case), reduced to its present value as of the date of the ship's loss, will ordinarily represent the charter encumbrance and the value of the estate which the charterer had in the vessel.

In order to insure accuracy and uniformity in the Commission's application of this rule, there has been assembled in the office of the Umpire a considerable body of pertinent data collected from the records of cases before this Commission and from all available official sources, including—

(1) Many affidavits of shipping and of chartering experts with lists which were submitted by them of actual sales made and charters entered into during the war period;

(2) Compilations procured from different sources aggregating approximately 700 time charters actually entered into in the United States during the war period and fairly distributed throughout that period, involving ships of United States, British, Canadian, Norwegian, Swedish, Danish, Dutch, Italian, French, Japanese, and other registry, tabulated in chronological order with respect to the date on which the charter was fixed, giving the name of the ship, flag, tonnage, charter rate, trade, delivery, and range;

(3) Similar compilations of approximately 1,500 trip, voyage, and net charters;

(4) A complete statement of all charters on foreign and American ships which were approved by the United States Shipping Board from October 3, 1917, to May 26, 1919, setting forth chronologically in tabulated form the name of each vessel, her type, flag, tonnage, date of fixture, date of approval, name of charterer, voyage, cargo, and rate;

(5) A similar statement, covering the same period, of charters disapproved, cancelled, or modified by the United States Shipping Board with its reasons for such action, frequent among which was the failure to file with the Board a guarantee to maintain and not exceed the Board's rates;

(6) Charts showing graphically the fluctuations in the average rate paid for steam vessels of all sizes under time charters covering every portion of the war period and a considerable time both prior and subsequent thereto;

(7) A statement, compiled from official sources, of all war-risk insurance rates promulgated by the Bureau of War Risk Insurance, United States Treasury Department, (now United States Veterans Bureau) beginning with September 17, 1914, and ending with November 27, 1918;

(8) A statement, month by month, compiled from official sources, covering all war-risk insurance written by the said Bureau of War Risk Insurance beginning with September, 1914, and ending with December, 1920, setting forth the amount of the insurance written, the amount of the losses paid, and the percentage of losses paid to the insurance written;

(9) Similar data on British rates, insurance, and losses, compiled from official sources;

(10) A statement, by nationalities and by months, throughout the war, of gross tonnage of merchant shipping (excluding that of Germany and her allies) lost through enemy action, with a similar statement of new merchant vessels constructed and brought into service; and

(11) Contemporary reports, contained in shipping journals and similar publications, and other data throwing light on shipping conditions as they existed at different times throughout the war period.

These data, with other pertinent evidence presented by or through either the American or the German Agent, will be examined, in connection with the facts of each particular case, in measuring whatever interest the charterer may have had in the ship at the time of her destruction.

For purposes of comparison it will be borne in mind that the charter rate per deadweight ton is influenced by the size of the ship, the rule being that (all other conditions being equal) the rate per deadweight ton decreases as the size of the ship increases. This is because the construction cost per ton of capacity is of course higher in small than in large vessels and also because the operating cost borne by the owner is less per ton in large than in small vessels.

For purposes of comparison it will also be borne in mind that ordinarily the rate per deadweight ton is less in long-term than in short-term charters. This is because the shipowner, who usually has a substantial investment in his ship, is ordinarily content to take a less rate for a long term than for a short term if by so doing he is reasonably assured of a steady income which will yield him a fair return on his investment and furnish steady employment for his ship and crew without taking the risks of fluctuations in charter hire and freight rates.

Likewise, for purposes of comparison, the restrictions, territorial and otherwise, contained in the charter are important as affecting its value. During the war a chartered vessel free to engage in European trade commanded a greater hire than a similar ship restricted to use outside of the war zone.⁷

The risk of the termination of a charter through the destruction of the ship by an act of war had a distinct influence in determining the relative interest of the shipowner and the charterer. The value of the charterer's interest largely depended on the probable life of the vessel. This was not true to so great an extent with respect to the owner, who, as a rule, was protected against loss by war-risk insurance, the heavy premiums on which were frequently paid by the charterer, especially with respect to charters entered into during the war. By the law of averages the risk of loss of a chartered vessel as it then appeared at any given time can be approximated by the application of the war-risk insurance rates which were then in effect and applicable to the particular trade in which the ship was at that time engaged, taking into account the safe margin allowed by the insurers.

The risk of frustration of the charter through requisition can be fairly approximated in the light of the extent to which the requisitioning power was exercised at the particular time.

The probability of the termination of the war and its being followed by a violent decline in charter hire and freight rates was a risk affecting the value of the charters in some of the cases before the Commission. One of the leading American charter experts, testifying before this Commission, has stated that

⁷ Many examples can be cited in support of this statement. It will suffice to refer, among others, to the United States Shipping Board rates of \$10.75 per deadweight ton per month on Danish steamers and 43s. 6d. on similar Norwegian steamers trading *in* the war zone and its rates in effect at the same time of \$8.50 on the same Danish steamers and 35s. on the same Norwegian steamers trading *outside* the war zone.

“every one recognized that the minute the war ended there might come such a drop in freights and values as to practically make tonnage of no value temporarily.” While this is probably an extreme statement, it will nevertheless be recalled that in fact the average time-charter hire per deadweight ton per month did drop from approximately 58s. at the time of the signing of the Armistice to approximately 29s. toward the end of the first half of 1919, when there was a recovery, and that by the end of 1919 the rate was approximately 47s., after which time-charter rates steadily declined to approximately 17s. at the end of 1920 and to approximately 7s. at the end of 1921. During the war period the prevailing opinion, broadly speaking, seems to have been that charter rates would following the termination of the war decline to approximately their average during the 15 years preceding the war. That opinion was apparently abundantly justified by the decline in tonnage values and in time-charter rates which followed the termination of the Boer War.

The World War found numerous long-term charters in existence. Wherever the owner had bound himself to operate the ship and to bear the expense of all insurance including war-risk insurance, the gradually mounting operating costs increasingly absorbed the charter hire until in a number of instances the hire did not suffice to pay them. But after the declaration of war very few time charters were entered into for a longer period than one year and usually they were for shorter terms save such as provided for delivery after the termination of the war. Even in the early days of the war, because of the unsettled conditions in shipping and the impossibility of forecasting the future, the charterers preferred to pay higher rates for one or two round trips or for a few months rather than to commit themselves under even a 12-month fixture. In many cases the charterers obligated themselves to carry war-risk insurance for the account of the owners in amounts substantially in excess not only of the actual original cost of the ships but in some instances the higher cost of their reproduction under the conditions then existing. The premiums on such insurance as a general rule could be paid by the charterer only voyage by voyage. Consequently the extent of his liabilities under the charter could never be accurately defined until the last payment had been made. As the cost of war-risk insurance increased, in some instances far beyond what could reasonably have been foreseen by the charterer at the date of the fixture, the obligation to carry insurance for the account of the owner became more and more burdensome. The terms of each charter, under conditions obtaining at the material time, with respect to the extent of the charterer's obligation to carry war-risk insurance for the owner's account, will be carefully examined by the Commission in determining the value of the charter and in comparing it with others.

The foregoing is not intended as an all-inclusive enumeration and analysis of the numerous factors which affected the value of vessels and of charters or as furnishing an exact formula for computing the relative interests of the owner and the charterer of a ship during the war. Its purpose is to enumerate the most important factors which will be taken into account in determining such values and such interests, in order to assist in the preparation and presentation of all cases of the classes here dealt with. The data which have been assembled by the Agencies and the Commission will be helpful in ascertaining average values and rates at a given time but they furnish only a general guide which at best requires adjustments in the light of the facts and conditions which may be found to have existed in each particular case. All of the pertinent facts in each claim asserting an alleged American interest less than the whole in a ship which has been damaged or destroyed will be fully developed in the light of this opinion, that the Commission may measure the extent and value of the

American interest, if any is found to exist, under the principles established in Administrative Decision No. VII.

Done at Washington August 7, 1926.

Edwin B. PARKER
Umpire

UNION OIL COMPANY OF CALIFORNIA
(UNITED STATES) *v.* GERMANY
(August 13, 1926, pp. 715-718.)

WAR: DESTRUCTION OF CHARTERED VESSEL.—DAMAGE: VALUE OF CHARTERER'S INTEREST IN VESSEL.—EVIDENCE: AFFIDAVITS, EVIDENCE TAKEN FROM OTHER CASES. Sinking by German cruiser on September 11, 1914, of British vessel chartered by claimant. Claim for value of claimant's interest in vessel. Application of rules announced in Administrative Decisions Nos. VII and VII-A, see pp. 203 and 330 *supra*. Damages allowed. Evidence: see *supra*.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

From the record it appears that the claimant herein, the Union Oil Company of California, an American corporation, on August 1, 1912, entered into a charter-party by the terms of which it chartered from a British national for a term of seven years, commencing from the date of delivery, a "good British Tank Steamer, to be built * * * and estimated to have a total deadweight carrying capacity of about 9,700 tons". The charter was the ordinary form of time charter, the charterer agreeing to pay £2,850 per calendar month commencing on date of delivery of the ship, which was accomplished on March 12, 1914. She was named *Elsinore* and put by the claimant with its fleet of 14 other tankers in its service of transporting oil from California ports to other California ports and ports in Oregon, Washington, British Columbia, Hawaii, and Central and South America. The *Elsinore* sailed from San Luis Obispo, California, on August 24, 1914, bound for Corinto, Nicaragua, arrived at that port on September 4, discharged a cargo of crude oil, and sailed for San Luis Obispo in water ballast on September 6. That was her fifth voyage carrying fuel oil from California to Central American ports. On September 11, 1914, the *Elsinore* was captured in the Gulf of California and sunk by the German Cruiser *Leipzig*. She carried no war-risk insurance for account of either the owner or the charterer. Her value as a free ship is estimated at from £117,500 to £119,609.

The sole question presented to the Umpire for decision is the value, if any, of the charterer's interest in the vessel at the time she was destroyed. She was a British ship, manned by a British master and crew, sailing under the British flag, and Great Britain was at war. She was therefore subject to requisition by Great Britain¹ and also subject to capture and condemnation by her

¹ As pointed out in Administrative Decision No. VII-A, the fact that ships of British registry were operating under American charters during American neutrality outside of British waters presented no obstacle to Great Britain's exercising its war powers for the purpose of requisitioning them.

enemies. The charter contained the usual restraint of princes, rulers, and people clause and expressly provided that it should terminate with the loss of the ship.

Following the outbreak of the World War and during August and September, 1914, shipping conditions in the United States were so demoralized that there was no ready market for either ships or charters. It was not until the establishment of the Bureau of War Risk Insurance in pursuance of the Act of the Congress of the United States of September 2, 1914, that war-risk insurance on American vessels and cargoes could be obtained at rates which were not practically prohibitive. The uncertainties as to the boundaries and the extent and the duration of the conflict rendered it impossible in those early days of the war to make any intelligent forecast with respect to the probable future demand for tankers, and hence at that time the value of a charter with a considerable time to run was highly speculative.²

As heretofore held by this Commission, the chief factor to be taken into account in measuring the extent, if any, of a charterer's interest in a ship is the relation of the stipulated hire to the current market hire at the material time. In undertaking to apply that measure in this case several affidavits of shipping experts have been offered on behalf of the claimant. None of them, however, has undertaken to testify with special reference to the charter rates in effect during September, 1914, the month in which the *Elsinore* was lost. One of these experts stated his conclusions with respect to the charter rates in effect during "the last two months of 1914"; another stated his conclusions with respect to the rates in effect from September to December, 1914, without attempting to segregate the rates in effect during each of those four months. None of them stated the facts upon which he based his conclusions or referred to any charter or charters actually entered into. When requested so to do by the American Agent on behalf of the Commission, one of those experts replied, without further explanation, "I regret I cannot furnish same". In these circumstances such expert testimony cannot be blindly accepted but must be carefully examined.

² See the opinion of United States District Judge Rose in the *Isle of Mull* case, 257 Federal Reporter, at page 810, where, in commenting on the offer made on September 3, 1914, by the charterer of the *Isle of Mull* to consent to a cancellation of the charter, Judge Rose observed: "It is needless to say that freight conditions were then very different from what they became a few months later. The offer of cancellation was declined." This aptly illustrates how impossible it was for men experienced in shipping, as were the owner and the charterer of the *Isle of Mull*, to forecast in September, 1914, the relative demand and supply of vessels and charters and their consequent value. It was not many months before the charterer was demanding through the courts heavy damages from the owner for a breach of this same charter.

In another case before this Commission (Docket No. 6627, Munson Steamship Line, claimant, for loss of Steamship *Lodaner*) it appears that as late as September 21, 1915, a charter was entered into for a period of five years to begin March 23, 1916, the charter hire for the first year being fixed somewhat below the then current charter hire for 12-month periods and providing for a reduction each year until the fourth year, when for a two-year period it should be one-half that of the first year. That charterer's experienced president, Frank C. Munson, testified: "In 1915 owners and charterers thought that the War could not go on more than a year or so because of the exhaustion of the gigantic forces and finances involved. The owner preferred to take a higher rate for the beginning of the charter and the second year of the charter because of the belief that the War would be over by the time that the second year had expired and that thereafter the market would go back to more normal rates."

From other testimony before this Commission, including the compilations mentioned in Administrative Decision No. VII-A,³ it appears that from shortly after August 1, 1912, when the claimant herein entered into the charter-party involved in this case, charter rates began steadily to go down and continued to decline until the middle of 1914. In August the tide turned but the advance in rates was slight. In September there was a further advance but scarcely to the point of regaining the ground lost after the claimant's charter was entered into in August, 1912. The demand for charters, however, was steadily growing and the rates increasing. Notwithstanding the unsettled conditions of the time and the uncertainties with respect to the supply and demand of tonnage and of charters, the Umpire finds that the claimant's charter was an asset to it and constituted an encumbrance on the free ship vesting claimant with an interest therein.

Applying the rules announced by this Commission in Administrative Decisions No. VII and No. VII-A to the facts as disclosed by the record herein, the Umpire finds that when the *Elsinore* was destroyed the claimant had an interest in her of the value of \$75,000. The Umpire further finds that gear and other personal property belonging to the claimant to the value of \$2,685 was lost with the *Elsinore*.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of the Union Oil Company of California the sum of seventy-seven thousand six hundred eighty-five dollars (\$77,685.00) with interest thereon at the rate of five per cent per annum from September 11, 1914.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

MUNSON STEAMSHIP LINE (UNITED STATES)
v. GERMANY

(August 13, 1926, pp. 719-725.)

WAR: DESTRUCTION OF CHARTERED VESSEL.—DAMAGE: VALUE OF CHARTERER'S INTEREST IN VESSEL, LOSS TO CHARTERER THROUGH REQUISITION.—EVIDENCE: EXPERT WITNESSES. Loss after departure from Brest for Penzance, on or about April 14, 1918, of British vessel chartered by claimant for five years from March 23, 1916, and requisitioned by British Government on January 26, 1917. Continuation of charter notwithstanding requisition: claimant paid to owner charter hire, owner to charterer requisition hire received from British Government. Claim for value of claimant's interest in vessel. Application of rules announced in Administrative Decision Nos. VII and VII-A, see pp. 203 and 330 *supra*. Held that, under Treaty of Berlin, Germany not liable for loss (difference between charter hire and requisition hire) sustained by claimant through requisition. Held also that vessel lost by act of war so as to render Germany liable to extent of American interest; evidence: expert witnesses. Damages allowed.

³ Decisions and Opinions, at pages 711-712. (*Note by the Secretariat*, this volume, pp. 335-336 *supra*.)

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

It is put forward on behalf of the Munson Steamship Line, an American corporation, for the alleged value of its interest as charterer of the British Steamship *Lodaner*, alleged to have been destroyed by a German submarine on or about April 14, 1918. The *Lodaner*, which was of 5,700 deadweight tons, was chartered by her British owner to the claimant on September 21, 1915, for a period of five years from March 23, 1916. The charter hire stipulated to be paid by the charterer, expressed in British sterling per calendar month, was as follows:

- (a) March 23, 1916, to March 23, 1917, £2,850, being 10s. per deadweight ton.
- (b) March 24, 1917, to March 23, 1918, £2,280, being 8s. per deadweight ton.
- (c) March 24, 1918, to March 23, 1919, £1,710, being 6s. per deadweight ton.
- (d) March 24, 1919, to March 23, 1921, £1,425, being 5s. per deadweight ton.

It will be noted that the time-charter hire stipulated for during the fourth and fifth years was only one-half that for the first year.

The experienced and able president of the claimant in his testimony filed herein explains this decreasing schedule thus:

“ * * * In 1915 owners and charterers thought that the War could not go on more than a year or so because of the exhaustion of the gigantic forces and finances involved. The owner preferred to take a higher rate for the beginning of the charter and the second year of the charter because of the belief that the War would be over by the time that the second year had expired and that thereafter the market would go back to more normal rates.”

The average of the rates for this five-year charter was 6s. 9-3/5d. per deadweight ton per month, which was approximately the average time-charter hire for the year 1900 and the year 1912, which were the peak years of the 15-year period just preceding the World War. This average charter rate was substantially above the average for the 15-year period, 1900-1914, inclusive, and approximately 2s. 5d. above the average for the year 1914.

The charterer was territorially restricted in the use of the *Lodaner* and was prohibited from using it in European trade (to quote the language of the charter) “during present War but Charterers agree to send steamer to the United Kingdom during 1917 and 1919 for survey, overhaul etc.” This language clearly indicates that while, as testified by claimant’s president, at the time of entering into this charter-party both the “owners and charterers thought the War could not go on more than a year or so”, the duration of the war was, in the opinion of the parties, so uncertain that it was expressly stipulated that the ship should be sent to the United Kingdom for survey and overhaul during 1917 and 1919 if the war should last so long. Mr. Munson’s further reference to “the belief that the War would be over by the time that the second year had expired and that thereafter the market would go back to more normal rates” reflects the opinion then generally accepted (apparently abundantly justified by the decline in tonnage values and time-charter rates following the Boer War) that after the termination of the “present war” British time-charter rates would decline to approximately what they had been during the fifteen years preceding the World War. It will be recalled that in fact the average time-charter hire per deadweight ton per month did drop from approximately 58s. at the time of the signing of the Armistice to approximately 29s. toward the end of the first half of 1919, when there was a recovery, and that by the end of 1919 the rate was approximately 47s., after

which time-charter rates steadily declined to approximately 17s. at the end of 1920 and to approximately 7s. at the end of 1921. The claimant's charter by its terms would normally have expired with March 23, 1921. These dates and rates and the prevailing opinions with respect to the development of charter rates following the termination of the war, which influenced the parties in fixing the rates named in the charter under examination, must also be borne in mind in determining the value of the claimant's interest in the *Lodaner* at the time of her loss, April 14, 1918.

The restriction preventing the charterer using the ship in European trade "during [the] present war" operated to reduce the risk of loss of the vessel to both the owner and the charterer, but also operated to reduce the value of the charter, as the highest freight rates and the highest time-charter hire was commanded by ships which were free to engage in European trade. The stipulated charter hire, therefore, cannot properly be compared with the hire stipulated for in charters containing no such restriction.

At the time this charter was entered into, the latter part of September, 1915, the current unrestricted time-charter rates for British steamers for a term of 12 months (very few charters were then entered into for a longer term) was approximately 14s. per deadweight ton per month. The market was a rising one but so uncertain that most charterers hesitated to commit themselves for even as long a term as 12 months. It was on this market that the charter under examination was entered into. The considerable difference between the then current rate of 14s. for a 12-month time charter and the average rate of hire of 6s. 9-3/5d. under this five-year charter can be accounted for in part by the territorial restrictions in this charter and in part by the binding obligation of the charterer to pay rates which it was then believed would yield the owner a fair return on his investment while his ship was engaged in a safe trade, covering a long period, at a time when the future development of charter rates was very uncertain.

The *Lodaner* was a British ship. As such, notwithstanding she was not within the territorial jurisdiction of the British Government, she was in practice subject at any moment to requisition by that Government for direct or indirect war uses. The requisitioning power was in fact exercised by the British Government on the *Lodaner* on January 26, 1917, after the claimant had used the vessel for a period of approximately ten months in the West Indies trade. The effect was to subject to the use of the sovereign the entire ship and every estate and interest therein. The charter contained the usual "restraint of princes" clause. To the extent that claimant sustained a loss through the exercise by Great Britain of the sovereign right of requisition of a British bottom Germany cannot be held liable under the Treaty of Berlin. As testified by Mr. Munson, the British Government did not directly or indirectly have any dealing with the claimant or recognize its interest, if any, in the *Lodaner*. That Government dealt with the owner—its own national—to whom it paid the requisition hire of 11s. per gross register ton per month. As early as March 26, 1917, the claimant's London representative advised it that the "Owners were told that they might take it as quite definite that the steamer would not be released from requisition until after the end of the War, but of course as to how long after it is impossible to say". In these circumstances the owner or the charterer, either or both, might well have treated the charter as frustrated and at an end.

However, the owner and the charterer elected not to treat the requisitioning of the *Lodaner* by the British Government as a frustration of the charter, and, notwithstanding the fact that the charter hire then in effect exceeded the requisition hire paid by the British Government, the charterer paid each month to the owner the stipulated charter hire and received from the owner

the requisition hire. The difference in favor of the owner up to February 26, 1918, (when remittances by the owner ceased) was approximately \$30,500.00.

It will be noted, however, that beginning with March 23, 1918, the requisition hire exceeded the charter hire and that the ship was lost on April 14, 1918. Had she lived to the expiration of the charter term on March 23, 1921, and continued under requisition by the British Government at the same rate, the charterer would, under the arrangement in effect between it and the owner, have somewhat more than recouped the balance against it. The charterer, therefore, seems to have been justified in its belief that it was to its interest to continue the charter in effect and not to treat the requisition as a frustration thereof but to continue to pay the charter hire, notwithstanding that for practically a year it was in excess of the requisition hire, and to take the risk of the ship being destroyed before released from requisition or before the decline in charter hire had worked an absorption of the first year's balance against the charterer.

The British Government subchartered the *Lodaner* to Sota and Anzar, who loaded her with a cargo of iron from Salta Caballo, Spain, for Glasgow and she proceeded to Brest to take up a convoy as far as Land's End. She proceeded with convoy from Brest for Penzance on the night of April 14-15, 1918. When she left the convoy is not clear. The statement in the record is that she "was never heard of again after sailing". There was a controversy, settled by arbitration, between the British Government on the one part and the owners and marine-risk underwriters of the *Lodaner* on the other part, with respect to the cause of her loss. The arbitrator found that "the '*Lodaner*' is to be treated as wholly lost by warlike perils, and * * * that the said loss shall be wholly borne by the Government under the provisions of T. 99, and shall not to any extent or at all be borne by the Marine Underwriters".

By a process of elimination of other possible causes of loss the claimant herein seeks to establish by expert testimony that the *Lodaner* was destroyed by a German submarine. The principal of these witnesses, a salvage expert and marine surveyor, testifying with respect to conditions existing in April, 1918, says:

"Enemy submarine activity was very pronounced during this period. The actual number of merchant vessels lost by this cause during the first six months of the year 1918 was 379 involving a sacrifice of 2826 lives.

"During the month of April 1918 (i. e.) the period in which the '*Lodaner*' was proceeding towards Glasgow, fourteen merchant ships in the Irish Channel, seven in the St. Georges Channel, and four in the Bristol Channel, were sunk by enemy submarines."

On the record here presented the Umpire finds that the *Lodaner* was lost by an act of war under circumstances rendering Germany liable to the extent of the American interest therein.

It is manifest that the risk of destruction existing just prior to the loss of the *Lodaner* was very great and that the value of the claimant's charter interest in her, which would terminate with her loss, was correspondingly reduced. At that time both groups of belligerents had mobilized and were using to the full all of their resources in men, materials, and money in a desperate struggle for their very existence. What the issue would be could not be forecast with certainty. When the end would come was highly speculative. The Allied and Associated Powers were going forward with preparations for an increased supply of war shipping for future use. It was about this time that the negotiations between the United States and the Allied Powers on the one part and the Government of the Netherlands on the other were consummated under which a large amount of Dutch tonnage was requisitioned. It was also about

this time that the agreement was entered into between Japan and the United States by which the former agreed to deliver to the latter 150,000 tons of Japanese shipping between May and December, 1918, in exchange for steel plates for shipbuilding operations. It was also about this time, with the current time-charter hire at approximately 44s. per deadweight ton per month, that a few steamers were chartered for delivery "after the war" at 25s. per deadweight ton per month for a period of three years.

At that time the *Lodaner* was not a free ship but a requisitioned ship. Her value as a requisitioned ship, as legally ascertained under the laws of Great Britain, to which she was subject, was £95,000, and that amount was paid by the British Government to her owner. From a statement of the British Admiralty found in the record it appears that "In April 1918 there was no intention of releasing this vessel [*Lodaner*], and as the war was still proceeding it could not be known when she would be returned to the owners". As Great Britain was sorely in need of shipping to meet her direct and indirect war needs and to furnish supplies for her civilian population, it is safe to assume that a British vessel under charter precluding her use in European trade would be among the last to be released from requisition.

To what extent, then, did the claimant's charter work a burden or an encumbrance on this requisitioned ship so as to affect the price which a purchaser desiring and able to buy would have paid on the market for her, subject to the charter, at the time she was destroyed?

The risk of her destruction was great; but, even assuming that this risk would continue unabated and that she would continue under requisition throughout the charter term, then, under the law of averages, the *Lodaner* had somewhat less than an even chance of outliving the charter period. During her life under requisition the claimant would reap the benefit of the excess of requisition hire over charter hire. On the other hand, there was a strong probability that the war would terminate long before the expiration of the charter period, in which event the risk of the destruction of the ship during the period of the duration of the war less than the charter period would be substantially reduced, and the claimant's chance to profit by the extremely low charter rate of 5s. per deadweight ton per month correspondingly increased. On the whole the Umpire finds that the charter was an encumbrance on the *Lodaner*, subject to the government requisition in existence at the time, and that the claimant had an interest in the ship within the rule announced in Administrative Decision No. VII.

Applying the rules announced in Administrative Decisions No. VII and No. VII-A, the Umpire finds that on April 14, 1918, when the *Lodaner* was destroyed, claimant had an interest in her of the value of \$145,000.00.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of the Munson Steamship Line the sum of one hundred forty-five thousand dollars (\$145,000.00) with interest thereon at the rate of five per cent per annum from November 11, 1918.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

GULF EXPORT COMPANY (UNITED STATES)
v. GERMANY

(August 13, 1926, pp. 725-730.)

WAR: DESTRUCTION OF CHARTERED VESSEL.—DAMAGE: VALUE OF CHARTERER'S INTEREST IN VESSEL, VALIDITY OF CHARTER. Sinking by German submarine on March 10 and 31, 1917, of two Norwegian vessels chartered by American corporation, which immediately after entering into charters reassigned and transferred them to claimant corporation. Claim for value of claimant's interest in vessels destroyed before delivery under charters. Application of rules announced in Administrative Decisions Nos. VII and VII-A, see pp. 203 and 330 *supra*. Held that two corporations closely connected; that intercorporate book transactions, therefore, not material in determining value, if any, of interest; and that charters to be treated as if originally entered into by claimant. Held also that clauses in charters, making them subject to approval of Norwegian War Risk Insurance Association, conditioned effectiveness of charters. No damages allowed.

Bibliography: Kiesselbach, *Probleme*, p. 111.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

It is put forward to recover the value of claimant's alleged interest as charterer in two Norwegian steamships, the *Ashjorn* and the *Farmand*, destroyed by German submarines.

The claim is based on three "net charter parties" entered into by H. Baars & Company, an American corporation, and by it assigned at advanced rates to the claimant, Gulf Export Company, also an American corporation. These corporations were officered, managed, and controlled by members of the Baars family who owned practically all of the stock in both. The books of both were kept in the same office and by the same bookkeeper. It is apparent that the three charters in question were entered into by H. Baars & Company with a view to their immediate reassignment and transfer to the claimant herein, as was done. The intercorporate book transactions between the two companies are therefore not material either in determining the value, if any, of the claimant's interest in the vessels lost or for any other purpose in connection with this claim. The charters will be treated as if originally entered into by the Gulf Export Company as charterer in name as well as in fact.

The *Ashjorn* charter was executed January 22, 1917, between V. Muller, of Copenhagen, as owner and claimant as charterer. Under it the ship, about 5,150 deadweight tons, of Norwegian ownership and registry, was to load with "lawful merchandise" at one or two ports in the Gulf of Mexico "and being so loaded shall therewith proceed, as ordered when signing bills of lading, to a safe port in the Continent between Bordeaux and Havre, both inclusive, (Rouen excluded) * * * in consideration whereof the vessel shall be paid freight" of 210 shillings per ton of 2,240 pounds, "Freight prepaid on signing Bills of lading without discount, and not returnable". At the time this contract was executed the *Ashjorn* was at Havre, France, and it was stipulated that she should sail "in ballast Havre to Gulf, subject permission British authorities, otherwise taking coal cargo then leaving in ballast". The claimant's explanation of this clause is that notwithstanding the *Ashjorn* was a Norwegian vessel the British Government authorities "required that vessels proceeding from allied

ports to the United States, and which otherwise would have sailed in ballast for loading ports in the United States, should carry some intermediate cargo for the benefit of the allied cause"; that as the *Asbjorn* was at Havre she "was ordered to carry a cargo of coal for allied interests from Barry, England, to Lisbon". As pointed out in Administrative Decision No. VII-A, this clause was incorporated in the charter by the Norwegian owner in pursuance of the "bunker pressure" arrangement devised by Great Britain, made possible by Norway's needs for British coal, the purpose being not only to prevent neutral trade with enemy countries but to drive neutral shipping into British trade and to insure that ships bunkering in Great Britain should return with a cargo to a British or Allied port. It is apparent from this charter that while the ship was Norwegian-owned and registered in Norway it was, by virtue of the agreement made between Great Britain, France, and Italy on the one part and the Norwegian steamship owners on the other, indirectly under the control of the British Government. The *Asbjorn* left Barry Dock on March 8, 1917, for Lisbon with 4,500 tons of coal and was sunk by a German submarine off Ushant Light March 10.

The *Farmand*, about 2,200 deadweight tons, also of Norwegian registry and ownership, was chartered by its owner on May 22, 1916, by time charter in the usual form, to Romariz, Abranches and Pistachini, a Portuguese firm, at the rate of \$30,000 per calendar month for a term of 12 calendar months. This Portuguese firm, as time-chartered owners, through its agent, Jose Da Silva Barreira, subchartered the *Farmand* to claimant under a "net charter party" dated January 1, 1917, similar in terms to the charter of the *Asbjorn* above-described, for a voyage from a United States Gulf port to a safeport on the Continent between Bordeaux and Havre both inclusive, Rouen excluded. The claimant agreed "to pay freight at the rate of" 180 shillings British sterling "per ton" of 2,240 pounds on the steamer's deadweight cargo capacity. It was further stipulated that "in addition to the freight, as above," charterer "agrees to pay the amount of five thousand dollars * * * toward the war-risk insurance on the steamer, payable on completion of loading".

