REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Administrative Decision No. VII (The Vinland Case)

25 May 1925

VOLUME VII pp. 203-252

NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

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 PREPARATOIRES, 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. I, 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. I and II, 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 ordened 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.

Chandler P. ANDERSON

15

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 is 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 *Vinland*	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 lost [1] 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 charty-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 broading 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. KIESSELBACH

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. KIESSELBACH
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 war [5] 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 Agent [12] it is pointed out that by the language of Article I of the Treaty of Berlin the United States and its nationals [13] 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 9 [14] 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 occuring 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 9 [17] 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 *jus 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 dates [22] 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 itself[23] 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 *Bjornefjord*, 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 case [28] 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