On January 6, 1917, Barreira, as agent of the time-chartered owner, and the claimant executed a second "net charter-party" similar to the first covering a voyage of the *Farmand* from a United States Gulf port to a safe port on the Continent between Bordeaux and Havre, Rouen excluded, which was to be undertaken after the completion of the first voyage, subject, however, to the owner's allowing the time charterer an extension of time necessary to make this trip. The ship was lost before reaching her loading port for her first voyage, and apparently no attempt was made to procure from the owner the extension which was a condition to the second charter becoming effective. The freight rate stipulated was 200 shillings per long ton on the steamer's deadweight cargo capacity and in addition thereto the claimant agreed to pay \$5,000 toward war-risk insurance premiums.

Both of the *Farmand* charters contained provisions with respect to procurement of the permission of the British authorities and the taking of intermediate coal cargoes similar to that contained in the *Asbjorn* charter. On March 27, 1917, the *Farmand* left Cardiff, Wales, for Lisbon with a cargo of coal and on March 31 was destroyed by a German submarine.

The original time charter from the owner of the *Farmand*, through which the Gulf Export Company claims, provided that "Charterers have no right to send the steamer on a voyage which has not been definitively approved of by the Directors of the Norwegian war insurance. * * * Owners have the right to cancel this charter in case the Norwegian war insurance withdraw insurance." All three of the claimant's charters under examination provided

that the charter was entered into subject to the approval of the Norwegian War Risk Insurance Association. There is no direct evidence that such approval was ever obtained, and the German Agent asserts that consequently the claimant has failed to establish the existence of valid and binding charters. Obviously these were important conditions stipulated for the protection and benefit, not only of the owners, but of the Norwegian insurance association and the British Government as well. From the history of that period it appears that the losses of Norwegian shipping had been particularly heavy during the last four months of 1916 and that during September and October alone these losses amounted to approximately five per cent of the whole Norwegian steam fleet at the outbreak of the war. The Norwegian shipowners were compelled by law to belong to the Norwegian War Risk Insurance Association, which was called upon to pay such heavy losses and faced so large a deficit that there was danger of the Norwegian ships being withdrawn from Allied trade. In this emergency Great Britain, for herself and for France and Italy as well, arranged for the underwriting of reinsurance on Norwegian tonnage engaged in Allied trade to the end that the Allies might hold and control that tonnage. This arrangement with modifications continued in effect until early in 1919 (see preliminary statement presented to British Parliament of "Government War Risk Insurance Schemes," Command Paper No. 98, and Fayle's "Seaborne Trade," volume II, page 358, etc.). At the time claimant's three charters were entered into the Norwegian War Risk Insurance Association, and through it the British Government, had a very vital interest in scrutinizing and approving or disapproving all charters on Norwegian bottoms. The clauses in these charters, therefore, making them subject to the approval of the Norwegian War Risk Insurance Association, far from being more formal than real, were important conditions precedent to the effectiveness of the charters. The explanation of the claimant on which it seeks to base a presumption that the approval of the Norwegian underwriters association had been procured is more ingenious than convincing. The thoroughness with which this claim has been prepared strongly suggests that if direct evidence of approval existed no resort would have been had to presumptions. In view of the disposition which will be made of this case, however, the point need not be further considered.

The owners of both these ships and the Portuguese time-chartered owner of the *Farmand* had no freight of their own to transport and no facilities for supplying cargoes. Their business was to furnish ships to those in position to supply cargoes of their own or to assemble the goods of others for shipment. It was necessary for these owners in the ordinary conduct of their business to take timely measures in advance of sailing to provide through charters for the employment of their vessels. This they had done. While the charters were entered into in January, it was then evident to both parties that even if no obstacles were encountered in procuring the necessary approvals the ships would probably not be ready for loading thereunder before sometime in April, and the rates were fixed in the light of that knowledge. According to the testimony of the claimant's officials, no time was lost by either ship after the respective charters were entered into in proceeding toward the United States for loading by complying first with the requirements of the British Government with respect to taking and discharging the intermediate coal cargoes. It appears from this testimony that the movements of both ships were promptly made in pursuance of their purpose to fulfill the terms of net charters entered into for prompt rather than deferred performance in accordance with established practices and only for the customary and necessary time in advance of that fixed for loading. Both ships were (according to the claimant's contention) en route to fulfill what was to them current net charters entered into in the regular

course of their business at current rates. Before the time arrived when they could be delivered for loading in the usual course of shipping practice the charters were terminated through the destruction of the ships. In what way did these charters constitute encumbrances on these ships? The evidence before the Commission indicates that the freight stipulated to be paid by the claimant was in each case fully equal to or perhaps a little in advance of the average net charter rates in effect during January, 1917; that there was no very material change in these rates between January and March; and that the stipulated freight was equal to that in effect in March when the ships were destroyed.

It follows that under the principles announced by this Commission in Administrative Decisions No. VII and No. VII-A the claimant had no such interest in the *Ashjorn* or in the *Famand* at the times they were destroyed as to render Germany pecuniarily liable under the terms of the Treaty of Berlin.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the Gulf Export Company, claimant herein.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

GANS STEAMSHIP LINE (UNITED STATES)
v. GERMANY

(August 13, 1926, pp. 730-733.)

WAR: DESTRUCTION OF CHARTERED VESSEL.—DAMAGE: VALUE OF CHARTERER'S INTEREST IN VESSEL, LOST PROFITS. Destruction on February 7, 1918 by act of war of Swedish vessel chartered by claimant. Claim for value of claimant's interest in vessel. Application of rules announced in Administrative Decisions Nos. VII and VII-A, see pp. 203 and 330 *supra*. *Held* that lost profits are of incidental value only in determining claimant's interest in ship. No damages allowed in excess of insurance collected.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

From the record it appears that the claimant herein, Gans Steamship Line, an American corporation, on August 8, 1913, entered into a charter-party with the Swedish owners of the Steamship *Fridland*, 8,175 deadweight tons, covering five consecutive winter seasons from October of each year to May of each succeeding year beginning with October, 1913. The stipulated charter hire was £1,669.1.3 per month.

The operations of the *Fridland* under this charter are not disclosed by the record, but it does appear that prior to November, 1917, the claimant had sued the owners of the *Fridland* for \$200,000 for the owners' alleged breach in failing to deliver the ship to the claimant on time during that and the preceding season. The owners had given bond in this suit for \$200,000. After cable negotiations an agreement was arrived at so amending the original charter, which would have terminated in May, 1918, that: (a) the charter was so extended as to enable the charterer to make five grain voyages for the Commission for Relief in Belgium or similar business from an Atlantic port

to Rotterdam; (b) the owners agreed to arrange for Swedish Government license for the entire period; (c) the charterer agreed to pay the owners a total monthly hire of \$12,000; (d) it was stipulated that if the five grain voyages were not completed within 10 months from date of delivery of the ship under this amended charter the charterer should pay the current market hire for any time in excess of 10 months; (e) the charterer agreed to pay the owners a lump sum of 250,000 kroner on each voyage prior to sailing from loading port on account of war-risk insurance; and (f) the charterer agreed to cancel its litigated claims of \$200,000 against the owners for which the latter had given bond.

It is assumed by both parties, and the assumption seems justified, that the five grain voyages could have been completed within 10 months. The *Fridland* was delivered to the Gans Steamship Line under the amended charter-party at Rotterdam on December 1, 1917, so that if the assumption with respect to the time required to complete the five grain voyages is correct the charter would have terminated on September 30, 1918. On this assumption the payments which the claimant had made and contracted to make for the use of the vessel for the 10-month term were:

	s
(a) \$12,000 per month, or	120,000
(b) A lump-sum payment of 250,000 kroner on sailing from loading port on each of the five voyages, or 1,250,000 kroner, at 35 cents (the rate in effect at the time of amendment of charter)	437,500
(c) Cancellation of claim	200,000
	TOTAL 757,500

The *Fridland* was destroyed by an act of war on February 7, 1918, leaving an unexpired charter term of seven and three-fourths months. The claimant carried on its own account \$500,000 war-risk insurance on its valued interest in the ship, which amount it collected in full.

Much stress is laid by the claimant's witnesses on the fact that the *Fridland* was engaged in the carriage of cargo for the Belgian Relief Commission which "was safer than practically any other trade to continental ports". However, the claimant was so much alive to the fact that there was a very substantial war risk involved in operating the *Fridland* in that trade that on her last voyage it paid nearly \$40,000 in premiums for war-risk insurance (which was at the rate of approximately eight per cent on the amount of insurance written) on the claimant's valued interest of \$500,000 in the ship. That insurance was placed in 15 different companies, the largest participation being \$85,000, the smallest \$5,000. This unusually high insurance rate in itself, apart from the other evidence before the Commission, indicates that the risk of operating the *Fridland* in that trade was great.

Much testimony is offered with respect to claimant's anticipated profits under this charter had it run its full term. The claimant's president frankly puts forward a claim for loss of total net profit. His statement is that "The total net profit which would have been made by the Gans Steamship Line, had the four voyages in question been performed, would have amounted * * * to \$1,456,202.98". For the reasons pointed out in Administrative Decisions No. VII and No. VII-A such testimony is of incidental value only in determining the extent of claimant's interest in the ship.

The highest rate at which time charters were fixed near the date of loss of the *Fridland* was 45s. 2d. (equal to \$10.75) per deadweight ton per month. Entirely ignoring the cancellation by the Gans Steamship Line of the claim

of \$200,000, which was a part of the consideration paid by it for the amended charter, and also ignoring the lump-sum payments made and contracted to be made by it for war-risk insurance for the owner's account, which were approximately three and one-half times the stipulated hire, and considering only the stipulated hire of \$12,000 per month, the hire of the *Fridland* at the maximum going rate above-mentioned would amount to \$75,959 per month in excess of the stipulated hire. Estimating the risk of loss on the basis of the United States Government war-risk insurance rates then in effect, 4% per voyage (although the claimants paid double this rate on the risk which it covered on this particular trip), making proper deduction on account of this risk, and reducing the balance to its present value as of the date of the loss, the result, representing the charterer's interest in the ship, is \$489,495.

As the claimant collected \$500,000 covering its valued interest in the *Fridland*, it sustained no loss for which Germany is liable under the Treaty of Berlin.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

AMERICAN UNION LINE, INC.
(UNITED STATES) v. GERMANY

(August 13, 1926, pp. 733-737.)

WAR: DESTRUCTION OF CHARTERED VESSEL.—DAMAGE: VALUE OF CHARTERER'S INTEREST IN VESSEL, CONSIDERATION PAID FOR ASSIGNMENT OF CHARTER. Destruction on July 7, 1917, by act of war, of Japanese vessel chartered by American corporation, which subsequently assigned charter to claimant. Claim for value of claimant's interest in vessel. Application of rules announced in Administrative Decisions Nos. VII and VII-A, see pp. 203 and 330 *supra*. Held that, in determining cost to claimant of use of vessel, consideration paid by claimant to original charterer for assignment of charter must be spread over and amortized during that part of charter period for which claimant had actual use of vessel; but that amount paid for assignment is not to be taken into account in determining to what extent charter was burden or encumbrance on vessel. No damages allowed in excess of insurance collected.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

It is put forward on behalf of the American Union Line, Inc., an American corporation, to recover its interest as charterer in the *Shigizan Maru*, which was destroyed by an act of war on July 7, 1917, under circumstances rendering Germany liable under the Treaty of Berlin to the extent of the American interest in the ship at the time of her loss.

The *Shigizan Maru* was of Japanese registry and ownership, operated by a Japanese master and crew. She had a total deadweight capacity of 4,050 tons.

On November 22, 1916, the owner entered into a time charter-party, for a term of about 12 months from date of delivery, with the Templeman Steamship Company, an American corporation, for a stipulated charter hire of £7,500 per month, equivalent to approximately 37s. per deadweight ton per month. The original charterer by agreement in writing dated December 21, 1916, amended January 12, 1917, assigned this charter to the claimant herein, American Union Line, Inc., for a consideration of \$37,000. The effect of the transactions between the Templeman Steamship Company and this claimant was to substitute the latter for the former as the charterer of the *Shigizan Maru* under the charter of November 22, 1916, without, however, releasing the Templeman Company from its obligations to the owner of the steamship.

The *Shigizan Maru* was delivered by the owner directly to the claimant herein on January 27, 1917, from which date the charter period of 12 months began to run. She was destroyed July 7, 1917, leaving an unexpired charter period of 6 months and 20 days. While the charter contained some territorial restrictions of minor importance and a provision that "Any detention caused by Warlike operations to be for account of Charterers", it nevertheless gave the charterer very great freedom in trading throughout the world so long as the cargo shipped or voyage undertaken did not "involve risk of seizure, Capture, or penalty by British or Allied Rulers or Governments".

In addition to the charter hire of £7,500 per month stipulated to be paid to the owner, the charterer was obligated to provide and pay for war-risk insurance on the hull and machinery for account of the owner in the sum of £100,000. This furnished to the owner at the charterer's expense substantial protection against the destruction of his vessel. It will be recalled that the intensive submarine campaign instituted by Germany in February, 1917, resulted in the destruction of a far greater amount of tonnage in each of the ensuing seven months than was destroyed during any month of the war not embraced in that period. The resultant increase in war-risk insurance premiums imposed a heavy burden on the charterer, a burden which it perhaps could not have reasonably foreseen at the time the charter was entered into; a burden which it could only cover voyage by voyage, so that its liabilities under the charter were uncertain and could not be ascertained until the charter was at an end. The cost to it of carrying the war-risk insurance of £100,000 on behalf of the owner reached the considerable sum of \$52,500 per month while the charter hire amounted to only \$35,700 per month.

In addition to the charter hire and the cost to the claimant of the owner's war-risk insurance, the claimant had invested in the charter the \$37,000 which it had paid to the Templeman Shipping Company. This amount is treated by one of the experts testifying before this Commission as additional charter hire. In one sense it was such; but it was something more. It was the purchase price for the charter—the out-of-pocket payment made by the claimant to the Templeman Company for the assignment of the charter, a sum which could not be recovered whether the claimant ever enjoyed the use of the vessel or not. In this sense it was the value of the charter at the time of its acquisition by claimant as expressed in the agreement reached between it and the Templeman Company. It differed materially from an ordinary subchartering operation where the subcharterer pays only if, when, and as the ship is available for his use. While the claimant assumed the payment of the charter hire due the owner this was not due and would not be paid unless the ship was available for use, but the amount which the claimant paid to the Templeman Company was paid as the consideration for the assignment

of the charter at that time—the agreed value of the charter at that time—the claimant taking the risk of the ship living out the charter period. This purchase price can, therefore, be amortized as a part of the cost of the use of the ship only when and as the vessel was actually used, and as the claimant had the use of the *Shigizan Maru* for a period of five months and ten days only this \$37,000 must be spread over and amortized during that period in determining the cost to the claimant of the use of the ship.

On the other hand, the owner was in no way interested in the payment of the \$37,000 by the claimant in the purchase of the charter from the Templeman Company, and this outlay by claimant is not a factor to be taken into account in determining to what extent if at all the charter operated as a burden or encumbrance on the *Shigizan Maru* when she was destroyed on July 7, 1917. The owner was accustomed to let his ship under time charters. In pursuance of this practice the charter acquired by claimant was entered into on November 22, 1916. Thereafter time-charter hire advanced steadily until about July 1, 1917, when the rate of approximately 57s. per deadweight ton per month on the average was reached. This was the peak for all time up to that date of average time-charter rates. Soon thereafter, due to the stringent control of chartering exerted by the Allied and Associated Powers over their own and Scandinavian tonnage as well, the rates declined steadily for approximately one year, when a sharp increase began.

Had the *Shigizan Maru* been on July 7, 1917, unencumbered with any charter the owner could have sold her as a free ship or chartered her at rates then procurable substantially in advance of the instant charter hire. Both purchasing and chartering were then controlled by the Allied and Associated Powers, and his selling and chartering markets were therefore restricted. But there is a record of time charters fixed during June and July of 1917 in the Pacific and the Far East, beyond the control which was in practice exercised by the Allied and Associated Powers, at rates from 63s. to 67s. per deadweight ton per month. Whether in addition to those extraordinary rates the charterers assumed the payment of war-risk insurance premiums is not disclosed, but it will be assumed that they did. It is believed that 67s. per deadweight ton per month is the highest known rate paid as time-charter hire in any trade during this period.

Comparing this extraordinary rate of 67s. with the rate fixed by the claimant's charter of 37s. per deadweight ton per month discloses a difference of 30s. per deadweight ton per month on this ship of 4,050 deadweight tons. The unexpired charter period was six months and 20 days. The risk that the ship would not live through this charter period was very great, as evidenced by the premium of 10% on the war-risk insurance paid by the claimant on the last voyage of the *Shigizan Maru*. But ignoring that risk, and assuming without deciding and for the purpose of this opinion only and in order to give the claimant the benefit of every doubt, (a) that the difference between the charter hire and the going timecharter hire was 30s. per deadweight ton per month and (b) that the *Shigizan Maru* would have survived her charter term, and applying the rules announced in Administrative Decisions No. VII and No. VII-A, it results that the charter worked an encumbrance on the vessel at the time of her loss representing the claimant's interest therein to the amount of approximately \$190,000.00.

This amount was fully covered by the war-risk insurance in the amount of \$200,000 collected by the claimant. It follows that the claimant has been fully reimbursed for its interest in the ship that was lost.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany

is not obligated to pay to the Government of the United States any amount on behalf of the American Union Line, Inc., claimant herein.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

GANS STEAMSHIP LINE (UNITED STATES)
v. GERMANY

(August 13, 1926, pp. 737-741.)

WAR: DESTRUCTION OF CHARTERED VESSEL.—DAMAGE: VALUE OF CHARTERER'S INTEREST IN VESSEL, TWO COMPLEMENTARY CHARTER-PARTIES, GERMAN STOCKHOLDING INTEREST IN CHARTERER.—EVIDENCE: EXPERT WITNESSES. Destruction on October 12, 1917, by act of war, of Norwegian vessel chartered by Nova Scotia company for nine consecutive summer seasons beginning 1911, and by claimant for nine corresponding winter seasons. Claim for value of claimant's interest in vessel. Application of rules announced in Administrative Decisions Nos. VII and VII-A, see pp. 203 and 330 *supra*. Twenty per cent German stockholding interest in claimant. Damages allowed. Evidence: see *supra*.

Bibliography: Kiesselbach, *Probleme*, pp. 111-112.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

From the record it appears that the Steamship *Themis* was built in Great Britain and completed in 1911. She was owned by a Norwegian corporation, of which Wilhelm Wilhelmsen appears to have been the principal executive and is sometimes treated as owner. She had a deadweight capacity of 12,500 tons. While she was under construction in 1910 her owners entered into two charter-parties which were obviously complementary and taken together covered a period of nine years. The first of these was entered into on March 21, 1910, with the Nova Scotia Steel & Coal Company, Ltd., (hereinafter called the Nova Scotia company) for nine consecutive summer seasons beginning with 1911 at a charter hire of £2,031.5 per calendar month. The second was entered into three days later with the Gans Steamship Line, claimant herein, for nine consecutive winter seasons commencing with the season 1911-1912 for a charter hire of £1,562.10 per calendar month (at the rate of 2s. 6d. per deadweight ton). In practice the two charters with their overlap provided for the use of the steamer throughout the year, giving the owner only a sufficient margin for the westbound voyage to make delivery to the Gans Steamship Line (hereinafter called claimant) within the time stipulated for in its charter. The president of the claimant points out that the Nova Scotia company intended to use the *Themis* in the transportation of steel and coal on the St. Lawrence River; that navigation on that river was closed for three winter months and hence the Nova Scotia company could not use the steamer during those months and (to quote his language) "It was not easy to find a charterer who would take a vessel for the winter season, for so many years, and the owners therefore had to make the charter for the winter seasons attractive, to compensate the charterer for the risks involved in so long a commitment."

For the reasons pointed out in Administrative Decision No. VII-A the charter hire stipulated to be paid by these two complementary charter-parties entered into for a period of nine consecutive years was at a much lower rate than short-term time or voyage rates. The hire under the Gans charter, which was made for a fraction of each year to give the ship employment during that time when it could not be used by the Nova Scotia company, was naturally substantially lower than the average charter hire for the year. The peculiar terms of this Gans charter must be taken into account in determining its value and the claimant's interest in the vessel at the time of her loss.

During the summer season of 1915 the Nova Scotia company subchartered the *Themis* to Barber & Company, Inc., for a term of eight months at a stipulated charter hire of £7,680 per month. Barber & Company, Inc., detained the *Themis* to such an extent that delivery could not be made to the claimant by the owner in accordance with the terms of the Gans charter and as a result the claimant lost the use of the *Themis* for the winter season 1915-1916 (see *The Themis*, 244 Federal Reporter 545 (1917), and 275 *ibidem* 254 (1921)). Omitting from the computation the season of 1915-1916, it appears from the record that during the period elapsing between the first delivery of the *Themis* to claimant, on March 20, 1912, and the date of her sinking the claimant had the possession and use of the ship on an average of 94 days per year.

Because of the increase in operating costs due to war conditions the charter hire paid by the claimant was substantially less than such of the costs of operation as were, under the charter, borne by the owner. For the season 1916-1917 the claimant voluntarily increased the charter hire to the extent of one shilling per deadweight ton per month and in the early part of 1917, in order to compose a controversy, made to the owner an additional lump-sum payment of \$25,000. Whether or not the charter hire paid by the Nova Scotia company was increased is not disclosed by the record.

On October 12, 1917, the *Themis*, while operated under the charter of the Nova Scotia company upon a voyage from India to Marseilles, was sunk by an act of war. Liability for her loss to the extent that her value was impressed with American nationality is admitted by the German Agent, who also admits that the Gans charter constituted an encumbrance on the *Themis* within the meaning of Administrative Decision No. VII. It is for the Umpire to determine the extent of that encumbrance and the value of the claimant's interest in the *Themis* on the date of her loss.

Stress is laid by the claimant on the fact that the *Themis* was a Norwegian ship. But Norwegian shipping suffered greater proportionate losses than those of any other nation, belligerent or neutral. The record in this and other cases before the Commission indicates that the claimant had used and was proposing to use the *Themis* in European trade. In February, 1917, she was loaded by claimant with a cargo of acid phosphate for Rotterdam, which use was protested by the owner on the ground that Rotterdam was an unsafe port. The protest was expressed by the Nordisk Skibsrederforening in a cable of February 25, 1917, thus: "Steamer *Themis* London war insurance Rotterdam to-day ten per cent via Halifax which best proof unsafe ports". At the time of the loss of the *Themis* the submarine campaign was being intensively prosecuted and the losses were extremely heavy. The risk that the *Themis* would be destroyed before completing the Gans charter term was great.

Under that charter the claimant was entitled to the *Themis* at the time of her loss for three winter seasons of say 94 days each. The average going charter rates at that time, while high, were lower than they had been several months earlier and were declining. What they would be during the following three

winter seasons no one could foresee. As one of the experts for claimant in this case, testifying in another case before the Commission, said, the high prices paid for tonnage "were due entirely to the war emergency and no buyer would pay them for future delivery". For the same reason no one at that time on a falling market would have made a three-year charter commitment at the charter rates then current. Another of claimant's experts in this case, testifying in another case, points out that "because of the uncertainty as to the duration of the War, the future commitment of a vessel for a considerable period of time made a tremendous difference in her market value for sale. * * * When her freedom of employment was postponed for a matter of six or eight months, *the risk of the termination of the War* immediately became a serious factor." It is evident from the testimony of this expert that he considered that on the conclusion of the war the price of tonnage and charter hire would in all probability substantially decline. The same risk of the termination of the war which depressed the selling value of a ship which was not available for use for "six or eight months" would depress the value of a charter to run for a longer period than six or eight months.

There is much testimony in the record with respect to the profits which claimant would have made under its charter had the *Themis* not been lost. For the reasons heretofore pointed out by the Commission this does not furnish a proper measure of Germany's liability and can be looked to only incidentally in measuring the value of claimant's interest in the ship. It is interesting to note in passing that the United States Circuit Court of Appeals in the case hereinbefore cited to which this claimant was a party, involving a partial breach of this same charter of the *Themis*, held that "To estimate the profits it [Gans Steamship Line] would have earned had it received and used the steamer involves speculation to a degree, which as the Commissioner and the court below found, makes such a measure entirely unsatisfactory."

But that claimant's charter was a valuable one constituting an encumbrance on the ship there can be no doubt. Taking into account all of the risks of loss in arriving at the probable duration of the charter, and also taking into account the uncertainties as to the duration of the war and the probable effect on charter hire of its termination, in arriving at the then value of the charter with its three unexpired winter seasons, and taking into account all of the other factors enumerated in Administrative Decision No. VII-A and applying the principles announced therein and in Administrative Decision No. VII, the Umpire finds that the claimant had an interest in the *Themis* at the time she was destroyed of the value of \$467,000.00.

The American and German Agents have agreed that during all of the material times there existed a German stockholding interest in the Gans Steamship Line and that 20% of the claim here presented shall for the purposes of this case be treated as impressed with German nationality while the remaining 80% shall be treated as impressed with American nationality. An award limited to the American interest in this claim, as defined by that agreement, will be entered in favor of the United States of America on behalf of the Gans Steamship Line for the use and benefit of such American interest.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Gans Steamship Line, for the use and benefit of the American interest therein, the sum of three hundred seventy-three thousand six hundred dollars (\$373,600.00)

with interest thereon at the rate of five per cent per annum from November 11, 1918.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

THE INTEROCEAN OIL COMPANY
(UNITED STATES) *v.* GERMANY

(August 13, 1926, pp. 741-743.)

WAR: DESTRUCTION OF CHARTERED VESSEL; RESPONSIBILITY UNDER GENERAL INTERNATIONAL LAW, TREATY OF BERLIN.—NEUTRALITY, ABSOLUTE CONTRABAND.—DAMAGE: VALUE OF CHARTERER'S INTEREST IN VESSEL. Sinking by German submarine on October 8, 1916, of Norwegian vessel chartered by claimant and carrying cargo of gas oil, declared absolute contraband by Germany. Claim for value of claimant's interest in vessel. Application of rules announced in Administrative Decisions Nos. VII and VII-A, see pp. 203 and 330 *supra*. Held that Commission not concerned with legality or illegality (under general international law) of destruction of vessel under neutral flag. Damages allowed.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

From the record it appears that the claimant herein, The Interocean Oil Company, an American corporation, on July 18, 1912, entered into a charter-party with the Norwegian owners of the Steamship *Christian Knudsen*. This charter was amended on July 14, 1913, and again on June 20, 1916, so that under its final terms the claimant herein chartered the said ship for a period of eight years with certain territorial restrictions as to use, including a restriction that (after the European voyage of October, 1916, on which she was lost) the ship should not during the war be used generally in European trade. The claimant agreed to pay as charter hire £2,350 per month with the privilege of the unrestricted use of the ship in European trade on the payment of an additional £1,000 per month. This practically gave to the charterer the option to remove all territorial restrictions on the payment of a total charter hire of £3,350 per month. The original charter, which, it will be noted, was entered into long prior to the war, provided that "In the event of a country to which Steamer trades being at war with any other country, Charterers agree to insure the steamer against all war risks for the value of not above £42,000". This provision was retained, but the amendment of June 20, 1916, obligated the charterer to carry at its cost on the ill-starred voyage of October, 1916, and it did in fact carry, war-risk insurance of £100,000 on behalf of the owner.

The *Christian Knudsen* was built in England in 1905. Originally she was a steel tank ship; she was converted in 1912, after the chartering, into a tanker of 6,700 tons deadweight. She was delivered to the charterer on November 11, 1912. She cleared the port of New York on October 7, 1916, bound for London

with a full cargo of gas oil in bulk consigned to the Anglo-American Oil Company, Ltd. At that time this cargo fell within the terms of the decrees promulgated by the German Government purporting to define absolute contraband. The ship was sunk off Nantucket by a German submarine on October 8, 1916. By its terms the claimant's charter had at that time slightly over four years to run.

The war demand for tankers was great and the supply comparatively limited. Approximately 50% of this supply was British-owned and pressed into service by Great Britain for war uses. The *Christian Knudsen* was of Norwegian registry and ownership. The charter hire, which was then far below the current rate, made the charter a valuable one. While the war demand for tankers available for immediate use in transporting oils to the war zone increased the value of the charter, it correspondingly increased the risk of destruction of the ship and the consequent termination of the charter. As Germany had declared petroleum and its products absolute contraband, a tanker conveying such a cargo to Great Britain, as was the *Christian Knudsen* at the time of her destruction, was not in practice protected by a neutral flag. This Commission is not concerned with the legality or illegality of such practice. It is dealing with the realities rather than with juridical abstractions.

The owner of the *Christian Knudsen* was protected by war-risk insurance paid for by the charterer in the amount of £100,000 while the charterer was protected by insurance in the amount of \$100,000.

So far as concerned the immediate future the charter was a valuable one, but the more distant development of charter rates for tankers was uncertain and this charter had yet more than four years to run. The testimony before this Commission indicates that during the summer of 1916 tank steamers then building were being offered on long-term charters for approximately 12 shillings per deadweight ton per month. While it is true that these were not then available and could not be made available for a considerable time, the offerings of long-term tanker charters and those actually entered into during that period for future delivery at comparatively low rates illustrate the uncertainty then prevailing with respect to the duration of the war and to the probable course of charter rates after its termination.

Notwithstanding these uncertainties the claimant's charter undoubtedly operated as a burden and an encumbrance on the ship, vesting in the claimant an interest therein. Weighing all of the facts and applying thereto the principles announced in Administrative Decisions No. VII and No. VII-A, the Umpire finds that at the date of her destruction the claimant's interest in the *Christian Knudsen*, less the insurance of \$100,000 collected by it, was of the value of \$447,000.00.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of The Inter-ocean Oil Company the sum of four hundred forty-seven thousand dollars (\$447,000.00) with interest thereon at the rate of five per cent per annum from October 8, 1916.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

JEANETTE SELINGER (UNITED STATES)
v. GERMANY

(August 13, 1926, pp. 744-745.)

PROCEDURE: ASSIGNMENT OF CLAIMS; CONFIRMATION BY COMMISSION OF AGREEMENT BETWEEN AGENTS.—WAR: DESTRUCTION OF CHARTERED VESSEL.—DAMAGE: VALUE OF CHARTERER'S INTEREST IN VESSEL. Sinking by German submarine on May 2, 1917, of Japanese vessel chartered by American corporation, subchartered by British corporation. Claim for value of American corporation's interest in vessel, assigned to claimant. Application of rules announced in Administrative Decisions Nos. VII and VII-A, see pp. 203 and 330 *supra*. Confirmation of agreement between Agents on value of charterer's interest. Damages allowed.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the *Umpire* for decision on a certificate of disagreement of the National Commissioners.

In so far as the facts are reflected by the meager record herein, they are as follows:

On August 31, 1916, Hashimoto Kisen Kabushiki Kaisha, Japanese owners of the *Taizan Maru*, of Japanese registry, entered into a time charter-party with the American Star Line, Inc., of New York, an American national, by the terms of which the owners chartered the said steamship to the charterer for a period of about 18 calendar months from date of delivery at £7,562.10.0 per calendar month, which was at the rate of 27s. 6d. per deadweight ton per month. According to the charter the ship was classed 100 A 1 Lloyd's and had a total deadweight capacity of 5,500 tons. The charter contained certain territorial restrictions not necessary here to notice. It provided that the charterer should carry war-risk insurance on behalf of the owners, to be approved by them, on the hull and machinery to the extent of £100,000 and that the vessel should be delivered to the charterer not earlier than October 1 or later than December 15, 1916. It is alleged that delivery was effected on November 4, 1916.

On November 29, 1916, the "American Star Line of New York" as "disponent Owners" entered into a time charter-party with Furness, Withy & Company, Ltd., of London, as charterers, by the terms of which the latter hired the *Taizan Maru* for a term of about 12 calendar months at a charter hire of £10,312.10.0 per calendar month (at the rate of 37s. 6d. per deadweight ton per month), the subcharterer agreeing to carry on behalf of the owner war-risk insurance to the extent of £100,000 as stipulated for in the original charter. Under this subcharter delivery was effected on April 4, 1917.

While the record in this particular case does not disclose the trade in which it was intended the *Taizan Maru* should engage under the subcharter, it is a matter of history that beginning with January, 1916, for reasons of efficiency and economy and in order to eliminate competition in chartering between the Allied Governments themselves, Furness, Withy & Company, Ltd., acted for the British Board of Trade in chartering tonnage not only for Great Britain but for her Allies as well, particularly France and Italy (Fayle, "Seaborne Trade," volume II, pages 249, 260, 264, 275, 296, 315, 316, 318, 323, 325, 326, 356). This trade was most hazardous, involving as it did transporting for the Allies materials, munitions, and supplies for their direct and indirect war needs.

On May 2, 1917, the *Taizan Maru* was captured in the Irish Sea by a German submarine and sunk by bombing. At that time she had a cargo of iron ore from Carthage, Spain, destined for Ardrossan, Scotland.

The American and German Agents have agreed that under the facts as disclosed by this record and other testimony before this Commission and the rules and principles announced in Administrative Decisions No. VII and No. VII-A the American Star Line, Inc., had an interest in the *Taizan Maru* at the time she was destroyed of the value of \$77,482. The Umpire confirms this agreement. The charterer had no insurance on its interest.

On April 15, 1919, the American Star Line, Inc., assigned its claim against Germany arising out of the sinking of the *Taizan Maru* to Jeanette Selinger, an American national and claimant herein.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Jeanette Selinger the sum of seventy-seven thousand four hundred eighty-two dollars (\$77,482.00) with interest thereon at the rate of five per cent per annum from November 11, 1918.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

THE UNITED STATES ASPHALT REFINING
COMPANY (UNITED STATES) v. GERMANY

(Three Claims, August 13, 1926, pp. 746-748.)

PROCEDURE: CONFIRMATION BY COMMISSION OF AGREEMENT BETWEEN AGENTS.—WAR: DESTRUCTION OF CHARTERED VESSELS.—DAMAGE: VALUE OF CHARTERER'S INTEREST IN VESSELS. Destruction on August 23 and September 3, 1915, and April 6, 1917, of three British vessels chartered by claimant. Claims for value of claimant's interest in vessels. Application of rules announced in Administrative Decisions Nos. VII and VII-A, see pp. 203 and 330 *supra*. Confirmation of agreement between Agents on value of charterer's interest. Damages allowed.

PARKER, Umpire, rendered the decision of the Commission.

These cases, which are before the Umpire for decision on a certificate of disagreement of the National Commissioners, have been submitted and will be considered together.

On February 10, 1912, the claimant chartered from the British owner, for a period of about five years from date of delivery, the British tank steamer *Cymbeline* of 6,700 deadweight tons. Delivery was effected on April 21, 1914. The stipulated charter hire was £2,275 per calendar month. On August 1, 1914, the *Cymbeline* was requisitioned by the British Admiralty at a requisition hire of £3,182. 6s. per month, an advance of £907. 6s. per month over the stipulated charter hire. The British Admiralty dealt directly with the charterer rather than with the owner of the vessel and paid the requisition hire to the claimants who in turn paid to the owners from time to time hire in accordance with the terms of the charter. The ship was sunk by a German submarine on September 3, 1915. Claim is put forward (in Docket No. 6630) for the value of the claimant's interest in this requisitioned vessel at the time of her loss.

On February 21, 1912, the claimant chartered from the British owner for a term of about five years from date of delivery, a tank steamer then building, at the rate of 6s. 6d. per deadweight ton per month. Under this charter-party delivery of the Steamship *Rosalind*, of 9,730 deadweight tons, was effected on April 19, 1913. The stipulated charter hire amounted to £3,162. 5s. per month. On November 28, 1913, the *Rosalind* entered upon a charter-party with the British Admiralty for a period of one year at £7,000 per month. Upon the completion of this subchartering the *Rosalind* entered upon a requisition charter with the British Government of two months at the rate of £4,135 per month, upon the completion of which she entered upon a regular requisition charter with the British Government for an indefinite period at £4,622 per month. She was destroyed on April 6, 1917. During the entire time this ship was under requisition the British Admiralty paid the requisition hire to the claimant and the claimant in turn paid to the owner the hire stipulated for in the original charter. This claim (Docket No. 6631) is put forward for the value of the charterer's interest in the *Rosalind* at the time of her loss.

Under date of May 24, 1912, the claimant chartered from the British owner a tank steamer then building for a term of five years beginning from date of delivery. The *Silvia*, with a deadweight tonnage of 7,767, was delivered under this charter-party on September 9, 1913. The charter hire stipulated was equal to £2,670 per month. This was later increased so that the charterer paid to the owners from May 9, 1915, to the date the vessel was lost additional hire of £280 per month or a total of £2,950 per month. On September 16, 1913, claimant entered into a "charter-party of affreightment" with the British Admiralty under which the claimant agreed to operate the *Silvia* for the British Admiralty for a period of thirty-six months from September 10, 1913, the claimant to be paid freight at the rate of £4,500 per calendar month. The Admiralty also agreed to indemnify to the extent of the value of the vessel if lost by war risks under certain conditions. The *Silvia* was destroyed on August 23, 1915. This claim (Docket No. 6632) is put forward for the value of the claimant's interest in the *Silvia* at the time of her loss.

All three of these vessels were destroyed under circumstances fixing liability on Germany to compensate for the value of the American interest therein.

Since the certification of these cases to the Umpire the American Agent and the German Agent have joined in and filed herein a stipulation in writing agreeing that the aggregate value of the claimant's interest in said ships on the date of loss, computed in accordance with the rules established in Administrative Decisions No. VII and No. VII-A, is \$150,000. This valuation is confirmed by the Umpire.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of The United States Asphalt Refining Company the sum of one hundred fifty thousand dollars (\$150,000.00) with interest thereon at the rate of five per cent per annum from November 11, 1918.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

BARBER & CO., INC. (UNITED STATES)
v. GERMANY

(August 13, 1926, pp. 748-751.)

WAR: DESTRUCTION OF CHARTERED, SUBCHARTERED VESSELS.—DAMAGE: VALUE OF CHARTERER'S, SUBCHARTERER'S INTEREST IN VESSELS. Sinking on May 19, 1917, and November 3, 1915, by German submarine of Norwegian and Japanese vessels, chartered and subchartered, respectively, by claimant. Claims for value of claimant's interest in vessels. Application of rules announced in Administrative Decisions Nos. VII and VII-A, see pp. 203 and 330 *supra*. Damages allowed for interest in Japanese vessel. *Bibliography*: Kiesselbach, *Probleme*, p. 112.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

It is put forward on behalf of Barber & Co., Inc., an American corporation, to recover the value of its alleged interest in two foreign steamships destroyed during the war by German submarines.

One of these was the Steamship *Askild*, of Norwegian ownership and registry, with a deadweight tonnage of about 3,000 to 3,600 tons. It appears that on April 30, 1917, the owner and the claimant executed a "net grain charter" by the terms of which the owner contracted to transport for the charterer from New York to Havre, France, a "complete cargo of lawful merchandise" "in consideration whereof Charterers shall pay the vessel freight" of 200s. per ton of 2,240 pounds. It was stipulated that charterer had the option to cancel should the vessel not be ready to load on or before July 31, 1917. It will be noted that this was a simple contract of affreightment. While on a westbound voyage with a cargo of coal from Wales to Portugal to be discharged before entering upon this charter the *Askild* was sunk by a German submarine near the English Channel on May 19, 1917. She was never delivered to the charterer and, as by the express terms of the charter it was terminated by her loss, there never was a time when the charterer was entitled to delivery. The owner of this ship was accustomed to operate her under contracts of affreightment rather than to commit her under time fixtures. In pursuance of that practice she was en route to New York for loading under a "net charter" currently entered into at a hire which was equal to or possibly a trifle above the going rate at the time she was destroyed.

The Umpire finds that under the principles laid down in Administrative Decisions No. VII and No. VII-A this charter did not constitute an encumbrance or burden on, and that the claimant had no interest in, the *Askild* at the time of her loss.

The second charter on which this claim is based covered the *Yasukuni Maru*, of Japanese ownership and registry, with a deadweight carrying capacity of 7,270 tons. On February 4, 1915, the Japanese owner entered into a time charter-party with Messrs. Phs. Van Ommeren (London), Ltd., for a period of about 12 months from date of delivery, effected March 25, 1915, and at a charter hire of £2,000 per month or about 5s. 6d. per deadweight ton per month. This was substantially below the then going rate for 12-month time charters, a number of which were entered into about that time in which the

restrictions were greater but the hire in excess of that contained in this charter. While it contained some territorial restrictions and a provision that "any detention caused by warlike operations to be for account of Charterers", it on the whole permitted reasonable freedom for engaging in Allied trading. The record contains no explanation of the low hire stipulated for.

On September 10, 1915, Messrs. Phs. Van Ommeren, Ltd., original time charterers, subchartered the *Yasukuni Maru* to the predecessor of Barber & Co., Inc., claimant herein, for a period of about six months at a monthly hire of £5,275, or about 14s. 6d. per deadweight ton per month—approximately the rate at which several other fixtures for a like period were made about that time. The steamship was delivered under this subcharter to the claimant at Newport News on September 18, 1915. She was loaded by the claimant for a voyage to Salonica, in the course of which she was shelled and sunk in the Mediterranean by a German submarine on November 3, 1915. At that time the claimant had used the ship under this charter one and one-half months. The original time charter would have expired on March 25, 1916, or about four and three-quarters months from the date the ship was destroyed. On the date of loss time-charter hire for periods from four to six months had increased to approximately 20s. per deadweight ton per month.

Manifestly the original time charter held by Messrs. Phs. Van Ommeren, Ltd., constituted a very substantial burden and encumbrance on the *Yasukuni Maru* at the time of her loss, but the subcharter of the claimant did not. This subcharter in effect sublet the ship to the claimant for a limited period at an increased hire and assigned to claimant a proportionate interest in the chartered owner's interest in the vessel, which, on such assignment, became impressed with American nationality. In measuring the extent of the interest in the ship of (1) the owner, (2) the time charterer, and (3) the subcharterer respectively it will be borne in mind that the owner was receiving a charter hire of 5s. 6d. per deadweight ton per month, that the time charterer was receiving *net* the difference between this charter hire and 14s. 6d. per deadweight ton per month, and that the subcharterer had the use of the vessel by paying this last-named charter hire at a time when the market hire was 20s. per deadweight ton per month.

The ship was of Japanese ownership and registry and the risk of requisition therefore remote. The risk of destruction under conditions as they existed in November, 1915, was substantial. Making allowance for that risk and applying the principles and rules announced in Administrative Decisions No. VII and No. VII-A, the Umpire finds that Barber & Co., Inc., had an interest of \$43,000 in the *Yasukuni Maru* at the time of her loss.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is obligated to pay to the Government of the United States on behalf of Barber & Co., Inc., the sum of forty-three thousand dollars (\$43,000.00) with interest thereon at the rate of five per cent per annum from November 3, 1915.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

M. A. QUINA EXPORT COMPANY
(UNITED STATES) *v.* GERMANY

(August 13, 1926, pp. 756-763.)

DAMAGE: (1) FRUSTRATION OF CONTRACT OBLIGATIONS, (2) RULE OF PROXIMATE CAUSE. Claim for frustration of charter obligations by German blockade of British Isles. *Held* that, under Treaty of Berlin, Germany not liable for such remote and consequential damage.

WAR: DAMAGE TO CHARTERED VESSEL.—DAMAGE: (1) DESTRUCTION OF LIEN, (2) RULE OF PROXIMATE CAUSE, NEGLIGENCE.—EVIDENCE: DECISIONS OF MUNICIPAL COURTS. Charter (a simple contract of affreightment concluded between claimant and Italian shipowner for transportation of goods from Pensacola to Cardiff. Advance of £7,000 made by claimant to shipowner, who gave claimant draft for that amount payable ten days after arrival at Cardiff or upon termination of voyage, but never completed voyage because of collision in Monkstown Bay, Cork Harbour (Ireland), where vessel, badly damaged after shelling on high seas by German submarine on June 3, 1917, was waiting to be towed to Cardiff. Abandonment of vessel by owner. Claim presented on behalf of charterer, who asserts that it had lien on freight and hull to secure payment of £7,000. *Held* that freight was never earned and claimant's lien on it therefore never matured (reference made to Arthur Sewall case, see p. 311 *supra*), and that freight and hull lost, and lien on hull, if any, destroyed, not by act of Germany, but by owner whose negligence caused collision and who abandoned contract of affreightment. Evidence: see *supra*.

Bibliography: Kiesselbach, *Probleme*, p. 112.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

Two distinct claims are here put forward on behalf of the M. A. Quina Export Company, an American corporation. One involves the schooner *Maria Lorenza*, of Uruguayan registry, with whose Spanish owner the claimant on February 16, 1916, entered into a charter-party for the transportation of a cargo of lumber from the Gulf of Mexico to a safe port in the United Kingdom of Great Britain and Ireland. The owner declined to fulfil his contract on the ground that subsequent to its execution conditions had changed in that Germany had declared a blockade around the British Isles and was seeking to establish it through an unrestricted submarine campaign which rendered a voyage by a sailing vessel to a British port too hazardous to be undertaken and in effect operated as a frustration of the charter. The claimant in 1917 brought suit against the owner in the District Court of the United States for the Southern District of Florida and libeled the vessel, which was then loading at Tampa. The court sustained the owner's contention and dismissed the claimant's libel (280 Federal Reporter 147 (1922); affirmed 1923, 287 Federal Reporter 626). It is contended that the claimant was damaged to the extent of \$16,000 by the frustration of this charter alleged to have been directly attributable to Germany's prosecution of unrestricted submarine warfare. For reasons fully set forth in numerous decisions of this Commission Germany is not liable under the Treaty of Berlin for such remote and consequential damages as form the basis of this claim. It is rejected.

The other claim has to do with the checkered career of the ill-fated Italian Brigantine *Luisa* and her hapless Italian owner, Antonio Benvenuto, who has abundant cause to regret that with his brigantine he ever ventured forth from the safe harbors of sunny Italy to be buffeted by wind and wave, by enemy shellfire, by collisions in strange waters with foreign vessels, and last but not least by the cross-fire of judicial decisions by distinguished judges whose learning was to him a sealed book and whose very language he did not understand. After being thus harassed for more than four years this ill-starred Italian mariner was left stranded and destitute, buried deeper in the muck of insolvency than his brig *Luisa* in the mud bank of Monkstown Bay, Cork Harbor. One of his creditors, the claimant herein, after exhausting with small success such remedies as seemed to be offered by other tribunals now turns to this Commission in the assertion of a claim against Germany.

Without undertaking to state the substance of the voluminous record the Umpire finds:

(1) Antonio Benvenuto, builder, owner, and master of the good ship *Luisa* of the burthen of 1,537 tons register or thereabout, described by an officer of the British Navy as "the largest brigantine I have ever seen", found himself and his vessel in Pensacola, Florida, on January 4, 1917, at which time he entered into a "pitch pine charter" with the claimant herein. This was a simple contract of affreightment for the transportation of pitch-pine sawn timbers and boards from Pensacola to Cardiff.

(2) The vessel was loaded by claimant. In accordance with the terms of this charter it advanced to the owner £7,000, receiving from him a draft dated January 26, 1917, for that amount payable ten days after arrival at Cardiff or upon termination of the voyage, which draft recited that it was for "value received, for necessary disbursements of my vessel at this Port, for the payment of which I hereby pledge my vessel and freight; and my consignees at the Port of destination are hereby directed to pay the amount of this obligation, from the first amount of freight received, for account of my said vessel".

(3) The owner, as master of the brigantine, issued and delivered to the claimant bills of lading covering the cargo to be transported to Cardiff and there delivered to the claimant or its assignees upon it or they paying the stipulated freight. These bills of lading were properly endorsed and negotiated by the claimant and were acquired and held by Denny, Mott & Dickson, Ltd., British subjects.

(4) After sailing on February 14, 1917, from Pensacola for Cardiff, the *Luisa* encountered such rough weather that much of her gear and stores had to be thrown overboard and a part of the deckload of timber jettisoned. She was finally brought by a salvage tug to a port in Bermuda where she was repaired and a part of her deck cargo sold to pay for the salvage and repairs.

(5) Nothing daunted, the *Luisa* on May 14 again set her course for Cardiff without serious mishap until when about 230 miles west of the Fastnet on June 3, 1917, she was attacked and shelled by a German submarine. One of her crew was killed and another wounded and the master with the rest of the crew in order to save their lives launched one of the boats and rowed away from the ship, taking with him the ship's log but little besides. He kept in sight of the *Luisa* for about an hour, during which time the shellfire continued; but the wooden vessel, heavily laden with pitch pine, did not sink. Twenty-four hours afterwards Benvenuto's boat was picked up by an American destroyer. He reported his experience to the Italian consul at Queenstown, in whose hands he left his case, and, believing his ship destroyed, he and his crew soon returned to Italy.

(6) An American destroyer went in search of and located the *Luisa* on June 6, brought her into Berehaven on June 10, and delivered her to the British receiver of wrecks on June 11. She was moved to Queenstown June 16, where the Italian consul on behalf of the owner claimed the right to the possession of the vessel and her cargo and was permitted to put men on board her. He communicated with the owner, who at once returned to Queenstown with his crew and took possession of his ship on July 1.

(7) While the *Luisa* was badly damaged by shellfire she was in a condition to be towed with her cargo on board to Cardiff. While she was waiting for her tug in Monkstown Bay on the night of August 14 she was run into by the British Steamship *Dungeness* and very seriously damaged as a result of this collision. The official survey discloses that the longitudinal bindings of the *Luisa* were severed and she was cut into amidships leaving a vertical gash of 15 feet 6 inches with a depth of penetration of her stem of 5 feet 3 inches while its fore and aft width was 4 feet. She was found to be developing a tendency for her two ends to fall asunder. Her deck planking and top-side planking butts were sprung open, the maximum distortion measuring one and one-quarter inches. All these enumerated damages were by the survey attributed to the collision and not to her previous damage by shellfire.

(8) That this collision was due to the negligence of the owner and master of the *Luisa* in not exposing proper lights was not seriously contested, and it was so found or assumed by all of the courts by which her case has been considered. The case serves aptly to point the moral that the negligence of one's self is often more deadly than the shafts of one's enemies. Following the collision there was instituted a systematic but ill-advised sparring for position between the owner of the *Luisa*, who was being advised by the Italian consul, on the one part and Denny, Mott & Dickson, Ltd., the transferees of the bills of lading and the cargo owners, who were being advised by their solicitors and the Salvage Association, on the other part. The owners of the cargo insisted that it should be delivered at Cardiff. Without declining to make such delivery the shipowner submitted several proposals, including a delivery of the cargo at Cork upon the payment of freight on a *pro tanto* basis. Nothing came of these negotiations. The cargo was a valuable one and was worth very much more at Cardiff than at Cork. The trial judge found that at a cost of not exceeding £2,500 temporary repairs could have been made on the *Luisa* which would have permitted her being towed to Cardiff where her owner would have been entitled to collect freight in an amount sufficient to pay claimant's draft and approximately £7,000 besides.

(9) The record suggests that the owner of the *Luisa* probably had neither cash nor credit to enable him to make these repairs. Whether in this emergency he appealed to the claimant herein for assistance is not disclosed. But the record does disclose that this claimant did advance to the shipowner funds with which to prosecute his litigation with the cargo owner. The sparring between the shipowner and the cargo owner continued to no purpose. As aptly stated in the opinion of Lord Summer when the litigation between them was before the House of Lords, "It seems to me that the Respondent [shipowner] dropped his bone in snatching at the shadow". Be this as it may, after a delay of nearly four months the cargo owners, despairing of having their cargo delivered to Cardiff by the *Luisa*, on October 29, 1917, began an action to recover the cargo without the payment of freight. An order was entered on December 3 directing that the cargo be delivered to the plaintiffs upon their giving bond, which was done.

(10) The claimants relied on the alleged abandonment of the contract of affreightment by the owner and master of the *Luisa*, first in leaving her when

she was under shellfire and letting her drift as a derelict and *second* by failing to proceed on the voyage after her collision with the *Dungeness* due to the negligence of her master, which collision, it was alleged, rendered her incapable of any further voyage.

(11) At the time this action was instituted the state of the decisions of the British courts supported the first ground of abandonment alleged. The case came on for hearing before Mr. Justice Gordon, the trial judge, who on June 27, 1918, reserved judgment, and before judgment was rendered by him the House of Lords reversed the decision of the Appeal Court in *Newsome v. Bradley* (1919 A. C. 16) upon which the plaintiffs relied. Mr. Justice Gordon delivered judgment on November 29, 1918, and held that the master of the *Luisa* in leaving her under shellfire did not abandon her under circumstances which amounted to a termination of the contract of affreightment. This point which was definitely settled in favor of the shipowner was the only ray of encouragement glimpsed by him in an otherwise inky sky.

(12) Throughout the litigation it was contended on behalf of the owner of the *Luisa* that she was not a wreck and that the voyage had not been abandoned.

(13) But Mr. Justice Gordon in effect held that the inaction of the owner of the *Luisa* was equivalent to a refusal to deliver the cargo at the port of destination and that in these circumstances the plaintiffs "were entitled to get possession of their cargo at Queenstown without being liable to pay the freight which had not been earned, or a pro rata freight which they had not expressly or impliedly agreed to pay".

(14) The case was reviewed in the Divisional Court of Appeal and the judgment of the trial court reversed. The unanimous opinion concluded thus: "Should there be a further appeal, we trust it will be set down forthwith for argument, so as to release Benvenuto from the perils and uncertainties of law on land after his escape from war dangers at sea. Hope deferred must indeed have made him heartsick, notwithstanding his cheery name."

(15) On appeal to the Court of Appeal (Ireland) the judgment of the Divisional Court of Appeal was affirmed with elaborate opinions.

(16) On final appeal to the House of Lords the judgment of the trial court as rendered by Mr. Justice Gordon was restored and affirmed and the judgment of the Divisional Court and the judgment of the Court of Appeal (Ireland) were reversed. There were present at the hearing Viscount Finlay, Lord Atkinson, Lord Sumner, Lord Parmoor, and Lord Phillimore. The first three read elaborate opinions in support of their judgment while the last two read equally elaborate opinions in favor of sustaining the Divisional Court of Appeal and the Court of Appeal (Ireland) and dismissing the appeal to the House of Lords.

(17) Thus on this narrow margin by the decision of the House of Lords rendered on May 10, 1921, Antonio Benvenuto, shipbuilder, shipowner, master mariner, but not a shining light either as a financier or negotiator, was left without cargo or freight, with his brig *Luisa*, which he and his solicitors vigorously protested throughout was not a wreck, lying abandoned in the mud of Monkstown Bay, Cork Harbor.

(18) All of the courts found that while the *Luisa* was damaged by German shellfire she was thereafter in a condition to be towed with her cargo to Cardiff. The shipowner and the cargo owner were acting in concert with a view to having her towed to Cardiff prior to the collision with the *Dungeness* which was her undoing. But all of the courts found that (as stated by Viscount Finlay in rendering the judgment in the House of Lords) "It must be remembered

throughout that the unfitness of the 'Luisa' to carry the cargo on to Cardiff was the result of the negligence of the Defendant [Benvenuto] himself".

(19) The claimant herein, M. A. Quina Export Company, alleges that it purchased insurance, including insurance against risks of war, to protect it against the loss of its interest in the freight to be earned by the *Luisa*, which interest was represented by the draft for £7,000 given by Antonio Benvenuto described in paragraph (2) *supra*. The insurance companies denied liability on the grounds among others that the loss sustained by claimants was not attributable to a war risk and also that the proximate cause of the loss was the negligence of the master which was not insured against. Demurrers interposed on these grounds were sustained by the court. Most of the claims were subsequently settled on the basis of 25% of the face of the policies.

(20) The record is barren of testimony from which the Commission could form any estimate or even hazard an intelligent guess of the amount, stated in terms of dollars, of the damage inflicted upon the *Luisa* by the shellfire of the German submarine.

(21) The charter of January 4, 1917, entered into between the owner of the *Luisa* and the claimant herein, was executed at a time when the *Luisa* was in port at Pensacola. She was immediately loaded thereunder and entered at once upon the performance thereof in the regular course of business at the then current rates. There is no evidence that the charter constituted an encumbrance on the *Luisa* within the rules announced in Administrative Decisions No. VII and No. VII-A.

(22) But the claimant asserts that it had a lien on the *freight* in the sum of £7,000 for advances made to the owner and master of the *Luisa* and that this freight was lost through the act of Germany. The British House of Lords decided that the freight was not lost through the act of Germany but through the negligence of the owner and master of the *Luisa* and because of his abandonment of the contract of affreightment. Moreover, the freight was never earned, and hence the lien on the freight to secure the payment of claimant's indebtedness never matured (see decision of this Commission of April 21, 1926, in the *William P. Frye* case, Docket No. 6070; a opinion of Viscount Finlay cited above; and Lord Ellenborough in *Hunter v. Prinsep* (1808), 10 East, page 394).

(23) The claimant further contends that it had a lien on and an interest in the *hull* of the *Luisa* to secure the payment of Benvenuto's indebtedness to it of £7,000. Assuming for the purposes of this opinion that such a lien was fixed on January 26, 1917, and still continues in existence, the claimant has wholly failed to produce before this Commission any proof that its interest in the *Luisa* was destroyed by the act of Germany. According to the record the *Luisa* was crippled but not destroyed by German shellfire. There is no evidence that after this shelling the value of the vessel on which claimant had a lien was not fully equal to the claimant's debt. If the claimant's interest in the *Luisa* was destroyed at all, as seems probable, it was, as abundantly proven in the litigation in the British courts, destroyed through the negligence of the owner, against which claimant had not insured and for which Germany cannot be held liable under the Treaty of Berlin.

Wherefore, applying the rules established in Administrative Decisions No. VII and No. VII-A and other decisions of this Commission to the facts as above set out, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany

^a *Note by the Secretariat*, this volume, p. 311 *supra*.

is not obligated to pay to the Government of the United States any amount on behalf of the M. A. Quina Export Company. claimant herein.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

ARTHUR ELLT HUNGERFORD
(UNITED STATES) *v.* GERMANY

(August 13, 1926. pp. 766-772.)

WAR: CIVILIANS AND CIVILIAN POPULATION AS DISTINCT FROM PERSONS WITH MILITARY STATUS; PERSONAL PROPERTY IMPRESSED WITH MILITARY CHARACTER.—EVIDENCE: OFFICIAL Y.M.C.A. PUBLICATIONS. Sinking by German submarine on April 28, 1918, of British merchant vessel transporting Young Men's Christian Association group recruited for service with American Expeditionary Forces in Europe. Claim for damages on account of personal property lost by leader of group. *Held* that members of group were not "civilians" or members of "civilian populations" of United States, as those terms are used in Treaty of Berlin, and that claimant, therefore, not entitled to damages: reference made to Christian Damson, case, see p. 184 *supra*. Evidence: official publications of Y.M.C.A.

Bibliography: Kiesselbach, *Probleme*, pp. 139-140.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

It is put forward by the United States on behalf of Arthur Ellt Hungerford, an American national, who was one of a group of 57 men recruited by the Young Men's Christian Association for service with the American Expeditionary Forces in Europe. The claimant was the leader of and in charge of this party which sailed from New York April 13, 1918, on the British merchant vessel *Oronsa* "en route to England, and from thence to the active war regions of France" (American brief, page 1). On April 28 the *Oronsa* was torpedoed and sunk in the Irish Channel by a German submarine. The claimant and his entire party escaped in small boats without sustaining personal injuries. They, however, lost their personal belongings for the value of which claims are made against Germany aggregating approximately \$50,000. This particular case is put forward for the value of claimant's personal belongings, fixed at \$1,529.96, including uniforms and equipment adapted for use in service with the A. E. F.

The question here presented for decision is: At the time of the sinking of the *Oronsa* were the members of the group to which claimant belonged "civilians" or members of the "civilian population" of America as those terms are used in the Treaty of Berlin? Applying the principles announced by this Commission in its decision in the Christian Damson case (Docket No. 4259, Decisions and Opinions, pages 258-265^a) to the facts as disclosed by this record, the Umpire decides that they were not. It was there held:

" * * * The true test in determining what nationals of each power belong to this class [civilians] is to be found in the object and purpose of their pursuits

^a Note by the Secretariat, this volume, pp. 195-199 *supra*.

and activities at the time of the injury or damage complained of, rather than in the statutory label which their respective nations may have happened to attach to them. * * * By reading the reparation provisions as a whole, it is clear that the terms 'civilian population' and 'civilian' describe a class common to all of the Allied and Associated Powers and that Germany's liability under the Treaty attaches only where claims are put forward by such a power for damages suffered by such of its nationals as fall within the general class described. If the activities of such nationals were at the time aimed at the direct furtherance of a military operation against Germany or her allies, then they can not be held to have been 'civilians' or a part of the 'civilian population' of their respective nations within the meaning of the Treaty. The line of demarcation between the 'civilian population' and the military within the meaning of the Treaty is not an arbitrary line drawn by the statutory enactments of the nation, each nation drawing it in a different place, but a natural line determined by the occupation, at the time of the injury or damage complained of, of the individual national of each and all of the Allied and Associated Powers without reference to the particular nation to which he may have happened to belong."

What are the facts disclosed by this record with respect to the claimant's status and the object and purpose of his journey to the zone of active war operations in France, and upon what pursuits and activities had he then entered of which this journey was the first step? The answer is found in the official publications of the Y. M. C. A. detailing the war work of that organization, particularly in "Service with Fighting Men" in two volumes (1922) and "Summary of World War Work of the American Y. M. C. A." (1920), hereinafter referred to as "Summary". The conclusions summarized in the following fourteen paragraphs are taken mainly from those publications:¹

(1) An order issued by the President of the United States on April 26, 1917, recited that "official recognition is hereby given the Young Men's Christian Association as a valuable adjunct and asset to the service". This was published in General Order No. 57 of the War Department for the information and guidance of the Army ("Service with Fighting Men," volume II, page 489).

(2) The Secretary of War of the United States wrote: "Whether or not an exemption from military service shall automatically be made in favor of any such young men [members of the Y. M. C. A. engaged as such in war work] cannot now be determined, but, pending their actual call to the colors, this Department will recognize their service *as directly in aid of the men in our own Army*" (quoted under the caption "Militarizing the Y. M. C. A." in "Service with Fighting Men," volume II, at page 498).

(3) The Commander-in-Chief of the American Expeditionary Forces wrote: "In view of the *military importance* of the Y. M. C. A. with the A. E. F. and with the other Allied Armies, I believe that your personnel should continue for the present in the service of the Y. M. C. A. unless they are specifically called by the Government *for military duty of another kind*" ("Service with Fighting Men," volume II, page 503).

(4) "A contributing cause to America's triumph in the World War was the high morale of the troops—the unconquerable spirit of the American soldier. It was to assist in maintaining this spirit to the highest pitch, *to help render the men 'fit to fight'* that the Y. M. C. A. threw itself into the struggle" (Summary, page 119).

(5) "* * * In two years the Y. M. C. A. created an organization for entertaining and amusing the Army which ultimately became recognized *as being as indispensable* to the *social welfare in modern scientific warfare* as were the departments which fed and clothed them to their material welfare" (Summary, page 125).

¹ Italics added.

(6) "A *specific military function* was assigned to the Y. M. C. A. Its duty was to assist in maintaining and promoting morale. * * *

"War is a grim business and until the War had been won *military efficiency was the sole consideration*. As a mere purveyor of comforts and luxuries, no organization could have been granted a share of the inadequate transportation for its supplies and workers. Because Y. M. C. A. welfare work and other activities grappled effectively with intangible foes that reduced the fighting efficiency of soldiers, and that cannot be reached by military regulations and penalties, its service was welcomed by the American and Allied Governments and commanders *as contributing directly to victory*" (Summary, pages v-vi).

(7) The Y. M. C. A. organization in America formed "a Committee on the A. E. F." to deal with overseas activities ("Service with Fighting Men," volume I, chapter XIII, "Militarizing the Y. M. C. A.," at page 222).

(8) Under the provisions of section 125 of the American National Defense Act the members of the Y. M. C. A. were prohibited from wearing the uniform of the Army while on duty in the United States. However, those members of the Y. M. C. A. serving with the American Expeditionary Forces in France were *required* by general orders to "wear the regulation United States Army uniform with U. S. Army buttons".

(9) The Adjutant General of the American Expeditionary Forces in referring to "Y. M. C. A. Agents in the Zone of the Armies" wrote: "They should thoroughly understand that they are now considered as *militarized* and are, consequently, *subject to all the rules, regulations and orders which apply to soldiers in the zone of the armies*". The Commander-in-Chief of the American Expeditionary Forces wrote: "I have the honor to call your attention to the fact that these organizations *are now militarized and are under the control and supervision of the American military authorities*" ("Service with Fighting Men", volume II, pages 498 and 499).

(10) "The overseas organization was under a dual supervision. Its authority, gradually defined as experience accumulated, was drawn from the National War Work Council upon whom rested the ultimate responsibility. *As a part of the A. E. F., it was under the direct control of the Commander-in-Chief* * * * the Commander, through the General Staff, concerned himself with the prescription of regulations designed to 'gear in' *the Y. M. C. A. organization as a part of the military machine*. * * * As a militarized organization, the Association was obliged to secure military sanction for every activity not specifically provided for in the General Orders related to its work" ("Service with Fighting Men," volume I, pages 448, 449, and 457).

(11) In dealing with the Army educational program of the Y. M. C. A., Professor Stokes, its organizer, wrote: "It must stand the acid test of whether or not it will *improve the military efficiency and fighting edge of the individual soldier*" (Summary, page 152).

(12) The members of the Y. M. C. A. serving with the A. E. F. were "persons accompanying or serving with the armies of the United States in the field" in time of war within the meaning of the 2nd Article of War. As such they were "amenable to trial by court-martial for offenses committed while so serving" (Letter of the Judge Advocate General of the United States Army dated February 1, 1919).

(13) Transportation of men and materials to the theater of war is an inseparable part of military operations. Members of the Y. M. C. A. en route to the war zone on the western front began their service with the A. E. F. at the port of embarkation in the United States (See Opinions of Judge Advocate General of the United States Army, 1918, volume II, pages 243-244).

(14) The members of the Y. M. C. A. were authorized to purchase supplies from the Quartermaster Department of the Army; their personnel as well as their property was carried on the French railways and charged against the A. E. F., and they enjoyed many other privileges ordinarily extended only to members of the military organization.

From the foregoing it is apparent that the members of the Y. M. C. A. who served on the western front were, in the language of the Commander-in-Chief of the A. E. F., "militarized and * * * under the control and supervision of the American military authorities". Or, to use the language of their own spokesman, they were "a part of the military machine". They rendered military service of a high order. The mere fact that they were not formally inducted into the Army or were not in the pay of the Government of the United States is immaterial so far as concerns the question here presented. They had voluntarily segregated themselves from "the civilian population" as that term is used in the Treaty of Berlin. They had deliberately exposed themselves and their personal belongings to the risks of war which began at the port of embarkation. The provisions of the Treaty of Berlin obligating Germany to make compensation for damages to "civilians" or to "civilian victims" or to the "civilian population" were manifestly intended to apply to the passive victims of warfare, not to those who entered the war zone, subjected themselves to risks to which members of the civilian population generally were immune, and participated in military activities, whether as combatants or noncombatants.

The particular claimant in this case with pardonable pride testifies:

" * * * During the six months I was in France I was along at least two-thirds of the Western front and saw active service with ten or twelve American Divisions. I was gassed at Chéry near the Vesle River and was wounded in an air raid at Fère-en-Tardenois."

The "Summary of World War Work of the American Y. M. C. A." contains an honor roll of 92 members of that organization who died overseas, 11 of whom died of wounds received in action, and a longer list of those "wounded or gassed under fire". There can be no doubt but that members of the Y. M. C. A. serving with the A. E. F., including the claimant and his 56 associates, were engaged in activities aimed at the direct furtherance of military operations against Germany or her allies and hence under the rule announced in the Damson case "they can not be held to have been 'civilians' or a part of the 'civilian population'" of the United States "within the meaning of the Treaty" of Berlin. The claimant entered upon his service with the American Expeditionary Forces when he embarked in New York en route to the war zone. The personal equipment, uniforms, and personal effects which he had with him were especially adapted for use in and were intended for service with the American Expeditionary Forces. He exposed not only his own person but this property to the risks of war—risks to which the general "civilian population" were not exposed. The loss of claimant's property is not one for which Germany is obligated to compensate under the Treaty of Berlin.

Applying the rules announced in the Damson case and other decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of the claimant herein.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

PAULA MENDEL AND OTHERS
(UNITED STATES) *v.* GERMANY

(August 13, 1926, pp. 784-798;

Certificate of Disagreement by the National Commissioners, May 14, 1926, pp. 772-784.)

WAR: INTERESTS IN ENEMY COUNTRY; DAMAGE, INJURY BY EXCEPTIONAL WAR MEASURES APPLIED BY OCCUPYING ALLIED POWER.—INTERPRETATION OF TREATIES: (1) INTENTION OF PARTIES, (2) TERMS, RELATED PROVISIONS, STRUCTURE, OBJECTS, PURPOSES OF TREATY.—RESPONSIBILITY: FUNDAMENTAL RULE.—PRECEDENTS.—EVIDENCE: HISTORICAL SOURCES, OFFICIAL REPORTS. Exceptional war measures and measures of transfer taken by Australian Government in former German New Guinea, after the coming into force of Treaty of Versailles, against two German companies which were finally liquidated. Claims for damages presented by American minority stockholders. *Held* that, under Article 297 (*e*) of Treaty of Versailles, as carried into Treaty of Berlin, Germany not liable for measures applied by other governments, since the intention of parties to the Treaty was to limit German liability to *German* measures “in German territory as it existed on August 1, 1914”: (1) Article 297 (*e*) is part of “Economic Clauses”, whose scope is limited to German territory on assumption that German legislation and decrees were there effective; (2) fundamental rule that in absence of express stipulation to contrary, a State or person is liable only for own acts or those for whom responsible; (3) implications from other provisions, structure, objects, purposes of Treaty as a whole; (4) precedents: decisions by Mixed Arbitral Tribunals. Evidence: see *supra*.

CERTIFICATE OF DISAGREEMENT BY THE NATIONAL COMMISSIONERS

The American Commissioner and the German Commissioner have been unable to agree as to the jurisdiction of the Commission over the claim of Paula Mendel and others, Docket No. 4089, their respective Opinions being as follows:

Opinion of Mr. Anderson, the American Commissioner

The facts upon which this claim rests are briefly as follows:

The claimants are American nationals who owned shares representing a minority interest in two German companies. These German companies owned properties located in German New Guinea, which on August 1, 1914, at the outbreak of the war, was one of the German colonies in the South Sea Islands. In September, 1914, those colonies were conquered by the Australian military and naval forces and the properties above-mentioned were taken over and thereafter administered by an administrator appointed by such authorities. As of January 10, 1920, the aforesaid German companies were divested of the titles to the properties, through liquidation proceedings taken by the Australian Government under the express sanction of paragraph (*b*), Article 297, of the Treaty of Versailles. Both the companies were incorporated in Germany. A large majority of their shares are German-owned, the claimants being minority shareholders.

The question presented is whether the exceptional war measures or measures of transfer taken by the Australian Government in German territory as it existed on August 1, 1914, come within the meaning of the provisions of Article 297 (*e*) of the Treaty of Versailles, which read as follows:

"The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. * * * This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. * * * The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany."

It is argued in opposition to this claim that Germany should not be held liable for losses caused to American nationals by "exceptional war measures or measures of transfer" other than her own, but it is not disputed that the measures taken by the Australian Government were of the character defined in paragraphs 1 and 3 of the Annex to Article 297, or that damage was inflicted upon property, rights, and interests of American nationals by those measures within German territory as it existed on August 1, 1914.

An examination of Article 297 as a whole will show that it embraces, in its various subdivisions, *both* those measures taken by Germany *and* those measures taken by an Allied or Associated Power; and, also, that the language of the various subdivisions of that article discriminates between the obligations of Germany in respect to her own exceptional war measures and measures of transfer and her obligations in respect to such measures when taken by an Allied or Associated Power in the territory of such power or "in German territory *as it existed on August 1, 1914*". Under the accepted rules of interpretation full effect must be given to all of these provisions and a significant contrast between the German and the American contentions is that under the former many of these provisions will be meaningless, whereas under the latter all of them are given a clear and appropriate application.

The reply of the German Agent claims that the compensation mentioned in paragraph (e) of Article 297 "consists primarily in the restitution of the property in question" and cites paragraph (f) of the article in this connection. It appears, however, that paragraph (f) specifically relates to restitution by Germany only where the property has been subjected to a measure of transfer "in German territory", and the significant words "in German territory *as it existed on August 1, 1914*" are omitted. Manifestly, therefore, what is dealt with in paragraph (f) solely covers the obligation of Germany to restore, where possible, property which Germany herself subjected to a measure of transfer in her own territory as continued by the Treaty.

This is emphasized by paragraph (a) of Article 297, which states the general obligation of Germany in respect to the restitution of property subjected *by her* to exceptional war measures, no matter where such measures were applied by her. It is further emphasized by paragraph 6 of the Annex to Article 297, which also relates to the restitution by Germany of property subjected *by her* to exceptional war measures wherever applied. These provisions are as follows:

297 (a): "The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) *taken by Germany* with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed *and the property, rights and interests* concerned restored to their owners * * *."

Paragraph 6 of the Annex to Article 297: "Up to the time when restitution is carried out in accordance with Article 297, Germany is responsible for the conservation of property, rights and interests of the nationals of Allied or Associated

Powers, including companies and associations in which they are interested, that have been subjected *by her* to exceptional war measures.”

The reply of the German Agent also refers to paragraph (*h*) of Article 297 as showing “The impossibility of applying par. (*e*) as far as it makes Germany liable for compensation, to war measures taken by other Powers” and states that “It appears from this clause that the framers of Art. 297 contemplated only those measures under which the proceeds of the property in question could and did come into the hands of the German Government”, and adds: “Otherwise it would have been necessary to add a special clause dealing with such proceeds ‘in the possession of Allied or Associated Governments.’” But the very next sentence of subdivision 2 of 297 (*h*) contains such a “special clause”, which reads: “the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations * * *”. The German nationals, in a case like this, include the *German companies controlled by German subjects* (see 297 (*b*)), and under the foregoing provisions the proceeds of the property of such German nationals taken over by an Allied or Associated Power are “subject to disposal” by such power. On the other hand, the compensation for the minority interests of nationals of Allied or Associated Powers in such companies is the very compensation for which Germany is made liable under 297 (*e*).

Paragraphs 1 and 3 of the Annex to Article 297, which paragraphs are directly referred to in 297 (*e*), are most significant in this connection. Paragraph 1 of the Annex repeatedly mentions war measures of “*any of the High Contracting Parties*”. It cannot be doubted that the expression “*any of the High Contracting Parties*” includes the Allied and Associated Powers and therefore cannot be limited to Germany. Moreover the concluding sentence of this paragraph 1 of the Annex expressly *excludes* Germany so far as any such measures taken by her after November 11, 1918, are concerned. The definitions contained in paragraph 3 of the Annex are equally significant, as the following extracts will show:

“In Article 297 and this Annex the expression ‘exceptional war measures includes measures of all kinds, legislative, administrative, judicial or others’ that have been taken *or will be taken hereafter*”, etc.

“Measures of transfer are those which have affected *or will affect*”, etc.

Accordingly, as 297 (*a*) specifically requires Germany immediately to discontinue or stay all exceptional war measures and measures of transfer initiated by her, and as the concluding sentence of paragraph 1 of the Annex makes all such measures taken by her after November 11, 1918, absolutely void, it follows that 297 (*e*) is not limited to war measures and measures of transfer taken only by Germany, for the definition of such measures in paragraph 3 of the Annex includes those to be taken in the future as well as those already taken.

Articles 119 and 121 of the Treaty, particularly the latter, also have direct bearing upon the matter in controversy. They read as follows:

Article 119: “Germany renounces in favor of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions.”

Article 121: “The provisions of Sections I and IV of Part X (Economic Clauses) of the present Treaty shall apply in the case of these territories whatever be the form of Government adopted for them.”

When the Treaty was written most if not all of the German colonies had already passed out of Germany’s possession. German New Guinea, for instance, had been out of her possession and in the control of Australia since September,

1914, and that fact, which was known to all the world, cannot be deemed to have been overlooked when the Treaty was framed. On the contrary, it is evident that in making the provisions of Section IV of Part X apply to those colonies it was intended to include such a claim as that here presented.

Under 297 (b) the Allied and Associated Powers expressly reserved the right "to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty". The use of the words "controlled by them", which words evidently contemplate the existence of Allied minority shareholders, is significant in connection with the provisions of 297 (e) giving Allied nationals a claim against Germany for injury "inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914". Obviously in no instance would Germany herself have taken over a German company controlled by German subjects, for the most she would have done would have been to seize the shares of any Allied minority shareholders. On the other hand, there could have been no case in which an Allied Power would have taken over a company controlled by Allied nationals, for there again the most that the Allied Power would have done would have been to seize the shares of any German minority shareholders. Hence, when the broad language of 297 (e) is considered, it cannot be doubted that the framers of the Treaty had in mind a case like that here presented.

It is important to note that the sustaining of this claim puts no additional liability on Germany.

Under Article 297 (i) of the Treaty, which by Article 121 is made applicable to the former German colonies, Germany undertakes in any event

"... to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States".

As already stated, the German nationals in this instance are the German companies which Australia took over, and the measure of Germany's obligation to compensate these companies would of course be reduced by the amount of compensation paid to American or Allied minority shareholders in these companies. In either case the sum total of Germany's liability is the same.

Inasmuch, however, as the primary obligation of Germany under Article 297 (e) is to make compensation to the nationals of the Allied Powers in respect of damages to their property, rights or interests, "including any company or association in which they are interested", and claims for such damages are expressly included in the first category of claims to be passed upon by this Commission, the claimants are entitled to present their claim here in preference to awaiting the uncertain adjustments which might at some later date be made between Germany and the German companies in which the claimants were shareholders.

The German Agent has raised the further question that even if Germany is liable for exceptional war measures of other Governments, such liability "could not apply to measures taken during the period of neutrality". It appears, however, that the title to the properties of the companies involved was divested, *i. e.*, to use the language of paragraph 3 of the Annex to Article 297, that the "ownership" of those properties was "transferred", after the United States entered the war.

Article 297 (b) expressly reserves to the Allied and Associated Powers the right "to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals,

or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty." Category (1) of Article I of the Agreement of August 10, 1922, between the United States and Germany specifically includes "Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914". As above pointed out, Article 297 (e) and paragraph 3 of the Annex thereto make Germany liable to compensate shareholders of such companies who are nationals of Allied or Associated States for injury suffered through such measures even though taken "hereafter", meaning after the Treaty took effect.

In the opinion of the American Commissioner the liability of Germany in the present case is clear, and the claim should accordingly be allowed, upon proof of the damages suffered.

Chandler P. ANDERSON

Opinion of Dr. Kiesselbach, the German Commissioner

Claimants allege that "by reason of the exceptional war measures and measures of transfer taken by said Commonwealth"—i. e., the Commonwealth of Australia—"in and for said German territory, both said Hamburgische Südsee Aktiengesellschaft and said Heinrich Rudolph Wahlen, G. m. b. H., and the several stockholders and shareholders in said respective companies have—since on or about September 17, 1914—been deprived of all benefits from their said respective properties in said German territory; and that as of January 10, 1920, all the right, title and interest in and to said respective properties and their increments and profits and in and to everything belonging and pertaining thereto have been, in the case of each of said companies, wholly, absolutely and finally divested, and that neither of said companies nor its stockholders or shareholders or any of them are or are ever to be permitted to share in said properties or in any of them or in any benefit, income or proceeds therefrom or thereof." Such allegation leaves it uncertain at what specific time the damage compensation for which is claimed has accrued, covering the period from September 17, 1914, to January 10, 1920.

Now, under Administrative Decision No. I during the period of neutrality—that is, the period between August 1, 1914, and April 5, 1917—Germany is liable only for damages or injuries caused by acts of Germany or her agents in the prosecution of the war. Therefore as far as the alleged damage may have accrued within that period the claim certainly is unfounded.

As far as the damage may have accrued in the period after April 5, 1917, it would fall within the period of belligerency—that is, the period between April 6, 1917, and July 2, 1921.

In so far as the rights of American nationals are concerned the same principles will apply during the whole of this time, but in so far as the Australian Commonwealth is concerned the legal situation would undergo an important change, since on January 10, 1920,—the date when the Treaty of Versailles came into force and when the Australian Commonwealth "wholly, absolutely and finally divested" the claimants of their property rights in the German companies—"German New Guinea", in which territory the companies and their properties were located, was ceded to the Australian Commonwealth.

The facts as far as they are disclosed make it doubtful whether the Australian Government applied its measures before or after the cession of the German territory, though it may be more likely that the Commonwealth waited for making the decision till the territory came under its own sovereignty.

Leaving aside for the moment the possible distinction arising out of this situation, it may be helpful to consider first claimants' argument as a whole, since if it should not be convincing at all the distinction mentioned becomes immaterial.

Such an examination seems to me to show that the argument is based on a misconception of the meaning of the Treaty of Versailles and especially of Article 297.

Article 297 and the Annex thereto provided:

(1) That the validity of all orders "in pursuance of war legislation * * * is confirmed" in the Annex, paragraph 1.

This provision applies, as expressly stated therein, to the orders of "any of the High Contracting Parties," that is to say, to the orders of Germany as well as of the *Allied and Associated Powers*. An attempt to interpret this phrase as meaning Germany alone would, as claimants' counsel justly argues, be absurd, and such an attempt has never been made.

(2) That Germany agrees to immediately discontinue the exceptional war measures and measures of transfer taken by her.

This provision applies only and can only apply to Germany within that State's territory as it existed *after* the conclusion of the Treaty of Versailles. This is evident from the very fact that Germany lost her sovereign power over the territories ceded under the Treaty, and that furthermore the Allied and Associated Powers reserved to themselves expressly the right "to * * * liquidate all property, rights and interests belonging * * * to German nationals * * * within their territories, * * * including territories ceded to them by the present Treaty" (Article 297 (b)).

(3) That Germany is liable for all damage caused by the application either of the exceptional war measures or measures of transfer to nationals of Allied and Associated Powers in German territory *as it existed on August 1, 1914*.

(4) That the Allied and Associated Powers retain the right to apply exceptional war measures also in the *territories ceded*, as already mentioned, under Article 297 (b).

The structure of this system dealing with the exceptional war measures as applied by *any* power is so clear that it hardly needs an interpretation. Confusion is only possible if an interpretation of the provisions is sought for "apart from the *context* in connection with which they are found, and apart from the facts to which they relate" (see Reply Brief for Claimants, page 9).

It is true that Germany's liability under clause (d) is not restricted *expressis verbis* to her own measures. But it does not follow that *therefore* Germany is liable for the measures of other powers.

Certainly it is a general rule that an individual as well as a government is responsible only for its own acts or the acts of its agents and not for the independent acts of a third party. Any deviation from this common-sense principle requires a special provision in municipal law as well as in international law.

Since no such extension of Germany's liability was intended here, it was superfluous to provide specifically for the application of a rule self-evident under the law of nations as well as under the principles of the Treaty.

Moreover such an extension of Germany's liability would have been at variance with another principle established under the Treaty:

The Treaty provides that as far as the reparation claims proper are concerned Germany's liability is "limited to physical or material damage to tangible things" (Administrative Decision No. VII, page 308^a) and that as far as Germany is liable for the application of exceptional war measures and measures

^a Note by the Secretariat, this volume, p. 228 *supra*.

of transfer such liability is broader and applies not only to tangible things but also to property, *rights, and interests* (Article 242 and Article 297 (d)).

The reason for this discrimination is explained by the Umpire (Administrative Decision No. VII, page 313^b: "The reason for this is clear. German territory was not invaded. She was directly and solely responsible for what happened within her territorial limits. * * * In applying these war measures Germany acted *advisedly*, with full knowledge of the nature, character, and extent of the property, rights, and interests affected * * * and she and her nationals *enjoyed the use and the fruits* of and the income from such property."

But no measure has been "advisedly" applied by Germany and no use or fruits of property enjoyed by her where an Allied Power applied such measures and enjoyed such use and fruits.

To hold Germany nevertheless liable for such acts under Article 297 (e) would clearly be contrary to the principles laid down in the Treaty and developed in the Umpire's decision.

I do not concur with the American Commissioner in his opinion that accepting the interpretation as urged by the German Agent "many of these provisions will be meaningless". On the contrary, I believe them to have a sound and consistent meaning.

I further disagree with the argument of the American Commissioner taken from the provisions of Article 297 (b) and (e). If the framers of the Treaty had really in mind "a case like that here presented" and if they intended to increase the financial burden laid upon Germany by making her liable for the application of war measures by Allied Powers, they could have done that by the simple means of inserting *expressis verbis* such rather unusual provision.

In my opinion the purpose of Article 297 (b), regulating the application of after-war measures to property, rights, and interests of nationals of Germany, with which country the Allied Powers were supposed to have made peace, is so different from the intent of Article 297 (e), providing for the indemnification of Allied nationals who had suffered through the application of war measures by Germany, that a comparison of the wording of both clauses does not justify the conclusions drawn by the American Commissioner. Moreover, the provision of Article 297 (e) does not only cover the compensation for damage caused by the taking over of companies controlled by Allied nationals. The term "exceptional war measures" as interpreted by the victorious powers does not only comprise such acts as are directed against nationals or corporations of an enemy character but comprises all kinds of measures indiscriminately applied to *all* residents within German territory having the effect of removing from the proprietors the power of disposition over their property. Hence the broad language of Article 297 (e) does not justify the conclusions arrived at by the American Commissioner.

If the language of Article 297 (e) had the broad meaning urged by claimants' counsel nothing would prevent the conclusion that moreover Germany would be liable for all damage caused to Allied nationals in all cases falling under Article 297 (b), as far as the measures were applied in ceded territories.

If Article 297 (e) makes Germany liable for *every* application of war measures, regardless of by which power it was applied, so long as it was applied "in German territory as *it existed on August 1, 1914*," cogently the consequence would be that all measures applied under Article 297 (b) within territories formerly German—as for instance, Alsace-Lorraine—would establish German liability.

^b Note by the Secretariat, this volume, p. 231 *supra*.

That such is not the meaning of Article 297 (*b*) and that certainly the framers of that part of the Treaty would have clearly said so seems to be beyond doubt.

Moreover, such theory as well as the special interpretation of Article 297 (*e*) propounded by claimants would be in contradiction with the Commission's decisions.

In the case of the Heirs of J. J. Helbron, Docket No. 6496, in which the French Government liquidated some German property in which an American national had an interest, the liquidation took place under the terms of the Treaty of Versailles—that means by virtue of the provision of Article 297 (*b*). The claim of the American heirs trying to hold Germany liable has been dismissed by this Commission.

And in the same way another claim before this Commission was dismissed, the case of Ernest Grutzmann, Docket No. 6602, which was based on the allegation that “the assets of the said banks” (that is, the Bank Jeremias in Strasbourg, Alsace) “were taken over by the French authorities”. In this case it is not disclosed whether the French Government applied the measure before or after January 10, 1920. Nevertheless the claim was disallowed under an unanimous decision of the Commission.

The reason in both decisions was that it is the taking over of property *by Germany*, as the Umpire stated in Administrative Decision No. III (page 65),^c with regard to the provisions of Section IV of Part X, and that it is the war measure “on the part of the *German* authorities against the nationals of the Allied and Associated countries”, as stated in the unanimous decision of the German-Italian Mixed Arbitral Tribunal in the case of Fadin *v.* German Government, No. 132, which constitutes the basis of Germany's liability under Article 297 (*e*).

If, therefore, Article 297 (*e*) does not support the claim at issue here, claimant's recurrence to Articles 119 and 121 cannot be of any help. Article 121 says that the provisions of Sections I and IV of Part X (Economic Clauses) “shall apply in the case of these”, that is, of the German oversea “territories”. This clause may provide for the application of Article 297 (*e*) in the German oversea possessions ceded, but certainly it cannot extend the scope of that article itself.

Finally, dealing with the American Commissioner's argument that the sustaining of this claim puts no additional liability on Germany, since Germany has undertaken to compensate her nationals, I may remark that if Germany actually were in a position to live up to her obligation of indemnification of her nationals the claim at issue here would be unfounded because under those circumstances the company in which claimants have a share would have a right to a *full* compensation from Germany and because therefore the claimants would not have suffered a loss. But unfortunately the European victorious Powers, though taking over the German property seized under the provision cited by the American Commissioner, have prevented Germany from fulfilling her obligations towards her own nationals, with the effect that Germany is not allowed to “compensate” her nationals except on the rather disappointing basis of 2 to 4%!

My conclusion therefore is that since it is not contended that a *German* war measure has caused the alleged damage the claim must be dismissed.

W. KIESSELBACH

^c Note by the Secretariat, this volume, p. 67 *supra*.

The National Commissioners accordingly certify to the Umpire of the Commission for decision the question of the jurisdiction of the Commission over this claim.

Done at Washington May 14, 1926.

Chandler P. ANDERSON
American Commissioner
 W. KIESSELBACH
German Commissioner

Decision

PARKER. *Umpire*, on a certificate of disagreement of the National Commissioners delivered the opinion of the Commission.

This case is put forward on behalf of American nationals as minority stockholders in two German corporations whose properties in German New Guinea, it is alleged, were taken over, administered, and finally liquidated by the Australian Government. Claimants contend that under the Treaty of Berlin Germany is liable to compensate them for the value (placed at approximately \$275,000) of their interests in the properties of the German corporations expropriated by Australia.

From the record herein and from historical sources and official reports of which the Commission takes judicial notice it appears:

(1) On and before August 1, 1914, among the "oversea possessions" of Germany was German New Guinea, the largest part of which embraced about 70,000 square miles or about 22½ per cent of the northeastern part of the main island of New Guinea (the largest island in the world except Australia). The remainder of the main island belonged to the Netherlands (Dutch New Guinea) and to the British Empire (Papua).

(2) On or about September 11, 1914, an Australian naval and military expeditionary force occupied German New Guinea. On such occupation a formal proclamation was promulgated by the commander of the expeditionary force. It recited that by virtue of such occupation "the authority of the German Government has ceased to exist" in the occupied territories, which "From and after the date of these presents * * * are held by me in military occupation in the name of His Majesty The King"; that "The lives and private property of peaceful inhabitants will be protected, and the laws and customs of the Colony will remain in force so far as is consistent with the military situation"; that all inhabitants shall "abstain from communication with His Majesty's enemies", and that "All male inhabitants of European origin are required to take the oath of neutrality prescribed".

(3) On September 17, 1914, a formal capitulation agreement was concluded between the commander of the Australian naval and military expeditionary force and the acting German governor of the German possessions known as German New Guinea, which in substance recognized and confirmed the terms of the proclamation above-mentioned and transferred the control and government of the colony to the Australian "Military Administration". Those taken prisoners (excepting officers of the German regular forces) were released on their taking the oath of neutrality and permitted to return to their homes and ordinary avocations. On September 18 the duly empowered Australian authorities appointed the commander of the expeditionary force as "Administrator" of the occupied territory. Every effort was made to restore normal conditions and avoid economic dislocations. All inhabitants, including German nationals, were encouraged to carry on their ordinary pursuits and

return to and cultivate their plantations. The military administration did not interfere with German private property in the occupied territory until after the coming into force of the Treaty of Versailles.

(4) Former German territory in the effective military occupation of Great Britain or her Allies was by royal proclamation designated "territory in friendly occupation", and former British, Allied, or neutral territory in the effective military occupation of an enemy of Great Britain was by the same proclamation designated "territory in hostile occupation". All proclamations for the time being in force relating to trading with the enemy were made to apply to territory in friendly occupation as they applied to British or Allied territory and to territory in hostile occupation as they applied to an enemy country. It was further provided that "Any references to the outbreak of the war in any Proclamation so applied shall, as respects territory in friendly or hostile occupation, be construed as references to the time at which the territory so became in friendly or hostile occupation".¹

(5) On January 10, 1920, the Treaty of Versailles became effective. Article 297 (b) of that Treaty provides:

"Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty.

"The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State."

By Article 119 of that Treaty Germany renounced in favor of the "Principal Allied and Associated Powers all her rights and titles over her oversea possessions", and by Article 121 of that Treaty the provisions of Sections I and IV of Part X (Economic Clauses), which include Article 297 (b) above-quoted, were made to apply to such oversea possessions so ceded by Germany "whatever be the form of Government adopted for them".

(6) By the Treaty of Peace Act 1919/1920 of the Australian Parliament² the Governor-General of the Commonwealth was empowered to make regulations for giving effect within the commonwealth and territories administered by it to the provisions of the Treaty.

(7) On September 1, 1920, the "British Military Administrator of the Colony of German New Guinea" promulgated the "Expropriation Ordinance 1920", which provided for the expropriation of the properties of German firms, companies, and persons.³ This ordinance was later amended to provide in effect that the property, rights, and interests belonging to a "prescribed company" on January 10, 1920, shall "be deemed to have vested, as on the 10th day of January, 1920, in the Custodian [of Expropriated Properties], and shall be treated at all times as having so vested". Among other things, this ordinance empowered the administrator by notice in writing to determine what companies were German companies (designated prescribed companies) to which the ordinance should apply, and section 4 of the ordinance provided that upon the service of such declaration "all property belonging to or held

¹ See the British "The Trading with the Enemy (Occupied Territory) Proclamation, 1915", dated February 16, 1915.

² See Volume I of Laws of the Territory of New Guinea.

³ Volume III of Laws of the Territory of New Guinea, pages 484-490.

or managed for or on behalf of the prescribed company, * * * and the right to transfer that property, shall thereupon vest in the Public Trustee and the estate and interest of the prescribed company * * * shall be by force of this Ordinance determined".

(8) On September 1, 1920, the work of taking over and managing the expropriated properties began, and the eight principal German companies in business in the Territory of New Guinea (including the two involved in this claim) were on that date prescribed under the expropriation ordinance above-mentioned and their properties vested in the "Public Trustee".⁴

(9) By an order entered on December 17, 1920, the Council of the League of Nations, in pursuance of Article 22, paragraph 8, of the Treaty of Versailles, explicitly defined "the degree of authority, control or administration to be exercised" over the former German Colony of New Guinea by the Commonwealth of Australia, which had been tendered and had accepted a mandate in respect of said territory. Article 2, defining in part the terms of the mandate, provides that "The Mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Commonwealth of Australia, and may apply the laws of the Commonwealth of Australia to the territory"⁵. This mandate further provided that the mandatory should make an annual report to the Council of the League of Nations indicating the measures taken to carry out the obligations assumed thereunder.

(10) On April 7, 1921, regulations promulgated by the Commonwealth of Australia under the authority of the Treaty of Peace (Germany) Act 1919-1920 charged all property, rights, and interests within the Territory of New Guinea belonging to German nationals at the date when the Treaty came into force and the net proceeds of their sale, liquidation, or other dealing therewith with the payment of amounts due in respect of claims by British nationals with regard to their property in German territories and with the payment of other amounts, and power was conferred to sell such property, rights, and interests.

(11) On May 9, 1921, by virtue of a proclamation issued by the Governor-General of the Commonwealth of Australia, in pursuance of the terms of an act of the Parliament of the said commonwealth entitled the "New Guinea Act 1920", the military occupation of the Territory of New Guinea terminated and the civil administration under the authority of the said commonwealth was installed.

(12) On May 14, 1923, the Commonwealth of Australia submitted to the Council of the League of Nations its first annual report on the "Administration of the Territory of New Guinea" from July 1, 1921, to June 30, 1922. Sections 465 to 472 inclusive of the report deal with the "Liquidation of Property of Ex-enemy Subjects", from which it appears: (a) The "Expropriation Board" began its duties on September 1, 1920. Its first operation was to take inventories of the stock in trade of the German companies engaged in business in the territory and to open new books so that separate accounts could be kept from that date. (b) Up to that time these properties had remained in the possession of and the business had been conducted by the German corporations owning them. (c) Measures were taken to offer the whole of the properties and businesses of these corporations for sale by public tender, but these sales had

⁴ See Government Gazette, British Administration of German New Guinea, published at Rabaul September 1, 1920, pages 103-104.

⁵ See XVII American Journal of International Law, Supplement, 158-159.

not been consummated when the report was made. ⁶ (d) The following excerpt from the report is illuminating in connection with the case here presented:

"The principal financial difficulty the Board had to face was the carrying on of the business operations of the three big companies, New Guinea Company, Hamburgische Südsee Aktien Gesellschaft, and Hershheim and Company. The business operations of these companies showed big profits during the war, which profits were either expended in the planting of young coconuts or lent out to private planters for the same purpose. This accounts for the large areas of young coconuts, much of which has been planted since the Armistice. The Germans expected the properties to be taken over, but had an idea that they would be paid for at a flat rate for old and young palms, and they rushed the planting of large areas (in very many cases hastily and badly planted), being under the impression that they would make a handsome profit from these later plantings when receiving compensation."

(13) The Commonwealth of Australia adopted the clearing office system ⁷ for the settlement of debts and claims as provided by Section III (Article 296 and Annex) of Part X of the Treaty of Versailles.

(14) Paragraph 3 of the Annex to Section IV of Part X of the Treaty defines "exceptional war measures" and "measures of transfer" as those terms are used in the Treaty. The pertinent provisions embracing these definitions appear in the margin. ⁸

(15) Article 297 (a) of the Treaty of Versailles provides:

"The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken by Germany with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of Article 298."

Appropriate legislation was promptly enacted by Germany effective on or before January 10, 1920 (the date of the coming into force of the Treaty of Versailles), to carry into effect her obligations under the Treaty.

⁶ From the report made April 21, 1925, for the year ended June 30th, 1924, (page 50) it appears that these properties had not then been sold but were held and operated by the Custodian of Expropriated Property.

⁷ Armstrong's War and Treaty Legislation 1914-1922 (2nd edition), page 363.

⁸ "In Article 297 and this Annex the expression 'exceptional war measures' includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

"Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities."

(16) It follows that so much of the Treaty definitions of "exceptional war measures" and "measures of transfer" (set out in note 8 *supra*) as are prospective in their scope apply to the Allied and Associated Powers but not to Germany.

(17) The second clause of paragraph 1 of the Annex to Section IV of Part X of the Treaty of Versailles provides in substance that all exceptional war measures or measures of transfer taken by the German authorities with respect to enemy property, rights, and interests in invaded or occupied territory and those wheresoever taken since November 11, 1918, shall be void.

This claim is put forward by the United States on behalf of American nationals as minority stockholders in two German corporations (Hamburgische Südsee Aktien Gesellschaft, mentioned in the report quoted in paragraph 12 (*d*) *supra*, and Heinrich Rudolph Wahlen G. m. b. H.) whose properties in German New Guinea, it is alleged, were taken over and administered by the Commonwealth of Australia through the application of "exceptional war measures" or "measures of transfer" as those terms are defined in the Treaty of Versailles and finally liquidated by the Australian Government under the express sanction of paragraph (*b*) of Article 297 of that Treaty, above set out. The claim is based wholly on the provisions of Article 297 (*e*) of the Treaty, the pertinent part of which reads:

"The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto."

The sole question presented by the certificate of the National Commissioners to the Umpire for decision is, Under the Treaty of Berlin is Germany directly liable for damages indirectly suffered by American minority stockholders in German corporations resulting from the acts of the Government of Australia in seizing and retaining the New Guinea properties or their proceeds of such German corporations, at a time when New Guinea had been ceded by Germany and was occupied and governed by Australia?

From the foregoing chronological statement of the pertinent war and peace legislation and decrees it is obvious that the acts complained of not only were not taken by Germany but at the time they were taken the Treaty of Versailles had become effective and by its terms (and the German legislation enacted in pursuance thereof) Germany was stripped of all power to take any exceptional war measure or measure of transfer affecting the property, rights, and interests of the nationals of the Allied Powers wheresoever located. On the other hand, the Territory of New Guinea, where the properties of the German corporations with which we are here concerned were located, which territory had been with respect to the Allied Powers "territory in friendly occupation" since September, 1914, had been actually ceded by Germany to the "Principal Allied and Associated Powers" at the time the measures complained of were taken.

The claimants plant themselves on the letter of the Treaty where it is written that they are "entitled to compensation in respect of damage or injury inflicted upon their property, rights and interests, including any company or association in which they are interested, *in German territory as it existed on August 1, 1914*, by the application either of the exceptional war measures or measures of transfer", and applying this language to the facts alleged demand an award against Germany for approximately \$275,000 with interest.

But the language here relied on by the claimants cannot be construed as an isolated phrase. The pertinent provisions of the whole Treaty must be con-

sidered in the light of the conditions existing at the time of its conclusion, the nature and cause of the damages and injuries which had been inflicted and the allocation of responsibility therefor, in order to apply the master rule governing the construction of all treaties, that the intention of the parties must be sought out and enforced even though this should lead to an interpretation running counter to the literal terms of an isolated phrase, which read in connection with its context is susceptible of a different construction. In arriving at this intention the difference in scope of the "Economic Clauses" (Part X) and of the "Reparation" provisions (Part VIII) of the Treaty, as applicable to property, must be constantly borne in mind. As was pointed out in Administrative Decision No. VII,⁹ the "Reparation" provisions deal only with material damage to tangible property suffered through the application of the exercise of force, not as a rule limited territorially. On the other hand, as there pointed out (pages 311-313),^a "The evident purpose of the 'Economic Clauses' of the Treaty was (1) to restore as far as practicable the economic relations between the peoples of belligerent powers which had been disrupted by the war and (2) to compensate the nationals of the Allied and Associated Powers for the damages and injuries suffered by them through the application of war measures by Germany in German territory." Here the liability of Germany *was* limited territorially, but broad and apt terms were used to include intangible as well as tangible property. The reason for this is clear. German territory was not invaded. She was directly and solely responsible for what happened within her territorial limits. Her exceptional war measures and measures of transfer principally, though not exclusively, were directed against and operated upon debts, credits, accounts, stocks, bonds, notes, contract rights, and interests, rather than on tangible properties. In applying those war measures Germany acted advisedly, with full knowledge of the nature, character, and extent of the property, rights, and interests affected and of the fact that they were owned by American nationals; and she must be presumed to have had in contemplation the consequences of her acts and her responsibility for such consequences. Germany and her nationals had the use of much of the property, tangible and intangible, which she requisitioned or impounded through the application of exceptional war measures or measures of transfer, and she and her nationals enjoyed the use and the fruits of and the income from such property.

The introductory clause of Article 297 of the Treaty, of which the paragraph relied on by claimants forms a part, limits the "property, rights and interests" dealt with to those located "*in an enemy country*". Liability is placed on Germany for damages resulting from the application of exceptional war measures and measures of transfer in German territory. Manifestly this is on the assumption that German legislation and decrees were effective in such territory at the time the damage or injury was inflicted, and German liability must be limited to damage or injury inflicted *because* German legislation and decrees *were* effective at that time in that territory and were applied by Germany.

It is fundamental that in the absence of an express stipulation to the contrary a state or person can be held liable only for its own acts or those for whom it is responsible. With this rule in mind, where the purpose was to fix liability for damages caused by the acts of others, the makers of the Treaty in framing its "Reparation" provisions defining Germany's obligations to make compensation were careful to use apt language extending her liability

⁹ Decisions and Opinions, pages 308-314. (*Note by the Secretariat*, this volume, pp. 227-231 *supra*.)

^a *Note by the Secretariat*, this volume, p. 229 *supra*.

in certain categories to war damages caused by "any belligerent" and in other categories to damages caused by either Germany or her allies, without any territorial limitations. But the "Economic Clauses" of the Treaty defining Germany's liability are limited to war measures applied to enemy property, rights, and interests "in German territory" or in "German territory as it existed on August 1, 1914" and do not even extend to war measures taken by one of her own allies.¹⁰ The obvious reason for this is that the legislation and decrees of Germany's allies had no extraterritorial effect and could not be operative in German territory.

That New Guinea was "German territory as it existed on August 1, 1914" within the meaning of the Treaty cannot be doubted. But it does not follow that under the provisions quoted Germany is liable for the application *by Australia* of exceptional war measures or measures of transfer to the property of *German corporations* in that territory resulting in indirect damage to the American stockholders therein. Liability under the Treaty hinges not only on the territorial requirements but on the government applying the measures in question within the requisite territorial limits. While this latter test of liability is not in express terms incorporated in the provision quoted, it is clearly implied from the structure and terms of the Treaty as a whole. Why hold Germany liable for the act of Australia in seizing the property of German corporations (including the American interests therein) in territory which had, at the time of the seizure, been formally ceded by Germany and was in the possession and control of Australia, simply because it *had been* German territory and in her possession and control at the beginning of and during the first six weeks of the war, and not at the same time hold Germany liable for the American interests in properties of numerous German corporations seized and liquidated by Great Britain, France, and other Allied Powers? Claimants' only answer is that the German properties seized and liquidated by Great Britain and France were not located in "German territory as it existed on August 1, 1914", while the New Guinea properties seized by Australia were so located. Such a literal construction of the language quoted finds no support in the other provisions of the Treaty and is repugnant to the objects and purposes of the Treaty as a whole. It cannot stand alone and must fall.

What, then, is the meaning of the phrase upon which the claimants rely, found in Article 297 (*e*), "in German territory as it existed on August 1, 1914"?

In the opinion of the Umpire one of its purposes was to prevent Germany from denying her liability for exceptional war measures or measures of transfer taken by her in territory then in her possession and under her jurisdiction and control but which was thereafter wrested from and ceded by her. Under the Treaty of Berlin Germany is liable for all exceptional war measures taken by her "in German territory as it existed on August 1, 1914" resulting in damage to the property, rights, or interests of American nationals¹¹ even though after the Treaty of Versailles came into effect such territory was no longer German territory. As ordinarily a treaty speaks only from its effective date, had the

¹⁰ *Fadin v. German Government*, Decision of the Italian-German Mixed Arbitral Tribunal, decided at Rome on September 3, 1924.

¹¹ The Mixed Arbitral Tribunals constituted under the Treaty of Versailles have dealt with several cases of exceptional war measures taken *by Germany* in German colonies as they existed on August 1, 1914, and where an Allied national has been injured thereby Germany has been held liable under the provisions of Article 297 (*e*) of the Treaty. It is such exceptional war measures taken *by Germany* in German colonies to which the Treaty refers. See *Lewa Rubber Estates, Ltd., v. Germany and Kanna Rubber Estates, Ltd., v. Germany*, III Decisions Mixed Arbitral Tribunals 29; *Brueninger v. Germany*, III *ibid.* 20.

phrase "as it existed on August 1, 1914" been omitted, it is conceivable that Germany might have contended that under the terms of the Treaty she was liable only for measures taken by her "in German territory" as it existed after the Treaty came into force. To guard against such a contention by Germany the phrase in question was used. But it was never intended by the use of this phrase to impose liability on Germany for war measures to be taken by her former enemies in a country which had already been ceded by Germany and was occupied and governed by them and at a time when Germany was stripped of her power to take any war measures whatsoever.

Another reason for the use of the phrase "in German territory as it existed on August 1, 1914" was to make it clear that the particular paragraph in which this phrase is found does not apply to measures taken by Germany in "occupied territory" or in territory of the Allied Powers in which Germany had been in effective military occupation, defined by the Allies as "territory in hostile occupation", to which all Allied measures relating to the trading with the enemy were applied by the Allied Powers as they were applied to an "enemy country". All measures taken by Germany in such "occupied territory" are by the express terms of the Treaty held void.¹² The damages inflicted by Germany in such occupied territory are dealt with in the reparation provisions of the Treaty.¹³

So far as the decisions of the Mixed Arbitral Tribunals constituted and functioning under Section IV of Part X of the Treaty of Versailles bear on the question here presented, they support the opinion here expressed.

A case decided by the Franco-German Mixed Arbitral Tribunal on October 8, 1924,¹⁴ was put forward by a national of Alsace-Lorraine for the loss of his crops in the German colony of German East Africa, which he was compelled to abandon when it was evacuated by the German authorities and occupied by the British troops. The tribunal held (1) that the claimant, a national of Alsace-Lorraine, had the right to invoke against Germany the benefits of the provisions of Section IV of Part X of the Treaty of Versailles; (2) that the damages complained of by claimant were not caused by an exceptional war measure taken in respect of his property by Germany; (3) *that it was on the order of the English military authorities that the lands of the claimant were requisitioned and evacuated*; and (4) "that in consequence, the responsibility of the defendant [Germany] could not be maintained"; and the complaint was dismissed.

Another case, decided by the Italian-Austrian Mixed Arbitral Tribunal on November 12, 1924,¹⁵ held that the liability of Austria under the provisions of the Treaty of St. Germain does not extend to the damages caused by war measures adopted by other states.

¹² Second clause of paragraph 1 of Annex to Section IV, Part X of the Treaty.

¹³ The Allied Reparation Claim against Germany includes damages suffered by Allied nationals "on account of requisitions, sequestrations and other war measures" applied by the German authorities in territory invaded by the German forces. The Reparation Commission adopted and acted on the view that such measures applied by the German authorities in "occupied territory" did not constitute "exceptional war measures" or "measures of transfer" within the scope of Part X of the Treaty, and hence (in the view of the Reparation Commission) the Mixed Arbitral Tribunals, constituted under the Treaty of Versailles, had no jurisdiction of claims based on such measures taken by Germany in "occupied territory" (see letter of Reparation Commission addressed to M. Asser, President of the Franco-German Mixed Arbitral Tribunal, dated September 15, 1922).

¹⁴ *Rothbletz v. Germany*, IV Decisions Mixed Arbitral Tribunals 747.

¹⁵ *Torres v. Spiegel and Austrian Government*, V Decisions Mixed Arbitral Tribunals 518.

In another case¹⁶ the Italian-German Mixed Arbitral Tribunal held that Germany was not liable for exceptional war measures taken by Austria as the provision of the Treaty of Versailles, upon which claimants here rely, concerns "only exceptional war measures on the part of the German authorities against the nationals of the Allied and Associated Countries".

Stress is laid by the claimants on the provisions of Article 121 of the Treaty, referred to in paragraph (5) above, which expressly provide that Sections I and IV of Part X of the Treaty shall apply to the territories of the former German colonies. But the inference which claimants would draw from this provision is not justified. Section I of Part X deals with the "Commercial Relations" between Germany and the Allied and Associated States, including within its scope "Customs regulations, duties and restrictions" (Chapter I), "Shipping" (Chapter II), "Unfair competition" (Chapter III), and "Treatment of nationals of Allied and Associated Powers" by Germany (Chapter IV). The provisions are prospective and bind Germany to take no action prejudicial to the Allied and Associated Powers in their commercial relations. These provisions are extended to and for the benefit of the governments administering the territories of the former German colonies and their residents, whether under mandates or "whatever be the form of Government adopted for them".

Section IV of Part X of the Treaty (the other section which Article 121 provides shall apply to the territories of the former German colonies) deals with "Property, rights and interests". While, as pointed out by claimants, it includes paragraph (*e*) of Article 297, upon the language of which as literally construed by the claimants this claim is based, it also includes among numerous other provisions paragraph (*b*) of Article 297, under which Australia retained and liquidated the property of German nationals located in German New Guinea—a former German colony—including the property of the German corporations in which these claimants are stockholders. There are numerous provisions in that Section IV which by Article 121 are extended to former German colonies for the benefit of the Allied and Associated Powers and their nationals. But there is nothing in Article 121 or elsewhere in the Treaty indicating an intention on the part of its framers to fix direct liability on Germany for indirect damages suffered by American nationals resulting from exceptional war measures taken by Germany's former enemies against German nationals or their properties.

It is suggested that, as under paragraph (*i*) of Article 297 of the Treaty "Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States", an award rendered by this Commission on behalf of these claimants would place no additional burden on Germany, as her obligation to compensate the German corporations in which claimants are stockholders would be reduced to the extent of such award and the total of Germany's liability remain the same. But certainly it is not within the competency of this Commission to deal with the method and extent of Germany's compliance with her undertaking to compensate her own nationals. Those are matters of domestic policy and administration, to be dealt with exclusively by Germany in accordance with her municipal laws and regulations. In this case, so far as Germany is concerned, the claimants as stockholders must look to the German corporations in which they invested for their distributive share of such sums as those corporations may recover from any source to compensate them in whole or in part for their properties which were expropriated by Australia.

¹⁶ *Fadin v. Germany*, decided at Rome on September 3, 1924.

From the foregoing it appears that the measures complained of by claimants were taken by Australia against Germany, not by Germany; they were taken not in territory in which the German laws and decrees were then effective but in territory which had been ceded by Germany and which was governed and controlled by one of her former enemies; and they were taken at a time when Germany had been stripped of her power to take any war measures whatsoever.

It is the opinion of the Umpire, and he so decides, that while under the Treaty of Berlin Germany is liable for all exceptional war measures *taken by her* "in German territory as it existed on August 1, 1914" resulting in damage to the property, rights, and interests of American nationals, even though on the date of the Treaty's coming into force such territory was no longer German territory, she is not liable for exceptional war measures and measures of transfer, as those terms are defined in the Treaty, taken with respect to German property by a former enemy of Germany to her detriment and to its advantage in territory which was German on August 1, 1914, but which had been ceded by Germany and was governed and controlled by such former enemy at the time the measures were taken.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of Paula Mendel *et al.*, the claimants herein.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

TURNER C. GILLENWATER
(UNITED STATES) *v.* GERMANY

(August 13, 1926, pp. 798-801.)

WAR: TREATMENT OF PRISONERS OF WAR, RESPONSIBILITY UNDER TREATY OF BERLIN. Claim for damages on account of maltreatment of American private when a prisoner of war. *Held* that no evidence submitted of maltreatment for which Germany liable under Treaty of Berlin, and in particular that violence in subduing and capturing enemy on battlefield constitutes no such maltreatment.

UNITED STATES OF AMERICA
on behalf of
Turner C. Gillenwater,
Claimant,
v.

GERMANY.

} Docket No. 5851.

PARKER, *Umpire*, rendered the decision of the Commission.

This case is before the Umpire for decision on a certificate of disagreement of the National Commissioners.

Turner C. Gillenwater, an American national, while a private soldier in the American Army, was taken prisoner by the German military forces in Argonne Forest September 29, 1918, and claims to have been held for four or five weeks at a German prison camp at Sedan, France, and then removed

to a German prison camp at Rastatt, Germany. He alleges that while a prisoner of war he was subjected to maltreatment resulting in pecuniary damage to him. His two *ex parte* affidavits are wholly uncorroborated and in one important detail they conflict. No testimony is submitted from fellow prisoners or from those members of the American Expeditionary Force to whom he reported after he was released from the prison camp on December 8, 1918, although they must have had knowledge of his then physical condition, which he claims was bad. He states that his left eye and the left side of his face were wholly paralyzed at the time of his release from the German prison camp and are still partially paralyzed, which condition he attributes to his having been "inoculated with something by the German Military authorities". In another statement he says that he was "innoculated three times and vaccinated once by the enemy." The fact that the German authorities inoculated and vaccinated claimant would imply that they were seeking to give him all proper and necessary attention rather than to maltreat him. The claimant offers and relies on a recent statement from a physician who has treated him since the latter's discharge from the Army for partial paralysis of his left eye and left side of his face and also for intestinal infection and indigestion, but there is no attempt on the part of this physician to attribute these maladies to the maltreatment of which claimant complains.

Since the certification of this case to the Umpire excerpts from the records of the War Department and of the United States Veterans Bureau pertaining to the physical condition of this claimant have been filed with the record in this case. From these it appears that following claimant's release on December 8, 1918, from the German prison camp he was admitted to a hospital for observation, was subjected to a physical examination, was found to be in good condition, and made no complaint of any physical disability; and that thereafter while on duty with the A. E. F. at St. Aignan, France, about February 14, 1919, he experienced muscular weakness and inability to close his left eye, "Exact cause not determined". These records negative the contention now put forward by claimant that he suffered any disability or impairment of health because of the treatment he received at the hands of the German authorities while a prisoner of war.

The German Agent presents statements of ten witnesses whose testimony with respect to the specific allegations of maltreatment, while of a negative character, tends circumstantially to rebut the claimant's testimony. They find no record of this claimant having been in the prison camp at Sedan. Their statements of the conditions at both Sedan and Rastatt contradict the claimant. At Rastatt particularly it appears that the authorities in charge had strict orders from the German War Ministry to treat American prisoners courteously and to make their lot as easy as possible. Members of the Young Men's Christian Association were permanently quartered in that camp and made the wishes of the American soldiers known and assisted the German authorities in carrying them out. Two American sergeants, whose names are given, and who visited the camp headquarters almost daily, far from lodging complaints, thanked the German authorities for their considerate treatment of American prisoners. The statement is made by one of the German officials in charge of the Rastatt Camp that "Whole carloads of the finest preserved goods and choicest delicacies for the Americans arrived from Switzerland. The management, distribution and preparation of the foregoing was left entirely and exclusively to the Americans." In one affidavit the claimant states that "during the time he was confined at Rastatt, he was fed by the Red Cross". Had he been subjected to maltreatment it would seem that he had ample opportunity to lodge a complaint with members of the Red Cross.

or the Young Men's Christian Association, but there is no evidence that such a complaint was ever made.

In one affidavit the claimant states that "when he was taken prisoner his raincoat was taken away from him and he was cut across the abdomen with a sword by the German soldiers who captured" him. The use of physical violence in subduing and capturing an enemy on the battlefield in order to make him a prisoner does not constitute "maltreatment of prisoners of war" within the meaning of the Treaty of Berlin.

In this state of the record the Umpire finds that the claimant has failed to discharge the burden resting upon him to establish the maltreatment complained of.

Applying the rules and principles heretofore announced in the decisions of this Commission to the facts as disclosed by the record herein, the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay any amount to the Government of the United States on behalf of Turner C. Gillenwater.

Done at Washington August 13, 1926.

Edwin B. PARKER
Umpire

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Annex 127



Conference of the Parties

Report of the Conference of the Parties on its twenty-seventh session, held in Sharm el-Sheikh from 6 to 20 November 2022

Addendum

Part two: Action taken by the Conference of the Parties at its twenty-seventh session

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Decision 1/CP.27

Sharm el-Sheikh Implementation Plan

The Conference of the Parties,

Recalling decisions 1/CP.19, 1/CP.20, 1/CP.21, 1/CP.22, 1/CP.23, 1/CP.24, 1/CP.25 and 1/CP.26,

Noting decision 1/CMA.4,

Being guided by science and principles,

Reaffirming the outcomes of all previous sessions of the Conferences of the Parties, Conferences of the Parties serving as the meeting of the Parties to the Kyoto Protocol and Conferences of the Parties serving as the meeting of the Parties to the Paris Agreement, including decisions 1/CP.26, 1/CMP.16 and 1/CMA.3 (the Glasgow Climate Pact),

Also reaffirming the critical role of multilateralism based on United Nations values and principles, including in the context of the implementation of the Convention and the Paris Agreement, and the importance of international cooperation for addressing global issues, including climate change, in the context of sustainable development and efforts to eradicate poverty,

Noting the importance of transitioning to sustainable lifestyles and sustainable patterns of consumption and production in efforts to address climate change,

Also noting the importance of pursuing an approach to education that promotes a shift in lifestyles while fostering patterns of development and sustainability based on care, community and cooperation,

Acknowledging that climate change is a common concern of humankind and that Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to a clean, healthy and sustainable environment, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

Noting the importance of ensuring the integrity of all ecosystems, including in forests, the ocean and the cryosphere, and the protection of biodiversity, recognized by some cultures as Mother Earth, and *also noting* the importance of 'climate justice', when taking action to address climate change,

Emphasizing that enhanced effective climate action should be implemented in a manner that is just and inclusive while minimizing negative social or economic impacts that may arise from climate action,

Recognizing the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change,

Also recognizing the critical role of protecting, conserving and restoring water systems and water-related ecosystems in delivering climate adaptation benefits and co-benefits, while ensuring social and environmental safeguards,

1. *Underlines* the urgent need to address, in a comprehensive and synergetic manner, the interlinked global crises of climate change and biodiversity loss in the broader context of achieving the Sustainable Development Goals, as well as the vital importance of protecting, conserving, restoring and sustainably using nature and ecosystems for effective and sustainable climate action;

2. *Acknowledges* that the impacts of climate change exacerbate the global energy and food crises, and vice versa, particularly in developing countries;

3. *Stresses* that the increasingly complex and challenging global geopolitical situation and its impact on the energy, food and economic situations, as well as the additional challenges associated with the socioeconomic recovery from the coronavirus disease 2019 pandemic, should not be used as a pretext for backtracking, backsliding or de-prioritizing climate action;

II. Science and urgency

4. *Welcomes* the contributions of Working Groups II¹ and III² to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change;

5. *Recognizes* the importance of the best available science for effective climate action and policymaking;

6. *Takes note* of the 2022 adaptation gap³ and emissions gap⁴ reports of the United Nations Environment Programme, and recent global and regional reports of the World Meteorological Organization on the state of the climate;⁵

7. *Reiterates* that the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C⁶ and *resolves* to pursue further efforts to limit the temperature increase to 1.5 °C;

8. *Recognizes* the impacts of climate change on the cryosphere and the need for further understanding of these impacts, including of tipping points;

III. Enhancing ambition and implementation

9. *Resolves* to implement ambitious, just, equitable and inclusive transitions to low-emission and climate-resilient development in line with the principles and objectives of the Convention, the Kyoto Protocol and the Paris Agreement, taking into account this decision, the Glasgow Climate Pact and other relevant decisions of the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement;

10. *Expresses appreciation* to the Heads of State and Government who participated in the Sharm el-Sheikh Climate Implementation Summit for their support in enhancing and accelerating the implementation of climate action;

IV. Energy

11. *Emphasizes* the urgent need for immediate, deep, rapid and sustained reductions in global greenhouse gas emissions by Parties across all applicable sectors, including through

¹ Intergovernmental Panel on Climate Change. 2022. *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. H Pörtner, D Roberts, M Tignor, et al. (eds.). Cambridge: Cambridge University Press. Available at <https://www.ipcc.ch/report/ar6/wg2/>.

² Intergovernmental Panel on Climate Change. 2022. *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. P Shukla, J Skea, R Slade, et al. (eds.). Cambridge and New York: Cambridge University Press. Available at <https://www.ipcc.ch/report/ar6/wg3/>.

³ See United Nations Environment Programme. 2022. *Adaptation Gap Report 2022: Too Little, Too Slow – Climate adaptation failure puts world at risk*. Nairobi: United Nations Environment Programme. Available at <https://www.unep.org/resources/adaptation-gap-report-2022>.

⁴ See United Nations Environment Programme. 2022. *Emissions Gap Report 2022: The Closing Window – Climate crisis calls for rapid transformation of societies*. Nairobi: United Nations Environment Programme. Available at <https://www.unep.org/resources/emissions-gap-report-2022>.

⁵ See, for example, World Meteorological Organization. 2022. *State of the Global Climate 2021*. Geneva: World Meteorological Organization. Available at https://library.wmo.int/index.php?lvl=notice_display&id=22080#.Y5cGUHbMKUk.

⁶ Decisions 1/CP.26, para. 16, and 1/CMA.3, para. 21.

increasing the use of low-emission and renewable energy, just energy transition partnerships and other cooperative actions;

12. *Recognizes* that the unprecedented global energy crisis underlines the urgency to rapidly transform energy systems to be more secure, reliable and resilient, including by accelerating clean and just transitions to renewable energy during this critical decade of action;

13. *Stresses* the importance of enhancing a clean energy mix, including low-emission and renewable energy, at all levels as part of diversifying energy mixes and systems, in line with national circumstances and recognizing the need for support towards just transitions;

V. Mitigation

14. *Recognizes* that limiting global warming to 1.5 °C requires rapid, deep and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030 relative to the 2019 level;

15. *Also recognizes* that this requires accelerated action in this critical decade, on the basis of equity and the best available scientific knowledge, reflecting common but differentiated responsibilities and respective capabilities, in the light of different national circumstances and in the context of sustainable development and efforts to eradicate poverty;

16. *Calls upon* Parties to accelerate the development, deployment and dissemination of technologies, and the adoption of policies, to transition towards low-emission energy systems, including by rapidly scaling up the deployment of clean power generation and energy efficiency measures, including accelerating efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies, while providing targeted support to the poorest and most vulnerable in line with national circumstances and recognizing the need for support towards a just transition;

17. *Reiterates*⁷ its invitation to Parties to consider further actions to reduce by 2030 non-carbon dioxide greenhouse gas emissions, including methane;

18. *Emphasizes* the importance of protecting, conserving and restoring nature and ecosystems to achieve the Paris Agreement temperature goal, including through forests and other terrestrial and marine ecosystems acting as sinks and reservoirs of greenhouse gases and by protecting biodiversity, while ensuring social and environmental safeguards;

19. *Recognizes* the importance of maximizing the positive and minimizing the negative economic and social impacts of the implementation of response measures and *welcomes* the adoption of decisions 20/CP.27, 7/CMP.17 and 23/CMA.4;

VI. Adaptation

20. *Notes with serious concern* the existing gap between current levels of adaptation and levels needed to respond to the adverse effects of climate change in line with findings from the contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change;

21. *Urges* Parties to adopt a transformational approach to enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change;

22. *Also urges* developed country Parties to urgently and significantly scale up their provision of climate finance, technology transfer and capacity-building for adaptation so as to respond to the needs of developing country Parties as part of a global effort, including for the formulation and implementation of national adaptation plans and adaptation communications;

23. *Highlights* the role of the Least Developed Countries Fund and the Special Climate Change Fund in supporting actions by developing countries to address climate change,

⁷ Decision 1/CP.26, para. 19.

welcomes the pledges made to the two Funds and *invites* developed countries to further contribute to the two Funds;

24. *Emphasizes* the importance of protecting, conserving and restoring water and water-related ecosystems, including river basins, aquifers and lakes, and *urges* Parties to further integrate water into adaptation efforts;

VII. Loss and damage

25. *Notes with grave concern*, according to information in the contributions of Working Groups II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, the growing gravity, scope and frequency in all regions of loss and damage associated with the adverse effects of climate change, resulting in devastating economic and non-economic losses, including forced displacement and impacts on cultural heritage, human mobility and the lives and livelihoods of local communities, and *underlines* the importance of an adequate and effective response to loss and damage;

26. *Expresses deep concern* regarding the significant financial costs associated with loss and damage for developing countries, resulting in a growing debt burden and impairing the realization of the Sustainable Development Goals;

27. *Welcomes* the consideration, for the first time, of matters relating to funding arrangements responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage, under the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and *also welcomes* the adoption of decisions 2/CP.27 and 2/CMA.4, on matters relating to funding arrangements responding to loss and damage associated with the adverse effects of climate change;

28. *Further welcomes* the adoption of decisions 11/CP.27 and 12/CMA.4, establishing the institutional arrangements of the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change to enable its full operationalization, including supporting its mandated role in catalysing technical assistance for the implementation of the relevant approaches at the local, national and regional level in developing countries that are particularly vulnerable to the adverse effects of climate change, and *affirms* its determination to select the host of the secretariat of the Santiago network by 2023 through a selection process conducted in an open, transparent, fair and neutral manner in accordance with the process outlined in paragraphs 19–23 of the decisions referred to above;

VIII. Early warning and systematic observation

29. *Emphasizes* the need to address existing gaps in the Global Climate Observing System, particularly in developing countries, and *recognizes* that one third of the world, including 60 per cent of Africa, does not have access to early warning and climate information services, as well as the need to enhance coordination of activities by the systematic observation community and the ability to provide useful and actionable climate information for mitigation, adaptation and early warning systems, as well as information to enable understanding of adaptation limits and of attribution of extreme events;

30. *Welcomes* and *reiterates* the United Nations Secretary-General's call made on World Meteorological Day on 23 March 2022 to protect everyone on Earth through universal coverage of early warning systems against extreme weather and climate change within the next five years and *invites* development partners, international financial institutions and the operating entities of the Financial Mechanism to provide support for implementation of the Early Warnings for All initiative;

IX. Implementation – pathways to just transition

31. *Affirms* that sustainable and just solutions to the climate crisis must be founded on meaningful and effective social dialogue and participation of all stakeholders and *notes* that the global transition to low emissions provides opportunities and challenges for sustainable economic development and poverty eradication;

32. *Emphasizes* that just and equitable transition encompasses pathways that include energy, socioeconomic, workforce and other dimensions, all of which must be based on nationally defined development priorities and include social protection so as to mitigate potential impacts associated with the transition, and *highlights* the important role of the instruments related to social solidarity and protection in mitigating the impacts of applied measures;

X. Finance

33. *Highlights* that about USD 4 trillion per year needs to be invested in clean energy technologies by 2030 to be able to reach net zero emissions by 2050,⁸ and that, furthermore, a global transformation to a low-carbon economy is expected to require an investment of at least USD 4–6 trillion per year;⁹

34. *Also highlights* that delivering such funding will require a transformation of the financial system and its structures and processes, engaging governments, central banks, commercial banks, institutional investors and other financial actors;

35. *Notes with concern* the growing gap between the needs of developing country Parties, in particular those due to the increasing impacts of climate change and their increased indebtedness, and the support provided and mobilized for their efforts to implement their nationally determined contributions, highlighting that such needs are currently estimated at USD 5.8–5.9 trillion¹⁰ for the pre-2030 period;

36. *Expresses serious concern* that the goal of developed country Parties to mobilize jointly USD 100 billion per year by 2020 in the context of meaningful mitigation action and transparency on implementation has not yet been met and *urges* developed country Parties to meet the goal;¹¹

37. *Emphasizes* that accelerated financial support for developing countries from developed countries and other sources is critical to enhancing mitigation action and addressing inequities in access to finance, including its costs, terms and conditions, and economic vulnerability to climate change for developing countries,¹² and that scaled-up public grants for mitigation and adaptation for vulnerable regions, in particular sub-Saharan Africa, would be cost-effective and have high social returns in terms of access to basic energy;

⁸ See International Energy Agency. 2022. *World Energy Outlook 2022*. Paris: International Energy Agency. Available at <https://www.iea.org/reports/world-energy-outlook-2022>.

⁹ As footnote 4 above.

¹⁰ See Standing Committee on Finance. 2021. *First report on the determination of the needs of developing country Parties related to implementing the Convention and the Paris Agreement*. Bonn: UNFCCC. Available at <https://unfccc.int/topics/climate-finance/workstreams/needs-report>.

¹¹ See Standing Committee on Finance. 2022. *Report on progress towards achieving the goal of mobilizing jointly USD 100 billion per year to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation*. Bonn: UNFCCC. Available at <https://unfccc.int/process-and-meetings/bodies/constituted-bodies/standing-committee-on-finance-scf/progress-report>.

¹² Intergovernmental Panel on Climate Change. 2022. Summary for Policymakers. In: H Pörtner, D Roberts, M Tignor, et al. (eds.). *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Cambridge: Cambridge University Press. Available at <https://www.ipcc.ch/report/ar6/wg2/>.

38. *Notes* that global climate finance flows are small relative to the overall needs of developing countries, with such flows in 2019–2020 estimated to be USD 803 billion,¹³ which is 31–32 per cent of the annual investment needed to keep the global temperature rise well below 2 °C or at 1.5 °C, and also below what would be expected in the light of the investment opportunities identified and the cost of failure to meet climate stabilization targets;

39. *Urges* developed country Parties to provide enhanced support, including through financial resources, technology transfer and capacity-building, to assist developing country Parties with respect to both mitigation and adaptation, in continuation of their existing obligations under the Convention, and *encourages* other Parties to provide or continue to provide such support voluntarily;

40. *Calls on* the shareholders of multilateral development banks and international financial institutions to reform multilateral development bank practices and priorities, align and scale up funding, ensure simplified access and mobilize climate finance from various sources and *encourages* multilateral development banks to define a new vision and commensurate operational model, channels and instruments that are fit for the purpose of adequately addressing the global climate emergency, including deploying a full suite of instruments, from grants to guarantees and non-debt instruments, taking into account debt burdens, and to address risk appetite, with a view to substantially increasing climate finance;

41. *Calls on* multilateral development banks to contribute to significantly increasing climate ambition using the breadth of their policy and financial instruments for greater results, including on private capital mobilization, and to ensure higher financial efficiency and maximize use of existing concessional and risk capital vehicles to drive innovation and accelerate impact;

42. *Emphasizes* the ongoing challenges faced by many developing country Parties in accessing climate finance and *encourages* further efforts, including by the operating entities of the Financial Mechanism, to simplify access to such finance;

43. *Takes note* of the report on the determination of the needs of developing country Parties related to implementing the Convention and the Paris Agreement¹⁴ and in this context *urges* developed country Parties to provide resources for the second replenishment of the Green Climate Fund while demonstrating progression from the previous replenishment and in line with the programming capacity of the Fund;

XI. Technology transfer and deployment

44. *Welcomes with appreciation* the first joint work programme of the Technology Executive Committee and the Climate Technology Centre and Network,¹⁵ for 2023–2027, which will facilitate the transformational change needed to achieve the goals of the Convention and the Paris Agreement, *invites* Parties and stakeholders to cooperate and engage with the Technology Executive Committee and the Climate Technology Centre and Network to support the implementation of the joint work programme activities, including on technology needs assessments, action plans and road maps, *acknowledges* the findings in the final report on the first periodic assessment of the effectiveness and adequacy of the support provided to the Technology Mechanism in supporting the implementation of the Paris Agreement¹⁶ and *decides* that the main challenges identified therein should be considered under the global stocktake;

45. *Highlights* the importance of cooperation on technology development and transfer and innovation in implementing the joint work programme activities;

46. *Welcomes* the forward-looking conclusions of the Subsidiary Body for Implementation to continue consideration of the Poznan strategic programme on technology

¹³ See document FCCC/CP/2022/8/Add.1–FCCC/PA/CMA/2022/7/Add.1.

¹⁴ As footnote 10 above.

¹⁵ Available at <https://unfccc.int/ttclear/tec/documents.html>.

¹⁶ FCCC/SBI/2022/13.

transfer at its sixty-first session (November 2024)¹⁷ with the aim of supporting the implementation of relevant activities, such as those identified and prioritized in developing countries' nationally determined contributions, national adaptation plans, technology needs assessments and technology action plans, and long-term strategies;

XII. Capacity-building

47. *Notes* that capacity gaps and needs still exist in developing countries and *calls on* developed country Parties to increase support for long-term country-driven capacity-building interventions to enhance the effectiveness, success and sustainability of those interventions;

XIII. Taking stock

48. *Notes* the importance of the periodic review of the long-term global goal under the Convention and *welcomes* the adoption of decision 21/CP.27, on the second periodic review of the long-term global goal under the Convention and of overall progress towards achieving it;

XIV. Ocean

49. *Welcomes* the outcomes of and key messages¹⁸ from the ocean and climate change dialogue¹⁹ in 2022 and *decides* that future dialogues will, from 2023, be facilitated by two co-facilitators, selected by Parties biennially, who will be responsible for deciding the topics for and conducting the dialogue, in consultation with Parties and observers, and preparing an informal summary report to be presented in conjunction with the subsequent session of the Conference of the Parties;

50. *Encourages* Parties to consider, as appropriate, ocean-based action in their national climate goals and in the implementation of these goals, including but not limited to nationally determined contributions, long-term strategies and adaptation communications;

XV. Forest

51. *Recalls* that, in the context of the provision of adequate and predictable support to developing country Parties, Parties should collectively aim to slow, halt and reverse forest cover and carbon loss, in accordance with national circumstances, consistently with the ultimate objective of the Convention, as stated in its Article 2;²⁰

52. *Encourages* Parties to consider, as appropriate, nature-based solutions or ecosystem-based approaches, taking into consideration United Nations Environment Assembly resolution 5/5,²¹ for their mitigation and adaptation action while ensuring relevant social and environmental safeguards;

XVI. Agriculture

53. *Welcomes* the establishment of the four-year Sharm el-Sheikh joint work on implementation of climate action on agriculture and food security, as well as the establishment of the Sharm el-Sheikh online portal under the joint work, by decision 3/CP.27;

¹⁷ See FCCC/SBI/2022/20, paras. 77–84.

¹⁸ Available at <https://unfccc.int/documents/615101>.

¹⁹ Mandated in decision 1/CP.26, para. 61.

²⁰ Decisions 1/CP.16 and 9/CP.19.

²¹ UNEP/EA.5/Res.5.

XVII. Enhancing implementation: action by non-Party stakeholders

54. *Acknowledges* the engagement of non-Party stakeholders in climate action, which complements and broadens it, while recognizing the pivotal role of governments in action on climate change within the framework of the Convention, the Kyoto Protocol and the Paris Agreement;
55. *Recognizes* the important role of indigenous peoples, local communities, cities and civil society, including youth and children, in addressing and responding to climate change and *highlights* the urgent need for multilevel and cooperative action in this regard;
56. *Notes* the adoption of the action plan under the Glasgow work programme on Action for Climate Empowerment by decision 23/CP.27;
57. *Encourages* Parties to increase the full, meaningful and equal participation of women in climate action and to ensure gender-responsive implementation and means of implementation, including by fully implementing the Lima work programme on gender and its gender action plan, to raise climate ambition and achieve climate goals;
58. *Invites* Parties to provide support to developing countries for undertaking gender-related action and implementing the gender action plan;
59. *Recognizes* the role of children and youth as agents of change in addressing and responding to climate change and *encourages* Parties to include children and youth in their processes for designing and implementing climate policy and action, and, as appropriate, to consider including young representatives and negotiators into their national delegations, recognizing the importance of intergenerational equity and maintaining the stability of the climate system for future generations;
60. *Expresses its appreciation* to the Presidency of the twenty-seventh session of the Conference of the Parties for its leadership in promoting the full, meaningful and equal participation of children and youth, including by co-organizing the first youth-led climate forum (the Sharm el-Sheikh youth climate dialogue), hosting the first children and youth pavilion and appointing the first youth envoy of a Presidency of the Conference of the Parties and *encourages* future incoming Presidencies of the Conference of the Parties to consider doing the same;
61. *Expresses its appreciation* to the children and youth constituency for co-organizing the Sharm el-Sheikh youth climate dialogue with the Presidency of the twenty-seventh session of the Conference of the Parties and *notes* the outcomes of the seventeenth Conference of Youth, organized by the constituency and held in Sharm el-Sheikh in November 2022;
62. *Encourages* Parties and non-Party stakeholders to engage actively in the Marrakech Partnership for Global Climate Action;
63. *Welcomes* the leadership of the Presidency of the Conference of the Parties and the high-level champions, in particular in the context of the Sharm el-Sheikh Adaptation Agenda and the Breakthrough Agenda, and the collaboration between Parties and non-Party stakeholders, and *emphasizes* the need for continued acceleration and collaboration;
64. *Welcomes* the recommendations of the High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities, launched by the United Nations Secretary-General in March 2022, which are designed to enhance transparency and accountability related to, and progress in achieving, the climate pledges of businesses, investors, cities and regions;
65. *Invites* the secretariat to ensure greater accountability of voluntary initiatives through the Non-State Actor Zone for Climate Action platform;²²
66. *Welcomes* the convening of five regional forums led by the President of the twenty-seventh session of the Conference of the Parties and the high-level champions, in

²² See <https://climateaction.unfccc.int/>.

collaboration with the United Nations Regional Economic Commissions, on initiatives for financing climate action and the Sustainable Development Goals.

*10th plenary meeting
20 November 2022*

Decision 2/CP.27

Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage¹

The Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement,

Recalling the Convention and the Paris Agreement,

Noting the increasing urgency of enhancing efforts to avert, minimize and address loss and damage associated with the adverse effects of climate change in the light of continued global warming and its significant impacts on vulnerable populations and the ecosystems on which they depend, as illustrated by the findings in relevant recent scientific reports, including the contributions of Working Groups I² and II³ to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change,

Also noting that keeping the global average temperature rise to below 1.5 °C will be essential to limiting future loss and damage and *expressing alarm* that the contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, in line with other best available science, concluded that the gravity, scope and frequency of loss and damage will continue to increase with every additional fraction of a degree of temperature increase,

Recalling previous work under the UNFCCC as part of the consideration of the current state of finance for addressing loss and damage associated with the adverse effects of climate change,⁴

Acknowledging the many institutions and stakeholders involved in financing activities for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events,

Welcoming related initiatives announced at the twenty-seventh session of the Conference of the Parties, including, but not limited to, the Global Shield against Climate Risks and the United Nations Secretary-General's Early Warnings for All,

Acknowledging that existing funding arrangements fall short of responding to current and future impacts of climate change and are not sufficient to address the existing funding gaps related to providing action and support in responding to loss and damage associated with the adverse effects of climate change,

Recalling paragraphs 7(b) and 2 of the reports on these sessions of the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris

¹ This item and the outcomes thereof are without prejudice to the consideration of similar issues in the future.

² Intergovernmental Panel on Climate Change. 2021. *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. V Masson-Delmotte, P Zhai, A Pirani, et al. (eds.). Cambridge: Cambridge University Press. Available at <https://www.ipcc.ch/report/ar6/wg1/>.

³ Intergovernmental Panel on Climate Change. 2022. *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. H Pörtner, D Roberts, M Tignor, et al. (eds.). Cambridge: Cambridge University Press. Available at <https://www.ipcc.ch/report/ar6/wg2/>.

⁴ Including but not limited to the 2016 Forum of the Standing Committee of Finance on financial instruments that address the risks of loss and damage, a technical paper on the elaboration of the sources of and modalities for accessing financial support for addressing loss and damage (FCCC/TP/2019/1), the Suva expert dialogue on loss and damage associated with climate change impacts, and the 1st Glasgow Dialogue, to discuss funding arrangements for activities to avert, minimize and address loss and damage.

Agreement respectively, in relation to the adoption of agenda sub-item 8(f), “Matters relating to finance: matters relating to funding arrangements responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage”,

1. *Acknowledge* the urgent and immediate need for new, additional, predictable and adequate financial resources to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, especially in the context of ongoing and ex post (including rehabilitation, recovery and reconstruction) action;

2. *Decide* to establish new funding arrangements for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage, including with a focus on addressing loss and damage by providing and assisting in mobilizing new and additional resources, and that these new arrangements complement and include sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement;

3. *Also decide*, in the context of establishing the new funding arrangements referred to in paragraph 2 above, to establish a fund for responding to loss and damage whose mandate includes a focus on addressing loss and damage;

4. *Establish* a transitional committee on the operationalization of the new funding arrangements for responding to loss and damage and the fund established in paragraph 3 above (hereinafter referred to as the Transitional Committee), in accordance with the terms of reference contained in the annex, to make recommendations based on, inter alia, elements for operationalization included in paragraph 5 below, for consideration and adoption by the Conference of the Parties at its twenty-eighth session (November–December 2023) and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its fifth session (November–December 2023) with a view to operationalizing the funding arrangements referred to in paragraph 2 above, including the fund referred to in paragraph 3 above;

5. *Agree* that the recommendations to operationalize the funding arrangements and the fund referred to in paragraphs 2–3 above respectively shall consider, inter alia:

(a) Establishing institutional arrangements, modalities, structure, governance and terms of reference for the fund referred to in paragraph 3 above;

(b) Defining the elements of the new funding arrangements referred to in paragraph 2 above;

(c) Identifying and expanding sources of funding;

(d) Ensuring coordination and complementarity with existing funding arrangements;

6. *Decide* that the Transitional Committee referred to in paragraph 4 above will be informed by the following, inter alia:

(a) The current landscape of institutions, including global, regional and national, that are funding activities related to addressing loss and damage, and ways in which coherence, coordination and synergies among them can be enhanced;

(b) The gaps within that current landscape, including the types of gap, such as relating to speed, eligibility, adequacy and access to finance, noting that these may vary depending on the challenge, such as climate-related emergencies, sea level rise, displacement, relocation, migration, insufficient climate information and data, or the need for climate-resilient reconstruction and recovery;

(c) The priority gaps for which solutions should be explored;

(d) The most effective ways in which to address the gaps, especially for the most vulnerable populations and the ecosystems on which they depend;

(e) Potential sources of funding, recognizing the need for support from a wide variety of sources, including innovative sources;

7. *Also decide* to undertake the following activities for informing the recommendations referred to in paragraphs 4–5 above:

(a) Request the secretariat to conduct two workshops in 2023, with the participation of a diversity of institutions, relevant to addressing loss and damage associated with climate change impacts;

(b) Request the secretariat to prepare a synthesis report on existing funding arrangements and innovative sources relevant to addressing loss and damage associated with the adverse effects of climate change;

(c) Invite Parties and relevant organizations to submit via the submission portal⁵ by 15 February 2023 views on topics for and the structure of the 2nd Glasgow Dialogue⁶ and the workshops referred to in paragraph 7(a) above;

(d) Invite United Nations agencies, intergovernmental organizations, and bilateral, multilateral and international financial institutions to submit inputs on how they might enhance access to and/or the speed, scope and scale of availability of finance for activities relevant to addressing loss and damage, including potential limitations and barriers and options for addressing them;

8. *Further decide* that the activities and considerations referred to in this decision will be undertaken taking into account the discussions at the 2nd and 3rd Glasgow Dialogues, to take place at the fifty-eighth (June 2023) and sixtieth (June 2024) sessions of the Subsidiary Body for Implementation respectively;

9. *Decide* that the 2nd and 3rd Glasgow Dialogues will build on the 1st Glasgow Dialogue, held at the fifty-sixth session of the Subsidiary Body for Implementation, and that the 2nd Dialogue shall focus on the operationalization of the new funding arrangements established in paragraph 2 above and the fund established in paragraph 3 above as well as on maximizing support from existing funding arrangements relevant for, inter alia, responding to economic and non-economic losses, slow onset events and extreme weather events, and that they will inform the work of the Transitional Committee;

10. *Request* the Chair of the Subsidiary Body for Implementation to provide a summary report on each Glasgow Dialogue no later than four weeks thereafter;

11. *Invite* the United Nations Secretary-General to convene the principals of international financial institutions and other relevant entities with a view to identifying the most effective ways to provide funding to respond to needs related to addressing loss and damage associated with the adverse effects of climate change;

12. *Also invite* international financial institutions to consider, at the 2023 Spring Meetings of the World Bank Group and the International Monetary Fund, the potential for such institutions to contribute to funding arrangements, including new and innovative approaches, responding to loss and damage associated with the adverse effects of climate change;

13. *Reiterate* decision 1/CMA.3, paragraph 64, in which developed country Parties, the operating entities of the Financial Mechanism, United Nations entities and intergovernmental organizations and other bilateral and multilateral institutions, including non-governmental organizations and private sources, are urged to provide enhanced and additional support for activities addressing loss and damage associated with the adverse effects of climate change;

14. *Request* the President of the Conference of the Parties at its twenty-seventh session, in collaboration with the incoming President of the Conference of the Parties at its twenty-eighth session, to convene ministerial consultations prior to the twenty-eighth session of the Conference of the Parties and the fifth session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement to advance consideration and understanding of a possible outcome on this matter at that session;

⁵ <https://www4.unfccc.int/sites/submissionsstaging/Pages/Home.aspx>.

⁶ See decision 1/CMA.3, para. 73.

15. *Also request* the secretariat to prepare a synthesis report on the outcomes of the activities and deliverables referred to in paragraphs 7(b), 11, 12 and 14 above to inform the recommendations to be developed by the Transitional Committee;
16. *Decide* that the secretariat shall support and facilitate the work of the Transitional Committee;
17. *Take note* of the estimated budgetary implications of the activities to be undertaken by the secretariat referred to in paragraphs 2–16 above;
18. *Request* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

Annex

Terms of reference for the Transitional Committee on the operationalization of the new funding arrangements for responding to loss and damage and the associated fund

I. Mandate

1. The Transitional Committee will make recommendations for consideration by the Conference of the Parties (COP) at its twenty-eighth session (November–December 2023) and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) at its fifth session (November–December 2023) in accordance with paragraphs 4–5 of this decision.
2. The Transitional Committee will serve as a coordination mechanism that guides and oversees, as appropriate, the activities referred to in paragraph 7 of this decision.
3. The work of the Transitional Committee will be concluded with the adoption no later than at COP 28 and CMA 5 of decision(s) related to the new funding arrangements responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage, and the fund established in paragraph 3 of this decision.

II. Composition

4. The Transitional Committee shall have 24 members, to be nominated no later than 15 December 2022, comprising 10 members from developed country Parties and 14 members from developing country Parties with geographical representation as follows:
 - (a) Three members from Africa, including a representative of the President of COP 27;
 - (b) Three members from Asia and the Pacific, including a representative of the incoming President of COP 28;
 - (c) Three members from Latin America and the Caribbean;
 - (d) Two members from small island developing States;
 - (e) Two members from the least developed countries;
 - (f) One member from a developing country Party not included in the categories listed above.

III. Modalities of work

5. The Transitional Committee shall be chaired by two co-chairs, one from a developed country Party and one from a developing country Party.
6. The Transitional Committee will hold at least three meetings.
7. The UNFCCC Executive Secretary, in consultation with the President of COP 27, will convene the 1st meeting of the Transitional Committee no later than on 31 March 2023.
8. Recommendations of the Transitional Committee shall be adopted by consensus.
9. The Transitional Committee will be guided by the best available science in conducting its work.

*10th plenary meeting
20 November 2022*

Decision 3/CP.27

Sharm el-Sheikh joint work on implementation of climate action on agriculture and food security

The Conference of the Parties,

Recalling Article 2 of the Convention,

Also recalling decision 2/CP.17, paragraphs 75–77,

Further recalling decision 4/CP.23,

Recognizing the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change,

Also recognizing that the impact of the coronavirus disease 2019 pandemic and other global challenges has exposed the limited resilience of global food systems to the adverse impacts of climate change and the limited progress towards achieving the Sustainable Development Goals and ensuring food security,

Acknowledging that the increasing frequency of extreme weather events has exposed millions of people, especially small-scale farmers, those from low-income households, indigenous peoples, women and youth in developing countries, to acute food and water insecurity and that, according to the Food and Agriculture Organization of the United Nations, more than 800 million people face hunger every year,¹ a figure set to increase as a consequence of climate change,

Highlighting that farmers, including smallholders and pastoralists, are stewards of the land and are inclined to apply sustainable land management approaches, and *acknowledging* that their vulnerability to climate change presents a challenge in fulfilling this important role and that policy responses in agriculture are more likely to succeed if they consider the role of farmers as key agents of change,

Highlighting that each food production system has its own challenges and that solutions must be context-specific and take into account national circumstances, especially if they are to be scaled up,

1. *Welcomes* the progress of and outcomes achieved by the subsidiary bodies in jointly addressing issues related to agriculture² and the Koronivia road map;³

2. *Takes note* of the following recommendations on the different workshop reports under the Koronivia joint work on agriculture identified and agreed in conclusions of the subsidiary bodies,⁴ recognizing that related policies and their implementation are context-specific and take into account national circumstances:

(a) Recognized that information provided during the workshops and in the workshop reports⁵ and other information provide a mapping of activities and mandates of UNFCCC constituted bodies;

¹ Food and Agriculture Organization of the United Nations, International Fund for Agricultural Development, United Nations Children's Fund, World Food Programme and World Health Organization. 2022. *The State of Food Security and Nutrition in the World 2022: Repurposing food and agricultural policies to make healthy diets more affordable*. Rome: Food and Agriculture Organization of the United Nations. Available at <https://www.fao.org/documents/card/en/c/cc0639en>.

² Pursuant to decision 4/CP.23, para. 1.

³ Contained in annex I to documents FCCC/SBI/2018/9 and FCCC/SBSTA/2018/4.

⁴ FCCC/SBI/2019/9, para. 44, FCCC/SBSTA/2019/2, para. 42, FCCC/SBI/2019/20, paras. 28–29, FCCC/SBSTA/2019/5, paras. 16–17, FCCC/SBI/2021/16, paras. 46–49, FCCC/SBSTA/2021/3, paras. 47–50, FCCC/SBI/2022/10, paras. 56–57, and FCCC/SBSTA/2022/6, paras. 27–28.

⁵ FCCC/SB/2019/INF.1, FCCC/SB/2019/1, FCCC/SB/2019/2, FCCC/SB/2020/1, FCCC/SB/2021/1, FCCC/SB/2021/2, and FCCC/SB/2021/3 and Add.1.

(b) Encouraged the continued involvement of constituted bodies and financing entities in the Koronivia joint work on agriculture, highlighting the potential for creating interlinkages that lead to enhanced action and improvements in implementation;

(c) Recognized that some modalities for implementation already exist and invited Parties to scale up implementation;

(d) Also recognized the importance of the continued involvement of scientific and technical knowledge in transforming the agriculture sector, enabling conditions, the crucial role of farmers, youth, local communities and indigenous peoples, including gender considerations, and of meeting the needs of farmers and food systems;

(e) Welcomed the presentation made by the Green Climate Fund on its work on issues relating to agriculture, and also welcomed the subsequent clarification by the secretariat of the process for Parties to submit their views to the Standing Committee on Finance, in line with existing procedures, on elements to be taken into account in developing guidance for the operating entities of the Financial Mechanism;

(f) Recognized that various tools are available for assessing and monitoring adaptation and its co-benefits, but existing tools could benefit from further adjustment and new tools could be developed for country-specific circumstances, while taking into consideration the importance of sharing best practices among countries and other stakeholders and the important role of science, technology and capacity-building in facilitating data collection and adaptation assessment;

(g) Also recognized that issues relating to soil carbon, soil health and soil fertility, as well as sustainable soil and integrated water management, are context-specific and, taking into account countries' circumstances, should be dealt with in a holistic and inclusive manner to realize the full potential of increased productivity in contributing to food security, adaptation and adaptation co-benefits as well as enhancing carbon sinks;

(h) Further recognized that soil and nutrient management practices and the optimal use of nutrients, including organic fertilizer and enhanced manure management, lie at the core of climate-resilient, sustainable food production systems and can contribute to global food security;

(i) Recognized that livestock management systems are very vulnerable to the impacts of climate change and that sustainably managed livestock systems have high adaptive capacity and resilience to climate change while playing broad roles in safeguarding food and nutrition security, livelihoods, sustainability, nutrient cycling and carbon management;

(j) Noted that improving sustainable production and animal health, aiming to reduce greenhouse gas emissions in the livestock sector while enhancing sinks on pasture and grazing land, can contribute to achieving long-term climate objectives, taking into account different systems and national circumstances;

(k) Recognized that socioeconomic and food security dimensions are critical when dealing with climate change in agriculture and food systems;

(l) Also recognized the fundamental priority of safeguarding food security and ending hunger by designing sustainable and climate-resilient agricultural systems, applying a systemic approach in line with the long-term global climate objectives, further recognizing the importance of long-term investment in agriculture focused on this objective;

(m) Noted the importance of scaling up support to enhance action on safeguarding food and nutrition security and ending hunger, aiming for inclusive, sustainable and climate-resilient agricultural systems, taking into consideration the vulnerability of agriculture to the impacts of climate change;

(n) Recognized the need to improve the enabling environment for mobilizing resources for implementing action at the local, national and international level;

(o) Noted the importance of considering sustainable land and water management for agriculture in a systemic and integrated manner informed by scientific, local and indigenous knowledge implemented in a participatory and inclusive manner and taking into

consideration regional, national and local circumstances to deliver a range of multiple benefits, where applicable, such as adaptation, adaptation co-benefits and mitigation, to ensure food security and nutrition;

(p) Highlighted ‘no regrets’ options, such as those mentioned in the workshop reports and avoiding maladaptation;

(q) Noted that implementing sustainable approaches can render multiple benefits for society, such as improved water quality, higher biodiversity and increased soil organic matter, and also noted the value of incorporating diversification, recycling and efficiency, and supporting synergies within agricultural systems;

(r) Recognized the importance of increased access to international resources, such as finance, capacity-building and technology development and transfer, from a variety of sources to implement these approaches;

(s) Also recognized the need to scale up the implementation of best practices, innovations and technologies that increase resilience and sustainable production in agricultural systems according to national circumstances in an inclusive and participatory way that includes farmers, pastoralists, indigenous peoples, local and vulnerable communities, women and youth and is informed by scientific, local and indigenous knowledge;

(t) Noted that many approaches with high potential for adaptation, adaptation co-benefits and mitigation relate to land and food systems, such as conserving and restoring ecosystems, improving sustainability of agricultural practices and reducing food loss and waste from sustainable food systems, and have significant positive direct and indirect links with biodiversity and ecosystem services, food security and the Sustainable Development Goals;

(u) Recognized that scaling up implementation requires enhanced knowledge-sharing on best practices, access to finance, technology development and transfer, and capacity-building;

(v) Also recognized that innovative policy and social approaches to scaling up, such as institutional arrangements, partnerships and farmers’ empowerment, can incentivize implementation and support an enabling environment for scaling up best practices;

(w) Noted that successful policy innovations can include extension services and farmers’ self-organization;

3. *Recognizes* that workshops under the Koronivia joint work on agriculture provide useful information on the latest agricultural research, national circumstances, the realities faced by farmers, challenges and opportunities relating to agricultural research and development, and ways of mobilizing climate action in the area of agriculture and food security, and have thus been crucial for building a common understanding of relevant challenges and opportunities;

4. *Recalls* that the Koronivia road map, workshops under the Koronivia joint work on agriculture and reports thereon, as well as the conclusions of the subsidiary bodies on those reports, have improved awareness of and knowledge on the impacts of climate change on agriculture, helped to focus the work of institutions, organizations and stakeholders working on matters of agriculture and climate change and led to new activities and initiatives in this area;

5. *Welcomes* the participation of representatives of constituted bodies, the operating entities of the Financial Mechanism,⁶ the Adaptation Fund, the Special Climate Change Fund, the Least Developed Countries Fund and observer organizations in workshops under the Koronivia joint work on agriculture;

6. *Acknowledges* that the Koronivia joint work on agriculture has highlighted the need to identify modalities for addressing challenges in and exploring opportunities for accessing existing means of implementation;

⁶ The Global Environment Facility and the Green Climate Fund.

7. *Also acknowledges* the need to strengthen work under relevant institutional arrangements under the Convention in order to consolidate and advance work on addressing issues related to agriculture;
8. *Further acknowledges* that the Koronivia joint work on agriculture has highlighted the need for enhanced climate action on agriculture and food security, and for enhanced coordination with and among actors outside the UNFCCC;
9. *Emphasizes* the urgent need to scale up action and support with regard to capacity-building, access to finance, and technology development and transfer with a view to enhancing the adaptive capacity and resilience and reducing the vulnerability of farmers and other vulnerable groups, especially small-scale farmers, women and youth, in relation to climate change;
10. *Urges* Parties, relevant organizations and other groups to increase their efforts in relation to promoting sustainable agriculture, including by strengthening the role of indigenous peoples and local communities, and particularly women and youth, with a view to eradicating hunger and poverty while ensuring food security;
11. *Underscores* the importance of constituted bodies and the operating entities of the Financial Mechanism taking into account the conclusions of the subsidiary bodies referred to in paragraph 2 above in implementing their actions and workplans, according to their mandates;
12. *Invites* Parties to consider policies, actions and measures relevant to implementing the conclusions referred to in paragraph 2 above;
13. *Also invites* the current and future Presidencies of the Conference of the Parties, high-level champions and other actors, when promoting climate initiatives, to take into account the conclusions referred to in paragraph 2 above in considering issues related to agriculture, and to promote the sharing of information and knowledge on best practices and means of implementation;
14. *Requests* the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation to establish the four-year Sharm el-Sheikh joint work on implementation of climate action on agriculture and food security, including implementation of the outcomes of the Koronivia joint work on agriculture and previous activities addressing issues related to agriculture,⁷ as well as future topics, recognizing that solutions are context-specific and take into account national circumstances, with the following objectives:
 - (a) Promoting a holistic approach to addressing issues related to agriculture and food security, taking into consideration regional, national and local circumstances, in order to deliver a range of multiple benefits, where applicable, such as adaptation, adaptation co-benefits and mitigation, recognizing that adaptation is a priority for vulnerable groups, including women, indigenous peoples and small-scale farmers;
 - (b) Enhancing coherence, synergies, coordination, communication and interaction between Parties, constituted bodies and workstreams, the operating entities of the Financial Mechanism, the Adaptation Fund, the Least Developed Countries Fund and the Special Climate Change Fund in order to facilitate the implementation of action to address issues related to agriculture and food security;
 - (c) Promoting synergies and strengthening engagement, collaboration and partnerships among national, regional and international organizations and other relevant stakeholders, as well as under relevant processes and initiatives, in order to enhance the implementation of climate action to address issues related to agriculture and food security;
 - (d) Providing support and technical advice to Parties, constituted bodies and the operating entities of the Financial Mechanism on climate action to address issues related to

⁷ See documents FCCC/SBSTA/2014/INF.2, FCCC/SBSTA/2015/INF.6, FCCC/SBSTA/2015/INF.7, FCCC/SBSTA/2016/INF.5 and FCCC/SBSTA/2016/INF.6.

agriculture and food security, respecting the Party-driven approach and in accordance with their respective procedures and mandates;

(e) Enhancing research and development on issues related to agriculture and food security and consolidating and sharing related scientific, technological and other information, knowledge (including local and indigenous knowledge), experience, innovations and best practices;

(f) Evaluating progress in implementing and cooperating on climate action to address issues related to agriculture and food security;

(g) Sharing information and knowledge on developing and implementing national policies, plans and strategies related to climate change, while recognizing country-specific needs and contexts;

15. *Also requests* the secretariat to support the joint work referred to in paragraph 14 above by:

(a) Preparing an annual synthesis report on the work undertaken by constituted bodies and financial and other entities under the Convention, as well as by relevant international organizations, on activities related to the joint work referred to in paragraph 14 above;

(b) Holding in-session workshops in hybrid format, facilitating both virtual and in-person participation, on agreed topics related to agriculture and food security at the first regular sessions of the subsidiary bodies each year and inviting representatives of the constituted bodies under the Convention, the operating entities of the Financial Mechanism, the Adaptation Fund, the Least Developed Countries Fund and the Special Climate Change Fund and observers to them;

16. *Decides* to establish the Sharm el-Sheikh online portal under the joint work referred to in paragraph 14 above for sharing information on projects, initiatives and policies for increasing opportunities for implementation of climate action to address issues related to agriculture and food security;

17. *Invites* Parties and observers to submit by 27 March 2023 via the submission portal⁸ views on the elements of the joint work referred to in paragraphs 14–15 above, including views on topics for the workshops referred to in paragraph 15(b) above, for consideration by the subsidiary bodies at their fifty-eighth sessions (June 2023);

18. *Also invites* Parties and observers to submit by 27 March 2023 via the submission portal views on the operationalization of the portal referred to in paragraph 16 above for consideration by the subsidiary bodies at their fifty-eighth sessions;

19. *Further invites* Parties, United Nations organizations and other relevant institutions, agencies and entities, the research community, the private sector, civil society and farmers organizations, among others and as appropriate, to strengthen cooperation, collaboration and partnerships in relation to the joint work referred to in paragraph 14 above, including with a view to fighting hunger on the ground, addressing in particular the needs of women, children, youth, indigenous peoples and local communities;

20. *Requests* the subsidiary bodies to report to the Conference of the Parties at its thirty-first session (2026) on the progress and outcomes of the joint work referred to in paragraph 14 above;

21. *Takes note* of the estimated budgetary implications of the activities to be undertaken by the secretariat referred to in paragraph 15 above;

22. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

*10th plenary meeting
20 November 2022*

⁸ <https://www4.unfccc.int/sites/submissionsstaging/Pages/Home.aspx>.

Decision 4/CP.27

Revision of the modalities and procedures for international assessment and review

The Conference of the Parties,

Recalling decisions 1/CP.16, 2/CP.17, 18/CP.22, 1/CP.24 and 18/CMA.1,

1. *Decides* that the modalities and procedures for international assessment and review, contained in annex II to decision 2/CP.17, shall continue to be used for conducting the technical review and multilateral assessment for Parties included in Annex I to the Convention, taking into account decision 1/CP.24, paragraphs 39, 41 and 44;
2. *Requests* the Subsidiary Body for Implementation to consider undertaking no later than at its first session of 2028, as appropriate, the review of the modalities and procedures for international assessment and review on the basis of experience of reporting, technical expert review and multilateral assessment.

*9th plenary meeting
17 November 2022*

Decision 5/CP.27

Revision of the modalities and guidelines for international consultation and analysis

The Conference of the Parties,

Recalling decisions, 1/CP.16, 2/CP.17, 1/CP.24 and 18/CMA.1,

1. *Decides* that the modalities and guidelines for international consultation and analysis, contained in annex IV to decision 2/CP.17, shall continue to be used for conducting the technical analysis and facilitative sharing of views for Parties not included in Annex I to the Convention, taking into account decision 1/CP.24, paragraphs 39, 41 and 44;
2. *Requests* the Subsidiary Body for Implementation to consider undertaking no later than at its first session of 2028, as appropriate, the review of the modalities and guidelines for international consultation and analysis on the basis of experience of reporting, technical analysis and facilitative sharing of views.

*9th plenary meeting
17 November 2022*

Decision 6/CP.27

Revision of the UNFCCC reporting guidelines on annual inventories for Parties included in Annex I to the Convention

The Conference of the Parties,

Recalling Article 4, paragraph 1, Article 10, paragraph 2, and Article 12, paragraph 1, of the Convention,

Also recalling decisions 24/CP.19 and 1/CP.24, in particular paragraph 42,

Further recalling decisions 18/CMA.1 and 5/CMA.3,

1. *Decides* that, when reporting their annual greenhouse gas inventories under the Convention in accordance with the “Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part I: UNFCCC reporting guidelines on annual greenhouse gas inventories” for the 2024 submission onward, Parties included in Annex I to the Convention that are not Parties to the Paris Agreement that are using an approach to reporting emissions and removals from harvested wood products other than the production approach¹ shall also provide supplementary information on emissions and removals from harvested wood products estimated using the production approach, either in their national inventory report, or as per paragraph 44 of decision 1/CP.24 and using the common reporting tables set out in annex I to decision 5/CMA.3;
2. *Also decides* that the global warming potential values, excluding the value for fossil methane used by Parties included in Annex I to the Convention to calculate the carbon dioxide equivalence of anthropogenic greenhouse gas emissions by sources and removals by sinks in their reporting under the Convention shall be those based on the effects of greenhouse gases over a 100-year time horizon listed in table 8.A.1 of the contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change² and that these values shall be applied by no later than 31 December 2024;
3. *Further decides* that Parties included in Annex I to the Convention may in addition also use other metrics (e.g. global temperature potential) to report supplemental information on aggregate emissions and removals of greenhouse gases, expressed in carbon dioxide equivalence; in such cases, they shall provide in their national inventory report information on the values of the metrics used and the Intergovernmental Panel on Climate Change assessment report from which they were sourced;
4. *Requests* the secretariat to enable, by 30 January 2023, an option to the current CRF Reporter for generating common reporting format tables using the 100-year time-horizon global warming potential values, excluding the value for fossil methane, listed in table 8.A.1 in the contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change;
5. *Notes* that the final version of the reporting tool for electronic reporting of the common reporting tables referred to in decision 5/CMA.3, paragraph 8, is not expected to be available for use until 30 June 2024;
6. *Decides* to change the deadline for the submission by Parties included in Annex I to the Convention that are Parties to the Paris Agreement of their annual greenhouse gas inventories due in 2024 to 31 December 2024;

¹ As set out in vol. 4, chap. 12, of the Intergovernmental Panel on Climate Change 2006 *IPCC Guidelines for National Greenhouse Gas Inventories*.

² Intergovernmental Panel on Climate Change. 2013. *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*. TF Stocker, D Qin, G-K Plattner, et al. (eds.). Cambridge and New York: Cambridge University Press. Available at <http://www.ipcc.ch/report/ar5/wg1>.

7. *Requests* the Subsidiary Body for Scientific and Technological Advice to revisit this matter at its sixty-first session (November 2024) should there be any unplanned delays in the development of the tool referred to in paragraph 5 above.

*9th plenary meeting
17 November 2022*

Decision 7/CP.27

Common metrics used to calculate the carbon dioxide equivalence of anthropogenic greenhouse gas emissions by sources and removals by sinks

The Conference of the Parties,

Recalling Article 4, paragraph 1, Article 10, paragraph 2, and Article 12, paragraph 1, of the Convention,

Also recalling decisions 3/CP.1, 4/CP.1, 9/CP.2, 10/CP.2, 12/CP.4, 3/CP.5, 4/CP.5, 8/CP.5, 32/CP.7, 17/CP.8, 18/CP.8, 14/CP.11, 2/CP.17, 15/CP.17, 19/CP.18, 24/CP.19, 1/CP.21, 1/CP.24, 6/CP.25, 18/CMA.1 and 5/CMA.3,

1. *Decides* that, until it adopts a further decision on the matter, the global warming potential values used by Parties in their reporting under the Convention to calculate the carbon dioxide equivalence of anthropogenic greenhouse gas emissions by sources and removals by sinks shall be based on the effects of greenhouse gases over a 100-year time-horizon as listed in table 8.A.1 in appendix 8.A to the contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change,¹ excluding the value for fossil methane;
2. *Also decides* that all Parties shall start using the global warming potential values referred to in paragraph 1 above no later than on 31 December 2024 for the purpose of meeting their reporting requirements under the Convention;
3. *Further decides* to consider the need to update the common metric values referred to in this decision no later than in 2028, concurrently with the review of the modalities, procedures and guidelines contained in the annex to decision 18/CMA.1;
4. *Decides* that each Party to the Convention may in addition also use other metrics (e.g. global temperature potential) to report supplemental information on aggregate greenhouse gas emissions and removals, expressed in carbon dioxide equivalent, and that in such case the Party shall provide in its reporting under the Convention information on the values of the other metrics used and the Intergovernmental Panel on Climate Change assessment report from which they were sourced.

*9th plenary meeting
17 November 2022*

¹ Intergovernmental Panel on Climate Change. 2013. *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*. TF Stocker, D Qin, G-K Plattner, et al. (eds.). Cambridge and New York: Cambridge University Press. Available at <http://www.ipcc.ch/report/ar5/wg1>.

Decision 8/CP.27

Report of the Adaptation Committee for 2022 and review of the progress, effectiveness and performance of the Adaptation Committee

The Conference of the Parties

1. Welcomes the work of the Adaptation Committee in 2022 and takes note of the report of the Adaptation Committee covering its work between September 2021 and September 2022, contained in document FCCC/SB/2022/5 and Add.1 and Add.1/Corr.1 and Add. 2, and the recommendations therein;
2. Also takes note of the progress of the Adaptation Committee in improving its outreach and communication efforts and encourages the Committee to make further use of platforms for outreach, communication in languages other than English and the organization of regional events and knowledge dialogues as ways to improve the dissemination, understanding and use of its knowledge products by organizations and practitioners within and outside the UNFCCC process and in all geographical regions;
3. Notes that considerations of the review of the progress, effectiveness and performance of the Adaptation Committee could not be completed at this session and will therefore continue at the fifty-eighth sessions of the subsidiary bodies (June 2023);
4. Encourages Parties to make available sufficient resources for the successful and timely implementation of the flexible workplan of the Adaptation Committee for 2022–2024.¹

*10th plenary meeting
20 November 2022*

¹ FCCC/SB/2021/6, annex.

Decision 9/CP.27

National adaptation plans

The Conference of the Parties,

Recalling decisions 1/CP.16, 3/CP.17, 5/CP.17, 12/CP.18, 18/CP.19, 3/CP.20, 1/CP.21, 4/CP.21, 6/CP.22, 8/CP.24, 7/CP.25, 1/CP.26 and 1/CMA.3,

1. *Welcomes* the reports for 2020–2022 on progress in the process to formulate and implement national adaptation plans¹ and *takes note* of other relevant documents;²
2. *Welcomes* the information provided by the Adaptation Committee³ and the Least Developed Countries Expert Group⁴ on gaps and needs related to the process to formulate and implement national adaptation plans and progress in implementing national adaptation plans;⁵
3. *Also welcomes* the national adaptation plans submitted in 2021–2022 by Cabo Verde, the Central African Republic, Chad, Costa Rica, the Democratic Republic of the Congo, Liberia, Madagascar, Niger and Sierra Leone on NAP Central,⁶ which brings the total number of countries with submitted national adaptation plans to 40, and the sectoral national adaptation plans submitted by other Parties;⁷
4. *Expresses concern* at the large number of countries that have not been able to submit their first national adaptation plan and in this respect *notes* the challenges, complexities and delays experienced by developing country Parties in accessing funding and support from the Green Climate Fund for the formulation and implementation of national adaptation plans, particularly in relation to the submission and review of proposals for funding;
5. *Invites* the Adaptation Committee and the Least Developed Countries Expert Group, in line with their mandates, to continue formulating recommendations on ways to facilitate the mobilization of support for the formulation and implementation of national adaptation plans with a view to addressing the challenges referred to in paragraph 4 above and to submit the recommendations to the Standing Committee on Finance for consideration;
6. *Welcomes* the work of the Adaptation Committee and the Least Developed Countries Expert Group on gaps and needs related to the process to formulate and implement national adaptation plans, including the needs referred to in annex II to document FCCC/SBI/2019/5,⁸ and their work on ways to assist with the implementation of national adaptation plans, as requested by the Subsidiary Body for Implementation at its forty-seventh session;⁹
7. *Requests* the Adaptation Committee and the Least Developed Countries Expert Group to continue to identify the priority gaps and needs of developing countries related to the process to formulate and implement national adaptation plans, the progress of each country in this process and any obstacles and challenges faced;

¹ FCCC/SBI/2020/INF.13/Rev.1, FCCC/SBI/2021/INF.7 and FCCC/SBI/2022/19.

² The reports of the Adaptation Committee for 2019–2022, available at <https://unfccc.int/topics/resilience/resources/documents-of-the-adaptation-committee>, and the meeting reports of the Least Developed Countries Expert Group for 2019–2022, available at <https://unfccc.int/topics/resilience/resources/documents-on-the-ldc-expert-group>.

³ See documents FCCC/SB/2019/3, paras. 54–56, and FCCC/SB/2020/2, para. 67.

⁴ See documents FCCC/SBI/2019/16, chap. III.G and annex I; FCCC/SBI/2020/6, chap. IV.F and annex II; FCCC/SBI/2020/14, chap. III.H and annex II; FCCC/SBI/2021/6, chap. IV.F; and FCCC/SBI/2021/13, chap. III.F.

⁵ FCCC/SBI/2022/6, chap. IV.C.2.

⁶ Available at <https://napcentral.org/submitted-naps>.

⁷ Available at <https://napcentral.org/sectoral-naps>.

⁸ In response to decision 8/CP.24, paras. 17–18, and decision 7/CP.25, para. 3.

⁹ FCCC/SBI/2017/19, para. 73.

8. *Also requests* the Adaptation Committee and the Least Developed Countries Expert Group to enhance their work in addressing the priority gaps and needs, obstacles and challenges identified through their work referred to in paragraph 5 above and to include information thereon in their reports;
9. *Further requests* the Adaptation Committee and the Least Developed Countries Expert Group to organize training for developing country Parties on addressing identified gaps and needs, which could be held in conjunction with the NAP Expo, the Adaptation Forum or other events outlined in their respective work programmes;
10. *Invites* other UNFCCC constituted bodies and relevant organizations to provide information to the Adaptation Committee and the Least Developed Countries Expert Group on activities that have the aim of addressing gaps and needs related to the process to formulate and implement national adaptation plans, including information on the regions and countries in which the constituted bodies and organizations provide support;
11. *Notes* that the technical resources developed and the scientific resources synthesized by the Adaptation Committee and the Least Developed Countries Expert Group can assist developing countries in addressing gaps and needs related to the process to formulate and implement national adaptation plans, including in assessing adaptation needs, applying regional approaches to adaptation planning, promoting linkages between adaptation and development, and strengthening gender considerations in national adaptation plans;
12. *Also notes* that the best available science, as well as traditional, indigenous and local knowledge, as appropriate, should be taken into account in addressing the priority gaps and needs referred to in paragraph 7 above and in enhancing the process to formulate and implement national adaptation plans for developing countries;
13. *Notes with serious concern* the findings on adaptation gaps in the contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change;¹⁰
14. *Recognizes* that long-term planning and accelerated implementation of adaptation actions, particularly in the next decade, is important for closing adaptation gaps;
15. *Also recognizes* that maladaptation can be avoided through flexible, multisectoral, inclusive and long-term planning and implementation of adaptation actions that benefit many sectors and systems;
16. *Takes note* of the support available to developing country Parties for formulating and implementing national adaptation plans and *recognizes* the importance of scaling up this support;
17. *Encourages* relevant organizations to continue coordinating support related to the process to formulate, update and implement national adaptation plans and to continue sharing lessons learned;
18. *Notes* that the process to formulate and implement national adaptation plans is crucial to informing the assessment of progress towards achieving the global goal on adaptation, including through the Glasgow–Sharm el-Sheikh work programme on the global goal on adaptation and the global stocktake.

*10th plenary meeting
20 November 2022*

¹⁰ Intergovernmental Panel on Climate Change. 2022. *Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. H Pörtner, D Roberts, M Tignor, et al. (eds.). Cambridge: Cambridge University Press. Available at <https://www.ipcc.ch/report/ar6/wg2>.

Decision 10/CP.27

Matters relating to the least developed countries

The Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement,

Recalling decisions 5/CP.7, 29/CP.7, 7/CP.9, 4/CP.10, 4/CP.11, 8/CP.13, 6/CP.16, 5/CP.17, 12/CP.18, 3/CP.20, 1/CP.21, 19/CP.21, 16/CP.24, 7/CP.25, 15/CP.26, 11/CMA.1 and 19/CMA.1,

Having considered the report on the 42nd meeting of the Least Developed Countries Expert Group,¹

Underscoring the importance of continued implementation by the Green Climate Fund of the mandate given to it in decision 1/CP.21, paragraph 46,

1. *Welcome* the progress of the Least Developed Countries Expert Group in implementing its work programme for 2022–2023,² including its provision of support to the least developed countries for developing project concepts for implementing adaptation actions associated with the priorities in their national adaptation plans;³
2. *Also welcome* the successful conduct by the Least Developed Countries Expert Group of the national adaptation plan writing workshop for Asia-Pacific least developed countries held in Siem Reap, Cambodia, from 12 to 15 July 2022 and the NAP Expo held in Gaborone, Botswana, from 22 to 26 August 2022;
3. *Express their appreciation* to the Government of Cambodia for hosting the workshop referred to in paragraph 2 above and the Government of Botswana for hosting the 42nd meeting of the Least Developed Countries Expert Group and NAP Expo 2022 and *express their gratitude* to the Government of Ireland for providing financial support for the work of the Least Developed Countries Expert Group;
4. *Express their appreciation* to the Least Developed Countries Expert Group and the secretariat for their valuable work in supporting adaptation in the least developed countries;
5. *Also express their appreciation* to the organizations that contributed to designing and conducting the workshop referred to in paragraph 2 above;
6. *Welcome* the progress of the Least Developed Countries Expert Group in developing technical guidelines for the implementation of national adaptation plans⁴ and *note* that those guidelines may help to address gaps and needs relating to the formulation and implementation of national adaptation plans⁵ and for informing the design and provision of support for the implementation of national adaptation plans;
7. *Also note* the limited progress of the least developed countries on the process to formulate and implement national adaptation plans and the need for enhanced support of the least developed countries to advance the process to formulate and implement national adaptation plans;
8. *Further note* that, as at 14 November 2022, 17 of the 46 least developed countries had submitted a national adaptation plan since the process to formulate and implement national adaptation plans was established in 2010, and of those 17 least developed countries with a national adaptation plan, 14 had accessed funding for implementing adaptation actions associated with the priorities identified therein;

¹ FCCC/SBI/2022/18.

² FCCC/SBI/2022/6, annex III.

³ FCCC/SBI/2022/18, paras. 21–23.

⁴ FCCC/SBI/2022/18, paras. 32–35.

⁵ See <https://unfccc.int/node/210550>.

9. *Reiterate and recall* decision 1/CP.21, paragraph 46, and *note* decision 16/CP.27 in relation to enhancing support to the least developed countries for the formulation and implementation of national adaptation plans;
10. *Underscore* the importance of developing project pipelines and proposals for implementing adaptation actions associated with the priorities in the national adaptation plans of the least developed countries and *encourage* relevant organizations, as well as operating entities of the Financial Mechanism, to enhance support to the least developed countries in this regard;
11. *Note with appreciation* the financial pledges, totalling USD 70.6 million, made by the Governments of Denmark, Finland, Germany, Ireland, Slovenia, Sweden and Switzerland and the government of the Walloon Region of Belgium to the Least Developed Countries Fund and *urge* additional contributions to the Fund;
12. *Request* the Least Developed Countries Expert Group to enhance the support provided to the least developed countries for aligning national adaptation plans and nationally determined contributions;
13. *Also request* the Least Developed Countries Expert Group to continue to support the least developed countries in integrating gender considerations into the formulation and implementation of national adaptation plans;
14. *Welcome* the development by the Least Developed Countries Expert Group of its draft rules of procedure;
15. *Adopt* the rules of procedure of the Least Developed Countries Expert Group contained in the annex;
16. *Encourage* the Least Developed Countries Expert Group to prioritize the implementation of the elements of its mandate in accordance with the needs of the least developed countries and the availability of resources;
17. *Invite* Parties and relevant organizations to continue to provide resources to support implementation of the work programme of the Least Developed Countries Expert Group.

Annex

Rules of procedure of the Least Developed Countries Expert Group

I. Scope

1. These rules of procedure shall apply to the Least Developed Countries Expert Group (LEG) in conjunction with 5/CP.7, 29/CP.7, 7/CP.9, 4/CP.10, 4/CP.11, 8/CP.13, 6/CP.16, 5/CP.17, 12/CP.18, 3/CP.20, 1/CP.21, 19/CP.21, 16/CP.24, 7/CP.25, 11/CMA.1, 19/CMA.1 and 15/CP.26, as well as any other relevant decisions of the Conference of the Parties and the Conference of the Parties serving as the meeting of Parties to the Paris Agreement.

II. Definition of terms

2. For the purpose of these rules of procedure, the following terms and definitions shall be used:

- (a) “Convention” means the United Nations Framework Convention on Climate Change;
- (b) “Chair” means the member of the LEG elected as Chair of the LEG;
- (c) “Vice-Chair” means the member of the LEG elected as Vice-Chair of the LEG;
- (d) “Rapporteur” means the member of the LEG elected as Rapporteur of the LEG;
- (e) “Secretariat” means the secretariat referred to in Article 8 of the Convention;
- (f) “Meeting” means the meeting of the LEG;
- (g) “Observer” means any entity the LEG may invite to its meetings.

III. Membership, term limits, nomination and rotation of members

3. Pursuant to decision 29/CP.7 and as amended by decision 15/CP.26, paragraph 18, taking into account the goal of gender balance pursuant to decision 23/CP.18, the LEG shall comprise 17 experts, who shall serve in their individual expert capacity and shall be nominated by regional groups and constituencies. The composition of the LEG shall be as follows:¹

- (a) Five members from African States that are least developed countries (LDCs);
- (b) Two members from Asia-Pacific States that are LDCs;
- (c) Two members from small island developing States that are LDCs;
- (d) Four members from the LDC Parties;
- (e) Four members from developed country Parties.

4. When nominating members to the LEG, regional groups and constituencies shall take into account, *inter alia*, expertise in climate change adaptation and support; engagement of youth; experience in climate finance; expertise in project design and implementation, indigenous and traditional knowledge, and education; and gender with a view to ensuring gender balance.

¹ Decision 15/CP.26, para. 18.

5. Regional groups and constituencies represented on the LEG are encouraged to accommodate the needs of members that would require extended temporary absence from service due to sickness, parental leave and commitments that cannot be avoided, by nominating a temporary replacement to serve during a member's term of office, before the return of the member to full service.
6. The nominated temporary replacement referred to in paragraph 5 above shall serve within the bounds of the remaining term of the member for a period of no more than 12 months.
7. Members shall serve for a term of three years and shall be eligible to serve a maximum of two consecutive terms of office.
8. Members shall remain in office for the duration of their term, unless replaced by Parties in their respective groups or constituencies in accordance with paragraphs 5 above and 11 below.
9. The term of office of a member shall start on 1 January unless, in cases where a member is replaced before the end of their term, the term shall start from the time of the replacement member's nomination by the nominating group or constituency.
10. In case of any vacancy in the LEG owing to the resignation of a member or the non-completion of a member's assigned term of office, including for the reasons indicated in paragraph 5 above, the LEG, through the secretariat, shall request the respective group or constituency to select another member from the same group or constituency for nomination.
11. If a member is unable to participate in two consecutive meetings of the LEG or is unable to undertake the functions and tasks set out by the Chair for circumstances beyond those referred to in paragraph 5 above, and that member has not communicated a reason for their absence to the Chair or the secretariat, the Chair shall bring the matter to the attention of the LEG and shall seek clarification from the group or constituency that nominated the member on the status of their membership.
12. Members shall serve in their individual expert capacity and shall have no pecuniary or financial interest in the issues under consideration by the LEG.

IV. Election of officers and their functions

13. The LEG shall elect annually the following officers from among its LDC members:²
 - (a) A Chair;
 - (b) A Vice-Chair;
 - (c) An anglophone Rapporteur;
 - (d) A francophone Rapporteur;
 - (e) A lusophone Rapporteur.
14. The officers shall be elected to serve for a term of two years.
15. To the extent possible, the Chair and the Vice-Chair should be from different United Nations regional groups. Gender balance should also be taken into account when nominating the Chair and the Vice-Chair.
16. The Chair and the Vice-Chair shall be elected by the majority of LDC members present and voting.
17. The Chair shall perform the following functions:

² Officers shall be elected in accordance with the terms of reference of the Least Developed Countries Expert Group contained in the annex to decision 29/CP.7, and as per the decision of the LEG to also appoint a lusophone Rapporteur.

- (a) Attending meetings of and reporting to the subsidiary bodies and to the Conference of the Parties and the Conference of the Parties serving as the meeting of Parties to the Paris Agreement, as appropriate;
 - (b) Chairing and facilitating the meetings of the LEG;
 - (c) Delegating tasks to LEG members and ensuring that members fulfil their commitments within specified time frames;
 - (d) Liaising with the Chair of the LDC Group under the UNFCCC and ensuring strategic engagement with the LDCs;
 - (e) Representing the LEG when conducting various outreach activities.
18. The Vice-Chair shall represent the Chair in their absence and shall perform the functions listed in paragraph 17 above, as appropriate.
19. The anglophone Rapporteur shall have the following functions:
- (a) Liaising with anglophone LDC Parties;
 - (b) Keeping records in English of meetings of the LEG.
20. The francophone Rapporteur shall have the following functions:
- (a) Liaising with francophone LDC Parties;
 - (b) Keeping records of meetings of the LEG in French.
21. The lusophone Rapporteur shall have the following functions:
- (a) Liaising with lusophone LDC Parties;
 - (b) Keeping records of meetings of the LEG in Portuguese.
22. If both the Chair and the Vice-Chair are absent from a particular meeting, any other LDC member designated by the LEG members present shall temporarily serve as Chair of that meeting.
23. If the Chair or the Vice-Chair is unable to complete the assigned term of office, the LEG shall elect a replacement from among the LDC members to complete that term of office.
24. The Chair or any member designated by the LEG shall represent the LEG at external meetings and shall report back to the LEG on those meetings.
25. The LEG may further define additional roles and responsibilities for the Chair, the Vice-Chair and the Rapporteurs.
26. The Chair, the Vice-Chair and the Rapporteurs, in the exercise of their functions, shall remain under the authority of the LEG.

V. Conflict of interest and confidentiality

27. Members shall promptly disclose and recuse themselves from any deliberations or decision-making where their personal or financial interests may be affected in order to avoid a conflict of interest or the appearance of one.
28. Members shall not disclose any confidential information they receive in the course of their duties, even after their term of office as a member has expired.

VI. Establishment and oversight of thematic working groups

29. Pursuant to decision 15/CP.26, paragraph 9, the LEG may decide to establish subcommittees, thematic working groups or task-focused ad hoc working groups to provide expert advice to assist the LEG in implementing its work programme, as appropriate, and shall report to the LEG on work undertaken.

30. In establishing any subcommittees, thematic working groups or task-focused ad hoc working groups, the LEG shall determine an appropriate number of members and ensure that members have relevant expertise in the respective field of work.

VII. Frequency, modalities and location of meetings

31. The LEG shall meet at least twice a year, while retaining flexibility to adjust the number of meetings, as appropriate.

32. The first meeting of the LEG shall be held no later than in March and the second meeting shall be held no later than in September to allow sufficient time for the meeting reports to be submitted and translated into the official languages of the United Nations in time for the relevant sessions of the Subsidiary Body for Implementation.

33. A quorum of 50 per cent plus one member of the members of the LEG shall be obtained for any decisions to be made at a meeting.

34. Virtual participation shall be made possible for LEG members who are unable to join an in-person meeting.

35. Meetings of the LEG shall take place in an LDC, unless otherwise decided by the LEG and subject to the necessary arrangements being made by the secretariat in consultation with the Chair.

36. The Chair, in consultation with the members, shall guide the secretariat on the agenda items that shall be open for participation by resource persons and observers.

37. The LEG shall decide on whether to webcast its meetings or part of them through the UNFCCC website should technical and financial resources permit.

VIII. Development of and reporting on the two-year rolling work programme

38. The LEG shall develop a two-year rolling work programme at its first meeting of each year for consideration by the Subsidiary Body for Implementation at its first session of each year.

39. The LEG shall report on its work to the Subsidiary Body for Implementation at each of its sessions.

IX. Agenda and documents for meetings

40. The Chair, assisted by the secretariat, shall prepare the provisional agenda for each meeting of the LEG.

41. Members may propose additions or changes to the provisional agenda in writing to the secretariat within one week of receiving the provisional agenda. Any additions or changes shall be included in a revised provisional agenda prepared by the secretariat in consultation with the Chair.

42. The secretariat shall transmit the provisional annotated agenda for each meeting to members of the LEG at least four weeks prior to that meeting.

43. The LEG shall adopt the meeting agenda at the beginning of each meeting.

44. Documents for the meeting shall be decided by the Chair and the Vice-Chair with the assistance of the secretariat.

45. The documents referred to in paragraph 44 above shall be made available to LEG members at least two weeks before the meeting.

46. The Chair, in consultation with LEG members, shall advise the secretariat on the documents that shall be made public at least two weeks before the meeting.

47. The secretariat, in consultation with the Chair, shall prepare a draft report on the meeting, to be made available, to the extent possible, to members for comment at least three days before it is submitted for publication.

48. The decisions and outputs of the LEG shall be made available on the UNFCCC website unless otherwise decided by the LEG.

X. Decision-making

49. Decisions of the LEG shall be taken by consensus.

XI. Participation of observers and non-members in meetings

50. The meetings of the LEG may be open to attendance by observers.

51. The LEG may invite experts as resource persons to contribute to specific technical work at its meetings.

52. The LEG may invite and fund, subject to the availability of resources, LDC Party representatives to take part in LEG meetings and contribute to the discussions.

53. The LEG shall invite interested organizations and individuals to actively participate in its work, including through any subcommittees, thematic working groups or task-focused ad hoc working groups the LEG may establish or in specific activities, such as designing and organizing events and producing technical materials.

XII. Means of communication

54. English shall be the working language of the LEG.

55. The LEG, in conducting its activities, shall facilitate translation into official languages of the United Nations relevant to the LDCs, to the extent possible.

56. The LEG may use electronic means of communication to facilitate its work and to take decisions in accordance with guidelines to be agreed by the LEG.

XIII. Collaboration with other constituted bodies and entities under the Convention and the Paris Agreement

57. The LEG shall invite the secretariats of the Green Climate Fund, the Global Environment Facility and the Adaptation Fund to its meetings to discuss collaboration in supporting the LDCs.

58. The LEG shall collaborate with other constituted bodies and entities under the Convention and the Paris Agreement working on adaptation and means of implementation, as well as on work under the Nairobi work programme on impacts, vulnerability and adaptation to climate change, in providing support to the LDCs.

XIV. Engagement of other organizations and regional centres and networks

59. The LEG may invite relevant regional centres to nominate one focal point each for the LEG with a view to enhancing collaboration with those centres.

60. The LEG may invite representatives of global programmes, projects and networks that support the process to formulate and implement national adaptation plans to its meetings, as appropriate, as a way of promoting the exchange of experience and lessons learned.

XV. Authority of the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement

61. In the event of any conflict between any provisions of these rules of procedure and any provisions of the Convention and the Paris Agreement, the Convention and the Paris Agreement shall prevail.

XVI. Amendments to the rules of procedure

62. These rules of procedure may be amended as requested by the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement.

*10th plenary meeting
20 November 2022*

Decision 11/CP.27

Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts

The Conference of the Parties

1. *Endorses* decision 12/CMA.4, on the Santiago network for averting, minimizing and addressing loss and damage under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, which provides as follows:

“1. *Recalls* that the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change was established to catalyse the technical assistance of relevant organizations, bodies, networks and experts for the implementation of relevant approaches for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change at the local, national and regional level in developing countries that are particularly vulnerable to the adverse effects of climate change;¹

“2. *Expresses its appreciation* to the Government of Denmark for hosting the technical workshop on institutional arrangements of the Santiago network from 4 to 6 May 2022, including for making the necessary logistical and financial arrangements therefor;

“3. *Decides* that the Santiago network will have the following structure:

(a) A hosted secretariat that will facilitate its work, to be known as the Santiago network secretariat;

(b) An Advisory Board to provide guidance and oversight to the Santiago network secretariat on the effective implementation of the functions of the network;

(c) A network of member organizations, bodies, networks and experts covering a wide range of topics relevant to averting, minimizing and addressing loss and damage;

“4. *Recalls* decision 1/CMA.3, paragraph 67, in which it was decided that the Santiago network will be provided with funds² to support technical assistance for the implementation of relevant approaches to averting, minimizing and addressing loss and damage associated with the adverse effects of climate change in developing countries in support of the functions set out in paragraph 9 of decision 19/CMA.3;

“5. *Also recalls* decision 1/CMA.3, paragraph 70, which urges developed country Parties to provide funds for the operation of the Santiago network and for the provision of technical assistance as set out in paragraph 67 of the same decision;

“6. *Encourages* others to provide support for the operation of the Santiago network and technical assistance;

“7. *Welcomes* the pledges that have already been made to the Santiago network;

“8. *Adopts* the terms of reference of the Santiago network contained in annex I;

“9. *Decides* to establish the Advisory Board of the Santiago network as part of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, which will be under the authority and guidance of and accountable

¹ Decision 2/CMA.2, para. 43.

² See also decision 1/CMA.3, paras. 68 and 70.

to the appropriate governing body or bodies³ and have the roles and responsibilities outlined in annex I;

“10. *Also decides* that the members of the Advisory Board will be elected at the next session of the governing body or bodies (November–December 2023) and encourages Parties to nominate experts with a diversity of technical experience and knowledge relevant to, inter alia, averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, as well as the roles and responsibilities of the Advisory Board referred to in annex I, taking into account the need for gender balance, in accordance with decisions 36/CP.7, 23/CP.18, and 3/CP.25, and the composition of the Advisory Board outlined in annex I;

“11. *Further decides* that the members elected to the Advisory Board shall serve a term of two years and shall be eligible to serve a maximum of two consecutive terms of office;

“12. *Decides* that half of the members elected in 2023 shall serve a term of three years and half of the members shall serve a term of two years, after which time the governing body or bodies shall elect half of the members every year for a term of two years;

“13. *Also decides* that the members of the Advisory Board shall remain in office until their successors are elected;

“14. *Requests* the Advisory Board to develop draft rules of procedure⁴ with a view to recommending them to the governing body or bodies through the subsidiary bodies for consideration and adoption at the sixty-first sessions of the subsidiary bodies (November 2024);

“15. *Also requests* the secretariat to continue providing support for developing countries that are particularly vulnerable to the adverse effects of climate change that may seek or wish to benefit from the technical assistance available from organizations, bodies, networks and experts under the Santiago network, until the Santiago network secretariat is operational;

“16. *Decides* that the Santiago network secretariat will be accountable to and operate under the guidance of the governing body or bodies through the Advisory Board and hosted by an organization or a consortium of organizations able to provide the necessary administrative and infrastructural support for its effective functioning;

“17. *Also decides* that the Santiago network secretariat shall, once it is operational, elaborate modalities and procedures for the Santiago network under the guidance of and by approval of the Advisory Board on the basis of the terms of reference contained in annex I, and taking into account decision 19/CMA.3, paragraph 9, endorsed in decision 17/CP.26, and decision 1/CMA.3, paragraph 67, including:

(a) Developing guidelines for the designation of organizations, bodies, networks and experts as members of the Santiago network;

(b) Developing guidelines and procedures for responding to requests for technical assistance, including considering the development of procedures for those that require an urgent response;

(c) Developing guidelines for managing funding provided for technical assistance, including to ensure that technical assistance funded directly by the Santiago network is made available to communities particularly vulnerable to the adverse effects of climate change, including through levels of minimum percentage of technical assistance funded directly by the Santiago network directed to communities particularly vulnerable to the adverse effects of climate change;

³ Nothing in this document prejudices Parties' views or prejudices outcomes on matters related to the governance of the Warsaw International Mechanism.

⁴ The Board will specify in its procedures how to adopt decisions in the event that all efforts at reaching consensus have been exhausted.

“18. *Further decides* that the selection process for the host of the Santiago network secretariat shall be launched upon the conclusion of the twenty-seventh session of the Conference of the Parties and the fourth session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement in order to select the host by 2023 and be conducted in an open, transparent, fair and neutral manner in accordance with the process outlined in paragraphs 19–23 below, informed by United Nations practices and standards;

“19. *Requests* the secretariat, under the guidance of the Chairs of the subsidiary bodies, to:

(a) Prepare and issue a call for proposals to host the Santiago network secretariat by 31 December 2022, making it widely and publicly available, including preparing a proposal template, and invite interested organizations, including consortiums of organizations, to submit their proposals in response to the call by 31 March 2023;

(b) Provide responses to enquiries from interested organizations, as appropriate;

(c) Compile the executive summaries contained in the submitted proposals and make them available on the UNFCCC website by 7 April 2023;

(d) Convene an evaluation panel by 7 April 2023 and support the panel in the preparation of an evaluation report, as referred to in paragraph 22 below;

(e) Ensure that it does not have a potential conflict of interest in the selection process, including by applying appropriate safeguards and procedures;

“20. *Invites* the Executive Committee to designate four of its members, the Climate Technology Centre and Network Advisory Board and the Paris Committee on Capacity-building to designate two members each to serve as members on the evaluation panel referred to in paragraph 19(d) above, to consider the proposals, ensuring that there is a balanced representation of developed and developing country Parties;

“21. *Also invites* the panel to consult, as appropriate, with other constituted bodies with relevant expertise, including in particular the Adaptation Committee and the Facilitative Working Group of the Local Communities and Indigenous Peoples Platform;

“22. *Requests* the evaluation panel to prepare an evaluation report with a shortlist of up to three proposals that meet the criteria referred to in annex II, including information on how the evaluation criteria have been applied to these proposals, and make the evaluation report available for consideration by the subsidiary bodies at their fifty-eighth sessions (June 2023);

“23. *Also requests* the subsidiary bodies to recommend at their fifty-eighth sessions a draft decision with one proposal to host the Santiago network secretariat that best meets the criteria set out in annex II for consideration and adoption by the governing body or bodies at their session(s) to be held in November–December 2023;

“24. *Further requests* the secretariat, under the guidance of the Chairs of the subsidiary bodies, to develop a draft host agreement (memorandum of understanding) with the proposer recommended by the subsidiary bodies at their fifty-eighth sessions with a view to recommending it for consideration and approval by the governing body or bodies at their session(s) to be held in November–December 2023;

“25. *Invites* Parties to inform the Santiago network secretariat of their liaison to the Santiago network secretariat, as appropriate for their national circumstances, to support alignment of technical assistance through the Santiago network with national priorities;

“26. *Affirms* that technical assistance provided through the Santiago network in a demand-driven manner will be developed through an inclusive and country-driven

process, taking into account the needs of vulnerable people, indigenous peoples and local communities;

“27. *Also affirms* that, when technical assistance is provided by the Santiago network, it should take into consideration the cross-cutting issues referred to in the eleventh preambular paragraph of the Paris Agreement;

“28. *Notes* that considerations related to the governance of the Warsaw International Mechanism will continue at its fifth session (November–December 2023);⁵

“29. *Takes note* of the estimated budgetary implications of the activities to be undertaken by the secretariat referred to in this decision;

“30. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.”

2. *Notes* that considerations related to the governance of the Warsaw International Mechanism will continue at its twenty-eighth session (November–December 2023).⁶

⁵ It is noted that discussions on the governance of the Warsaw International Mechanism did not produce an outcome; this is without prejudice to further consideration of this matter.

⁶ As footnote 6 above.

Annex I*

Terms of reference of the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change

I. Objective

1. The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA), at its second session, established, as part of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change to catalyse the technical assistance of relevant organizations, bodies, networks and experts for the implementation of relevant approaches at the local, national and regional level in developing countries that are particularly vulnerable to the adverse effects of climate change.¹

II. Functions

2. CMA 3 decided that the Santiago network is to have the following functions:²

(a) Contributing to the effective implementation of the functions³ of the Warsaw International Mechanism, in line with the provisions in paragraph 7 of decision 2/CP.19 and Article 8 of the Paris Agreement, by catalysing the technical assistance of organizations, bodies, networks and experts;

(b) Catalysing demand-driven technical assistance, including of relevant organizations, bodies, networks and experts, for the implementation of relevant approaches to averting, minimizing and addressing loss and damage in developing countries that are particularly vulnerable to the adverse effects of climate change by assisting in:

(i) Identifying, prioritizing and communicating technical assistance needs and priorities;

(ii) Identifying types of relevant technical assistance;

(iii) Actively connecting those seeking technical assistance with best suited organizations, bodies, networks and experts;

(iv) Accessing technical assistance available, including from such organizations, bodies, networks and experts;

(c) Facilitating the consideration of a wide range of topics relevant to averting, minimizing and addressing loss and damage approaches, including but not limited to current and future impacts, priorities and actions related to averting, minimizing and addressing loss and damage pursuant to decisions 3/CP.18 and 2/CP.19, the areas referred to in Article 8, paragraph 4, of the Paris Agreement and the strategic workstreams of the second five-year rolling workplan of the Executive Committee of the Warsaw International Mechanism;⁴

(d) Facilitating and catalysing collaboration, coordination, coherence and synergies to accelerate action by organizations, bodies, networks and experts, across communities of practices, and for them to deliver effective and efficient technical assistance to developing countries;

* Annex I to decision 12/CMA.4, endorsed by the Conference of the Parties in this decision.

¹ Decision 2/CMA.2, para. 43.

² Decision 19/CMA.3, para. 9.

³ Decision 2/CP.19, para. 5.

⁴ See FCCC/SB/2022/2/Add.2, annex I.

(e) Facilitating the development, provision and dissemination of, and access to, knowledge and information on averting, minimizing and addressing loss and damage, including comprehensive risk management approaches, at the regional, national and local level;

(f) Facilitating, through catalysing technical assistance of organizations, bodies, networks and experts, access to action and support (finance, technology and capacity-building), under and outside the Convention and the Paris Agreement, relevant to averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including urgent and timely responses to the impacts of climate change.

III. Structure

3. The Santiago network will have the following structure:

(a) A hosted secretariat that will facilitate its work, to be known as the Santiago network secretariat;

(b) An Advisory Board to provide guidance and oversight to the Santiago network secretariat on the effective implementation of the functions of the network;

(c) A network of member organizations, bodies, networks and experts covering a wide range of topics relevant to averting, minimizing and addressing loss and damage.

IV. Roles and responsibilities

A. Santiago network secretariat

4. The Santiago network secretariat shall be accountable to and operate under the guidance of the Advisory Board.

5. The Santiago network secretariat shall facilitate the implementation of the functions of the Santiago network.⁵

6. The Santiago network secretariat shall manage day-to-day operations of the Santiago network, including:

(a) Building and managing the network of member organizations, bodies, networks and experts, covering a wide range of topics relevant to averting, minimizing and addressing loss and damage approaches;⁶

(b) Ensuring the coordination and collaboration of the work of the Santiago network with relevant UNFCCC constituted bodies, in particular the Executive Committee, as well as exploring synergies with other initiatives and networks;

(c) Receiving, assessing and managing the process of responding to requests from developing countries that are particularly vulnerable to the adverse effects of climate change for technical assistance to avert, minimize and address loss and damage, in coordination with network members;

(d) Developing and executing the work programme approved by the Advisory Board, building on synergies with the five-year rolling workplan of the Executive Committee;

(e) Promoting and disseminating information on the Santiago network in a manner that is comprehensible and accessible to communities particularly vulnerable to the adverse effects of climate change;

⁵ As per decision 19/CMA.3, para. 9, endorsed in decision 17/CP.26.

⁶ FCCC/SB/2022/2/Add.2, annex I.

- (f) Managing and directing the disbursement of funds provided for the Santiago network consistently with the fiduciary standards, legal and ethical integrity policies, and financial rules and regulations of the host of the secretariat;
- (g) Administering the funds provided for technical assistance under the Santiago network in a cost-effective and transparent manner;
- (h) Maintaining a monitoring and evaluation system to assess the timeliness, appropriateness and outcomes of assistance provided;
- (i) Supporting and facilitating the work of the Advisory Board.

B. Advisory Board

7. The Advisory Board will:
- (a) Approve policies, procedures and guidelines developed by the Santiago network secretariat;
 - (b) Provide guidance on the effective implementation of the functions of the Santiago network;
 - (c) Provide guidance on the preparation of the annual report of the Santiago network;
 - (d) Approve modalities for the designation of organizations, bodies, networks and experts as members of the Santiago network;
 - (e) Approve the work programme of the Santiago network, ensuring, as much as possible, coherence and synergies with the five-year rolling workplan of the Executive Committee and the plans of action of the expert groups, task force and technical expert group of the Warsaw International Mechanism;
 - (f) Approve the annual budget of the Santiago network;
 - (g) Endorse the appointment of the director of the Santiago network secretariat;
 - (h) Endorse the financial statement of the Santiago network;
 - (i) Review the timeliness and quality of the responses of the Santiago network to requests for technical assistance;
 - (j) Provide guidance on and approve the criteria used to assure the relevance and quality of expertise and services delivered by organizations, bodies, networks and experts.

V. Composition of the Advisory Board

8. The Advisory Board, with the aim of achieving fair and balanced representation, shall be composed of the following:
- (a) Two members from each of the five recognized United Nations regional groups;
 - (b) One member each from the least developed countries and small island developing States;
 - (c) Two members of the Executive Committee, nominated by the Executive Committee from among its members.
9. The Advisory Board will also have three other representatives, one from the women and gender constituency, one from indigenous peoples organizations, and one from the children and youth non-governmental organizations, who may actively participate in the deliberations of the Advisory Board.

VI. Matters related to meetings of the Advisory Board

10. The Advisory Board meetings will be open to observers, unless otherwise decided by the Advisory Board, and the Advisory Board will invite observers from relevant constituted bodies, civil society organizations and other organizations, bodies, networks and experts to attend its meetings in order to provide technical expertise and inputs, as appropriate, to the Advisory Board for its deliberations.

11. Decisions of the Advisory Board will be taken by consensus by the members listed in paragraph 8 above.

12. The Advisory Board shall meet at least twice a year, where possible in connection with meetings of the Executive Committee, while retaining its flexibility to adjust the number of meetings to suit its needs.

VII. Organizational structure of the secretariat

13. The Santiago network secretariat will have a lean, cost-efficient organizational structure, led by a director who will manage a small core team of professional and administrative staff, in order to meet its responsibilities and perform its functions efficiently and effectively.

14. The Santiago network secretariat is to be hosted by an organization or a consortium of several organizations capable of supporting the functions of the Santiago network secretariat.

15. Subject to the endorsement of the Advisory Board, the director of the Santiago network secretariat will be appointed by the host. The director will be accountable to the host for administrative issues relating to the administrative effectiveness and efficiency of the Santiago network secretariat and to the Advisory Board for the effective implementation of the functions of the Santiago network.

16. The director will have a fixed term of office no longer than the term of the host agreement, which may be renewed subject to endorsement by the Advisory Board, and should have broad responsibility to provide strategic leadership to the Santiago network and to manage its secretariat.

17. The director of the Santiago network secretariat shall serve as secretary to the Advisory Board.

VIII. Reporting

18. In line with guidance provided by the Advisory Board, the Santiago network secretariat will prepare an annual report on activities of the Santiago network secretariat and network and on the performance of their respective functions, including information on:

- (a) Requests received and activities carried out by the Santiago network and their outcomes;
- (b) Responses to requests;
- (c) Ongoing work as well as lessons learned and best practices derived from that work;
- (d) Support delivered in regions, finance disbursed and administrative costs;
- (e) Inclusion of new members in the Santiago network and their engagement therein;
- (f) Assistance to developing country Parties in identifying, prioritizing and communicating their needs for technical assistance;
- (g) Efforts to reach communities that are particularly vulnerable to the adverse effects of climate change;

(h) Gender considerations, including through the use of gender-disaggregated data, consistently with decision 3/CP.25.

19. The Santiago network secretariat will prepare an annual report and submit it to the Advisory Board for its consideration and approval. The approved report will be forwarded to the secretariat to be included in a joint annual report of the Santiago network and the Executive Committee submitted to the governing body or bodies through their subsidiary bodies.

IX. Review

20. The Santiago network secretariat will commission one independent review of the performance of the Santiago network, including, inter alia, sustainability and sources of funding, adequacy of funding levels relative to technical assistance requests, timeliness, effectiveness, engagement, gender-responsiveness and delivery of technical assistance to communities particularly vulnerable to the adverse effects of climate change, in a timely manner so that the findings of this review can feed into the subsequent review of the Warsaw International Mechanism,⁷ for determining the need for further independent reviews of the performance of the Santiago network.

X. Term of host agreement

21. The initial term of the agreement to host the secretariat of the Santiago network will be five years, with five-year renewal periods, if so decided by the appropriate governing body or bodies.

22. The renewal of the agreement to host the Santiago network secretariat will be subject to the host organization satisfactorily fulfilling its functions.

⁷ As per decision 2/CMA.2, para. 46.

Annex II*

Criteria to be used to evaluate proposals and select the host of the secretariat of the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change

1. The proposals submitted pursuant to paragraph 19(a) of this decision will be evaluated against the criteria below.

I. Technical capability

2. The technical capability criteria are as follows:

(a) Be a single organization or a consortium of partner organizations capable of providing a lean, efficient and agile service to the secretariat of the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change;

(b) Have strong networks across communities of practice, including development and humanitarian actors, relevant to averting, minimizing and addressing loss and damage, climate change adaptation, and disaster risk reduction, response and recovery;

(c) Have a broad regional presence and have demonstrated experience and expertise in understanding the dynamics of various countries;

(d) Have a track record of facilitating technical assistance and building capacity in developing countries and communities that are particularly vulnerable to the adverse effects of climate change;

(e) Have demonstrated experience in managing global networks or initiatives and capability to engage with multiple stakeholders for effective operations;

(f) Have demonstrated the capacity to engage in partnerships with a wide range of organizations, bodies, networks and experts across different communities working in domains relevant to averting, minimizing and addressing loss and damage, including climate change adaptation, disaster risk management, humanitarian aid and development cooperation, as well as with finance providers and other partners.

II. Management and governance

3. The management and governance criteria are as follows:

(a) Have an effective governance and management structure to support high-quality administration, ensuring compliance with ethical standards;

(b) Have the necessary staff recruitment and management capability;

(c) Have demonstrated an ability to simultaneously administer and manage multiple and complex projects in developing countries;

(d) Be able to manage and maintain information systems to enable sharing of best practices and lessons learned;

(e) Be able to guarantee the appropriate monitoring and tracking of the actions undertaken.

* Annex II to decision 12/CMA.4, endorsed by the Conference of the Parties in this decision.

III. Financial management

4. The financial management criteria are as follows:
 - (a) Have financial management, auditing and reporting functions; a robust accountability system; sound financial systems of international standard; and a fiduciary record that ensures the correct and impartial administering and disbursement of funds;
 - (b) Have a track record in financial stability and sustainability.

IV. Vision and management plan

5. The vision and management plan criteria are as follows:
 - (a) Have an overall vision, structure and approach in terms of how the host will support the effective functioning of the Santiago network;
 - (b) Have a proposal for providing the Santiago network secretariat with in-kind and financial support;
 - (c) Identify the ways in which partners and networks could be engaged to facilitate and catalyse technical assistance.

*10th plenary meeting
20 November 2022*

Decision 12/CP.27

Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts

The Conference of the Parties

1. *Endorses* decision 13/CMA.4, on the Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts and the report¹ of the Executive Committee, which provides as follows:

“1. *Welcomes*:

(a) The report for 2022 of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, appreciating the work of the Executive Committee and endorsing the recommendations in the report;²

(b) The adoption by the Executive Committee of its second five-year rolling workplan, the second plan of action of the technical expert group on comprehensive risk management and the third plan of action of the task force on displacement;³

“2. *Expresses its appreciation* to the organizations and experts that contributed to the progress of the work reported in the document referred to in paragraph 1(a) above, including in relation to:

(a) The development of the second five-year rolling workplan of the Executive Committee;

(b) The achievements of the expert groups, technical expert group and task force of the Executive Committee;

(c) Contribution to the regular meetings of the Executive Committee;

(d) The submission of information pursuant to paragraph 44 of decision 2/CMA.2, and noted in decision 2/CP.25, relevant to the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change;

“3. *Encourages* the organizations and experts to continue to contribute as referred to in paragraph 2 above;

“4. *Requests* the Executive Committee to continue:

(a) Exploring further opportunities and modalities for engaging national stakeholders, including loss and damage contact points and national focal points;

(b) Collaborating and enhancing synergies with programmes, bodies and platforms under and outside the Convention and the Paris Agreement;

“5. *Also requests* the Executive Committee, with regard to information relating to averting, minimizing and addressing loss and damage, to continue collaborating with the Consultative Group of Experts in accordance with the latter’s mandate to provide technical advice and support to developing country Parties for enhancing their institutional and technical capacity to prepare and submit national reports;

“6. *Further requests* the secretariat, in responding to paragraph 11 of decision 19/CMA.3, and endorsed in decision 17/CP.26, to make public the requests it receives

¹ FCCC/SB/2022/2 and Add.1–2.

² As footnote 1 above.

³ Contained in document FCCC/SB/2022/2/Add.2, annexes I–III.

for technical assistance and to more actively communicate information on technical assistance available and the ways in which countries may access the technical assistance available, including as articulated by organizations, bodies, networks and experts responding to the invitation in paragraph 44 of decision 2/CMA.2, and noted in decision 2/CP.25, relevant to the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, and to report on progress to the Executive Committee;

“7. *Notes* that considerations related to the governance of the Warsaw International Mechanism will continue at its fifth session (November–December 2023);⁴

“8. *Takes note* of the estimated budgetary implications of the activities to be undertaken by the secretariat referred to in paragraphs 1–6 above;

“9. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.”

2. *Notes* that considerations related to the governance of the Warsaw International Mechanism will continue at its twenty-eighth session (November–December 2023).⁵

*10th plenary meeting
20 November 2022*

⁴ It is noted that discussions on the governance of the Warsaw International Mechanism did not produce an outcome; this is without prejudice to further consideration of this matter.

⁵ As footnote 5 above.